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Cover Story

Is every document titled "Bill of Lading" a contract of carriage and document of title?

Introduction

It is well-settled that a modern bill of lading serves three functions:

1. a receipt by the carrier acknowledging the shipment of goods on a particular vessel for carriage to a particular destination;
2. a memorandum of the terms of the contract of carriage; and
3. a document of title to the goods.

In commercial practice, however, the title "bill of lading" may also be used loosely in documents that do not function as such. The recent Singapore case of *The Luna and another appeal* [2021] SGCA 84 shed light on how the Court determines whether a document titled "bill of lading" in fact operates as a contract of carriage and document of title.

Facts

The Respondent is a trader and supplier of bunker fuel. The trading process includes storing and blending fuel oil in storage tanks and then selling the product from Vopak Terminal. The bunkers are sometimes sold on a FOB (free-on-board) basis for delivery to bunker barges. The Respondent's customers will then on-sell the bunker fuel loaded on board these bunker barges to ocean-going vessels in Singapore. The Appellants include a demise charterer and owners of a number of bunker barges (the "**Bunker Barges**") used to supply bunker fuel to other vessels.

By three sale contracts (the "**Sale Contracts**") in September and October 2014, the Respondent sold several parcels of bunkers to the subsidiaries of OW Bunker (the "**Buyers**").

The Sale Contracts incorporated the Respondent's General Terms and Conditions for Sales of Marine Fuel February 2013 and provided that payment of the bunkers would only become due upon the expiry of 30 days after the certificate of quantity ("**CQ**") date.

Pursuant to the Sale Contracts, the Buyers nominated the Bunker Barges for loading of the bunkers at Vopak Terminal. Vopak Terminal generated several documents in respect of the bunkers upon loading, including a CQ and a document issued in triplicate titled "Bill of Lading" (the "**Vopak BLs**"). The Vopak Terminal would send the CQ, the Vopak BLs and other documents to the Respondent shortly after the completion of each loading. The Respondent's practice was to courier the original CQ to the Buyers and keep the Vopak BLs itself until payment was received. At the same time, the Bunker Barges delivered the bunkers to various ocean-going vessels within several days from the date of loading without production of the original Vopak BLs.

In November 2014, OW Bunker became insolvent and the Buyers defaulted on payment. The Respondent then demanded delivery of the bunkers from the Appellants based on the Vopak BLs and separately arrested the Bunker Barges.

The High Court Judge found that the Vopak BLs had contractual force as bills of lading and the Appellants had undertaken to the Respondent to deliver only against presentation of the Vopak BLs. The Appellants appealed.

Main issue

The main issue on appeal is whether the parties had intended for the Vopak BLs to have contractual force and to operate as documents of title.

The Singapore Court of Appeal's decision

The Singapore Court of Appeal ("**SGCA**") held that in ascertaining the existence of contract, as opposed to interpretation of a contract, the Court is not bound by the parol evidence rule and is entitled to take into account all the relevant circumstances of the case in order to draw the appropriate inferences as to what the parties had objectively intended by the issuance of the Vopak BLs.

The SGCA noted a number of features in respect of the Sale Contracts:

1. the Buyers were given a 30-day credit period by the Respondent in which they would on-sell the bunkers and use the sale proceeds to pay the Respondent;
2. title and possession of the bunkers passed to the Buyers upon loading;
3. following the loading of the bunkers on board the Bunker Barges, it was the Buyers and not the Respondent who would give instructions to the Appellants to deliver the bunkers to ocean-going vessels;
4. the deliveries were made very shortly after loading and before the expiry of the 30-day credit period, such that any attempt by the

Respondent to regain possession or demand delivery of the bunkers would be futile; and

5. there is a conspicuous absence of any references to bills of lading.

The SGCA inferred from the abovementioned features that the Respondent and the Buyers could not have intended for the Buyers to be able to lawfully deal with the bunkers only upon presentation of an original Vopak BL. It is thus clear between the Respondent and the Buyers that the Vobak BL was a non-essential document with no contractual force or effect as a contract of carriage or as a document of title and did not and could not serve the traditional functions of a bill of lading.

Furthermore, the Vopak BLs did not specify a port of discharge, an essential term for a typical bill of lading. The absence of a port of destination thus reflected that the Vopak BLs were not intended to function as contracts of carriage or documents of title. Deliveries to multiple ocean-going vessels were also contemplated. The SGCA therefore concluded that the Vopak BLs were not typical bills of lading and did not operate as contracts of carriage nor documents of title even though it is titled “Bill of Lading”. The appeal is thus allowed.

Takeaway

The case of *The Luna* illustrates the Court’s holistic approach in ascertaining whether a “bill of lading” is in fact a contract of carriage and document of title. In particular, it highlighted the relevance of the underlying contractual arrangements to such determination. The decision also reflects that a bill of lading in its genuine sense may not be compatible with the common practice of the bunkering industry. Sellers who want to protect their interests with security will have to revisit and revise their current arrangements.

Yantian port back at full speed; box recovery could take a month

A coronavirus outbreak at the Chinese Port of Yantian and neighbouring Shekou ports in southern China earlier this year has caused congestion to the ports starting from May 2021. It is reported that up to 5% of the global freight capacity was being held up in China as a result of the outbreak.

The impact of the disruption is anticipated to be even bigger than that of the Suez Canal Blockage, which occurred in March 2021 when a huge container ship got stranded in the Egyptian waterway leaving nearly 600 other ships stranded for 6 days. The Suez Canal Blockage cost around HK$70 billion to the global economy.

While the operation of the ports is gradually recovering, it is observed that the global supply chain will not be immediately repaired. Although the Yantian Officials have made administrative commitments to eliminate the accumulation of stacked containers, the congestion is moving from the ports onto the factory floor.

During Covid-19, consumers who are flushed with savings during the pandemic has caused a surge in consumer spending. When products are selling quickly yet companies are unable to restock due to port congestions, they face backlogs. The backlog of shipments piled up in factories is physically impacting the production at factories and delaying the whole global supply chain.

Turning tides: how the shipping sector is going green

The European Union ("**EU**") will be discussing whether European shipping is to be included in the EU Emission Trading System. Meanwhile, pressure is intensifying on the industry to reduce carbon emission to contribute to the international goal of net-zero carbon emission by 2050, an objective lies at the heart of the European Green Deal. There are global attempts in curbing carbon emission, including International Chamber of Shipping's ("**ICS**") plans for global carbon levy to expedite global shipping industry's decarbonization, International Maritime Organization's ("**IMO**") target in reducing carbon intensity of international shipping by 40% by 2030.

Given the expectation of a global carbon levy, there are options available in the shipping sector to reduce emission:

1. Installing machinery energy saving systems that enhances the performance of the main engine, auxiliary engines, or boiler. For example, a waste heat recovery system saves around 3-5% energy by reusing the thermal energy in exhaust gases produced by the main engine.

2. Improvements can be implemented on hull structures and propulsion systems. For example, a retrofit of the bulbous bow may decrease fuel consumption of the main engine by up to 5%.

3. Implementing operational measures, such as running the machinery at optimal engine load, slow steaming and well-established maintenance routines can be undertaken by vessel crew to reduce carbon emission significantly.

4. Observing the speed versus fuel consumption, and maximizing fuel efficiency by taking into account the optimized point, design point, and other factors such as draft, ship dimensions, environment, etc.

While technologies such as no-carbon fuels (e.g. Ammonia, hydrogen and battery) are in place in decarbonizing the maritime sector, its viability are questionable considering the high financial cost, the risk involved and the lack of necessary infrastructure for development. Energy recovery system such as vessels equipped with sails could be used in conjunction with the alternative fuels to improve the efficiency of vessels.

There is no clear solution for the industry to hit the carbon reduction goal of 40% by 2030. However, whichever plan from the ICS or IMO is to be implemented, it is expected that unwarranted cost and new regulations will come along.

Officials: HK to enhance status as global shipping hub

The first World Maritime Merchants Forum ("Forum") was held in Hong Kong and streamed online on 20 October 2021. The event was initiated by China Merchants Group in association with the Baltic and International Maritime Council, the International Chamber of Shipping, and the Hong Kong Shipowners Association.

Teresa Cheng, Secretary for Justice, at her opening speech in the Forum, highlighted Hong Kong's unique advantages over shipping regulations and dispute resolution services under "One Country, Two Systems". She also pointed out the clear shift of maritime and trading activities to the East, meaning a larger demand for maritime-related financial and legal services. This trend is inevitable as out of the world's top 10 container ports, China accounts for seven of them, and three of which are cities of the Greater Bay area, i.e. Shenzhen, Guangzhou and Hong Kong.

Teresa Cheng was also of the view that, with the 14th Five-Year Plan and the Greater Bay Area development plan explicitly support Hong Kong in consolidating and enhancing its status as a center for international legal and dispute resolution services in the Asia-Pacific Region, Hong Kong's maritime industry and related services have been given new impetus for growth.

Yin Zhonghua, Deputy Director of the Liason Office of the Central People's Government in the HKSAR, stressed that Hong Kong must be consolidated and upgraded to be an international shipping center. He pointed out the strengths of Hong Kong's shipping industry: the great market resources of the motherland, the location advantage for connecting the world, professional services to provide, and an aspiration to innovate.

The shipping industry also has its challenges. As suggested by Miao Jianmin, chairman of China Merchants Group, there are three key challenges: the imbalance of the supply chain, the need for innovation, and decarbonization. There is a need for green ecology in the shipping industry, including balancing the process of decarbonization among different areas and constituting a fair system on the carbon trade.

China-US shipping rates begin to cool as power crisis forces production cuts, but freight costs still elevated

The spot rate for shipping a 40-foot container from China to Los Angeles has dropped about 51% from September to October after months of steep increases. The sharp drop was partly attributed to Chinese factory output being disrupted by a power crunch.

On the other hand, the drop in spot rate is also driven by the reduction in orders for year-end holiday, because retailers ran out of time to get its products on store shelves ahead of the holidays with the sky-high shipping costs since the start of the pandemic. Indeed, surging prices for containers and congestion at ports around the world has driven shipping rates sky high over the past year. Many smaller producers of low-value goods have started cutting back on production and turning away orders to preserve their margins.

Despite falling shipping rates, transpacific freight costs are still about four times higher than the same period last year, and more than 10 times higher than pre-pandemic levels, due to the uneven distribution of containers at major ports around the world brought by pandemic-related lockdowns and port suspensions. The problem has been exacerbated by speculators who “took advantage of the price increases and congestion by buying up capacity”. Due to the serious shortage of boxes in the market, companies are usually willing to get the expensive cabins through these “scalpers”.

It is observed that easing spot rates do not yet indicate prices are on a permanent downward trend, but only reflect factory closures in China during recent national holidays. It is also less likely that spot rates will see significant correction as the underlying demand fundamentals remain strong, with market expectations for shipments to pick up again from the end of October.

Maersk AS v Mercuria Energy Trading SA

[2021] EWHC 2856 (Comm)

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This case concerns a dispute between a container ship operator, Maersk (the "**Defendant**") and a global commodity trading company, Mercuria (the "**Claimant**"). The Claimant purchased 4,000 metric tonnes of copper blister ingots from a Turkish seller while the Defendant, acting through its Turkish agent, entered into a contract of carriage with the seller for shipment of copper to China.

Upon arrival of containers in China, the Claimant discovered that the contents of the containers had been fraudulently replaced by cobblestones. The Claimant claimed against the Turkish entity operating the container terminal at the load port, and the Defendant for being vicariously liable for the terminal operator's act and omissions.

The bills of lading issued by the Defendant contained a contractual time bar and an exclusive jurisdiction clause. The Defendant would be discharged from all liabilities unless a claim was brought within a year after the date when the relevant goods had been delivered, and the English High Court of Justice in London should have exclusive jurisdiction to determine all disputes under the bills of lading.

The Claimant commenced proceedings against the Defendant in Turkey on 13 August 2021 and served its statement of claim on 25 August 2021. Under Turkish law, a mediation is a mandatory pre-action step before proceedings. The Claimant therefore filed an application for mediation in Turkish courts, which consisted of two short telephone calls to indicate that the matters would not be resolved. The Defendant filed a defence after seeking an extension of time from the Turkish courts without any challenge to their jurisdiction, until on 20 September it applied for an anti-suit injunction in English courts.

Prejudice from the time-bar defence

The Claimant opposed to the anti-suit injunction, on the ground that the Defendant would be able to raise the time bar defence, which would not have been available had the proceedings been continued in Turkish courts. The Court however did not agree, as the Claimant could have issued a protective claim form in London in adherence to the bills of lading. The fact that the bills of lading was entered into on behalf of the Defendant by its Turkish agent was no good reason for the Claimant to bring the claim in Turkey. The Court reiterated that an exclusive jurisdiction clause is of great significance and should not be lightly discharged. The Claimant's deliberate attempt to commence

proceedings in Turkey would indisputably let the time run in London where the Claimant was bound to litigate, and the Claimant should not complain about the result of its own choice of not issuing a protective writ there.

Delay

The Claimant further alleged that the Defendant ought to have been aware of its intention to commence proceedings in Turkey but there was a considerable delay for the Defendant to raise its objection.

The Court, bearing the general rule in mind that an injunction will be granted if it is sought promptly and before the foreign proceedings are too far advanced, ruled that the Defendant's injunction application was not brought less than promptly. The Defendant was not under an obligation to seek an injunction at the time it first became aware of the Turkish proceedings. During the one-month time when the writ was served to the Defendant and when it applied for an anti-suit relief, it had never indicated that it would not rely on its contractual rights, which was carefully secured in contract and should not be deprived easily.

Further, the Turkish courts had only been engaged to decide on an extension of time to file a defence statement and a total of 17 minutes of pre-action telephone mediation. The foreign proceedings was not far advanced and would not cause prejudice to parties by allowing the injunction.

Upon the above grounds, the Court ruled that the Claimant unreasonably failed to protect its own interest by commencing proceedings in the wrong courts in breach of the contract. There is no reason why the Defendant shall be deprived of its limitation rights and hence the Defendant's application of an anti-suit injunction was allowed.

The Caraka Jaya Niaga III-11

[2021] SGHC 43

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The High Court of Singapore (the "**Court**") delivered its decision concerning a collision between two vessels, namely "Grand Ace 12" and "Caraka Jaya Niaga-11" on 3 April 2017. The registered owner and its demise charterer of "Grand Ace 12" (collectively, the "**Plaintiffs**"), and the demise charterer of "Caraka Jaya Niaga-11" (the "**Defendant**") both claimed to have suffered loss subsequent to the collision.

Pursuant to s8 of the Maritime Conventions Act 1911 ("**MCA 1911**") under the laws of Singapore, a time-bar will be imposed on any proceedings, including a counterclaim, after 2 years from the date when the damage, loss or injury was caused. The Plaintiffs issued an in rem writ to the Defendant on 29 March 2019 while the Defendant issued a counter-claim in another in rem writ on 13 May 2019 (which was issued after its claim was time-barred), which was not served and lapsed on 13 May 2020. The Defendant applied for an extension of time on 12 June 2019, but the application was dismissed and no appeal was brought on that decision. As such, the counter-claim of the Defendant against the Plaintiffs has been time-barred.

The quantum of recoverable loss of the owners of colliding vessels will depend on the apportionment of their liability. One of the party may bear a larger liability than the other, and as such, there will eventually be one net balance to be paid by the net paying party to the net receiving party, which is known as the "single liability principle" as applied in the case *The Khedive* [1882] 7 App Cas 795.

The Defendant sought to rely on the single liability principle and reduce the amount of damages payable to the Claimant. The Defendant argued that the time limit only prohibits it from bringing new proceedings against the Claimant. Relying on an English case *MIOM 1 Ltd v Sea Echo ENE (No 2)* [2012] 1 Lloyd's Law Reports 140, the Defendant stressed the fact that its counter-claim was issued beyond the time limit was irrelevant to the matter of assessment of damages, as it was only raising a defence against the Plaintiffs' claim, but not bringing new proceedings. On the other hand, the Plaintiff consider this argument a "backdoor route to circumventing the time bar", and hence should not be entertained.

The Court first distinguished *MIOM 1 Ltd v Sea Echo ENE (No 2*) from the current case, as the Plaintiffs in that case did not raise the issue of time-bar at any point during the trial of liability, until the Court had to make decision on costs after determining liability. Due to the Plaintiffs' delay in raising

the time-bar issue, they were estopped from doing so. Besides, the Defendant in *Sea Echo*, unlike the Defendant in current case, actively sought an extension of time, which the Court expressed that it would have been prepared to grant.

Considering the nature of the 2-year time bar under s.8 of MCA 1911, the Court held that it is procedural in nature and bars only the remedy sought by a party whose claim is not brought in time, but does not extinguish all the rights in the underlying claim. The same notion applies to a counterclaim.

Analysing the history of the single liability principle, the Court held that its application presupposes that the two colliding vessels are at fault, and there shall exist both valid or maintainable claims and counterclaims. On this premises, the Court would then pronounce a single judgment in favour of the net receiving party for a portion of its damage beyond the point of equality. If the single liability principle applies regardless of the time bar, an absurd result will follow in which the net paying party can sit back and refuses to commence proceedings but still be entitled to the single liability principle.

Further, the single liability principle is not a form of set off which reduces the amount that the Defendant is liable to pay the Plaintiff, though it might have such a practical effect. The Court stressed that the principle is a procedural mechanism and is unrelated to set-off.

Based on the above grounds, the Court deviated from *MIOM 1 Ltd v Sea Echo ENE (No 2)*, and held that the single liability principle only operates to reduce the amount payable by the net paying party when its claim is not time-barred, and that the Defendant was not entitled to rely on the single liability principle since its claim has already been time-barred.

Shanghai Shipyard Co. Ltd. v Reignwood International Investment (Group) Company Limited

[2021] EWCA Civ 1147

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This English Court of Appeal (the "**Court of Appeal**") decided on the enforceability of a guarantee pursuant to a payment of the final instalment of the price under a shipbuilding contract.

The appellant Shanghai Shipyard Co. Ltd. (the "**Builder**"), operated a shipyard in Shanghai providing shipbuilding and repairing services while the respondent Reignwood International Investment (Group) Company Limited (the "**Guarantor**") is a Hong Kong company offering investment services. Both parties entered into a shipbuilding contract dated 21 September 2011, in which the Builder agreed to build an offshore drillship (the "**Vessel**") for a total price of US$200 million, which was to be paid through 3 instalments, the final instalment (the "**Final Instalment**") of which was to be paid upon delivery of the Vessel. The Guarantor acted as a financial investor for the purchase of the drillship and paid for the first two instalments. Under a novation arrangement, a company which was indirectly and partly held by the Guarantor later became the buyer (the "**Buyer**") under the shipbuilding contract.

On 17 November 2011, the Guarantor entered into an "Irrevocable Payment Guarantee" (the "**Guarantee**") in favour of the Builder and undertook to, inter alia:

1. "irrevocably, absolutely and unconditionally" guarantee the due and punctual payment by the Buyer of the Final Instalment of the contract price. (Clause 1)

2. if the Buyer failed to punctually pay the Final Instalment for the period of 15 days, then upon demand from the Builder, the Guarantor shall immediately pay the Builder all the unpaid Final Instalment. (Clause 4)

3. If there exists dispute between the Buyer and the Builder as to (1) whether the Buyer is liable to pay the Final Instalment and (2) whether the Builder is entitled to claim the Final Instalment, and such dispute is submitted for arbitration, the Guarantor would be entitled to withhold and defer payment until the arbitration award is published and it orders that the Buyer shall pay the Final

Instalment. (Proviso of Clause 4)

4. The obligations of the Guarantor shall not be affected or prejudiced by any dispute between the Builder and the Buyer. (Clause 7)

In December 2016, dispute arose between the Builder and the Guarantor as to whether the vessel was in a deliverable condition as it allegedly contained a number of major and critical defects. The Builder sought to enforce the Guarantee against the Guarantor.

The Commercial Court's Decision

Justice Knowles in the Commercial Court ruled that the Guarantee was a "see-to-it" guarantee (also known as a surety guarantee), under which the Guarantor was only liable if the Buyer was bound to pay the Final Instalment. A see-to-it guarantee is different from a "demand" guarantee to the effect that a guarantor's liability under a demand guarantee arises upon demand, whether or not the buyer to the contract is liable to pay the final instalment. The Builder appealed against Justice Knowles' decision to the Court of the Appeal.

Enforceability of the Guarantee

The Court of the Appeal first emphasised that the identity of the guarantor will not cast any impact on the nature of instrument. The nature of instrument depends entirely on its wordings, which the Court of the Appeal would interpret with the established rules of construction. The language in an instrument should be interpreted as a whole in its particular commercial context. The Court of the Appeal clarified that reliance on case precedents concerning similarly worded instrument only provides assistance in limited circumstances, such as when the words used in the instrument taken as a whole and the contractual context are materially identical.

The Court of the Appeal, applying the above rules to interpret the critical language used in the Guarantee, held that it was a demand guarantee on the following grounds:-

1. The capitalized words "ABSOLUTE and UNCONDITIONAL" were used to describe the obligations of the Guarantor, which would convey to businessman that the obligations was not conditional on the liability of the Buyer.

2. The Guarantor undertook to guarantee "as the primary obligor and not merely as the surety", which unequivocally indicated that the instrument is not a surety guarantee. The trigger of the Guarantor's obligation to pay "immediately" upon receipt of written demand also supported this notion that it is a demand guarantee.

3. Clause 7(a) states that the obligation the Guarantor would not be affected by any dispute between the Builder and the Buyer, which points against a surety guarantee. However, the proviso of Clause 4 stipulating that upon any dispute between the Buyer and the Builder which was submitted for arbitration, the Guarantor would not be obligated to make any payment unless the arbitration award orders the Buyer to pay the Final Instalment. The Court of the Appeal ruled that the proviso in Clause 4 only modifies the parties' rights, and the word "any" dispute in Clause 7 is wide enough to cover all disputes arising under the building contract. The Guarantor's obligation is not dependent on the conditions under Clause 4.

4. The proviso in Clause 4 shall be interpreted in support of the Builder's case. Although it entitles the Guarantor not to assume any obligation to pay the Final Instalment until an arbitration order requires the Buyer to do the same, the Guarantor is not entitled to challenge the decision of the tribunal, and the obligation arises the moment the award is made. As such Clause 4 does not introduce a surety obligation, but is part of a demand guarantee.

The Builder argued that to trigger the proviso in Clause 4, the Guarantor must prove that there were both a dispute and the commencement of arbitration before a valid demand made. Otherwise, the Builder shall be entitled to payment immediately under the Guarantee upon valid demand. The Court of Appeal upheld the interpretation of the Builder, as both the presence of a dispute and submission of the dispute to arbitration are conditions under Clause 4. The accrued right of the Builder to payment will not be suspended once it has arisen when a valid demand is made.

Base on the above grounds, the Court of Appeal ruled in favour of the Builder and reversed the decision of the Commercial Court.

Euronav NV v Repsol Trading SA (mt MARIA)

[2021] EWHC 2565 (Comm)

The English Commercial court (the "**Court**") laid down a decision on the time zone that should be used for determining when a time-bar under a charter party takes effect.

The Claimants Euronav N.V. (the "**Owners**") were the owners of a vessel "MARIA" (the "**Vessel**"). They entered into a voyage charterparty dated 23 October 2019 with the Defendants Repsol Trading S.A. (the "**Charterers**") based on Shellvoy 6 form (the "**Charterparty**"), under which the Vessel would be chartered out for the carriage of crude oil from Brazil to the US.

The Vessel, upon demurrage at Brazil and the US, gave rise to around US$487,000 of demurrage claim as per the Owner's invoice. Under Clause 15(3) of the Charterparty, Owners should make a notification of a demurrage claim within 30 days after completion of discharge, failing which the Charterer's liability for such demurrage would be extinguished. When the Owners sent email to the Charterers regarding the claim, a dispute arose as to the date of completion of the discharge and whether the notice was sent within the 30 day limit.

1. If the date of discharge was ascertained upon the local time in California where the discharge took place, the Owner's claim would be time-barred.

2. On the other hand, if it was ascertained according to the time zone of either the notice recipient i.e. the Charterer, or the giver i.e. the Owners, the Owners' claim would not be time-barred.

<u>The Court's Decision</u>

The Honourable Mr Justice Henshaw held that for the purpose of Clause 15(3) regarding notification of demurrage claims, the date of discharge shall be determined by the local time at the place of discharge.

The Court started from the basic principles applicable to the interpretation of commercial contracts, including (1) to ascertain the objective meaning of the language which parties chosen to express their agreement; (2) where there are rival meanings, the Court would interpret it in a way which is more consistent with business common sense; (3) the Court must consider the quality of drafting of the clause and the possibility that a party might have agreed to a provision which might not serve his interest as a negotiated compromise; and (4) when textual analysis cannot successfully interpret agreements, the Court will also consider the factual matrix and the purpose of similar provisions in contracts of the same type.

Considering various authorities and commentary, the Court endorsed the notion that the date of discharge shall be determined by the local time at the place of discharge on the following grounds:-

1. It is ordinary and natural to allocate to an event the date that was current in the place where the event occurred. Similarly, the discharge of cargo from a vessel would be recorded as having occurred at the time and date applying local time, which the contracting parties should have naturally expected to be the date of completion of discharge for contractual purposes.

2. The use of local time at the place of discharge gives rise to a clear and easily ascertainable date and time of completion of discharge, which promotes certainty and reduces the risk of confusion.

3. It is not essential to apply the same time zone to the beginning and the end of the 30 day limit under Clause 15. Such approach would not erode the parties' entitlement to the 30-day period, as this is an inherent feature of a notice period framed in terms of calendar days rather than elapsed time. Even in the most extreme case, the period would not be shortened by more than about 23 hours. Such difference would not have fundamentally altered the entitlement of both parties to a 30-day notice period.

In view of the above grounds, the Court ruled that the Owners' notice in the current case was time-barred, and as such they were not entitled to the demurrage claim under Clause 15 of the Charterparty.

What actions should vessels take when the Crossing Rules and the Narrow Channel Rules impose conflicting obligations in avoiding collision?

Introduction

In the recent case of *Evergreen Marine (UK) Limited v Nautical Challenge Limited* [2021] UKSC6, the UK Supreme Court considered conflicting obligations imposed on vessels by the Convention on the International Regulations for Preventing Collisions at Sea, 1972 ("**Collision Regulations**").

A collision took place between the Appellant's large container vessel, Ever Smart ("**Ever Smart**") and the Respondent's VLCC (very large crude carrier), Alexandra 1 ("**Alexandra 1**"). For the whole of the 23 minute period before the collision, Alexandra 1 and Ever Smart were approaching each other on a steady bearing, while Alexandra 1 was not on a steady course.

What are the Crossing Rules?

Rules 15-17 of the Collision Regulations apply where two power-driven vessels are crossing so as to involve a risk of collision (the "**Crossing Rules**"). If vessels approach each other and the bearings of each, taken from the other, do not appreciably change (i.e. "steady bearing"), then there will be a risk of collision.

Rule 15 of the Collision Regulations governs crossing situations and provides that:

> "*When two power-driven vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side (i.e. the "give-way vessel") shall keep out of the way and shall, if the circumstances of the case admit, avoid crossing ahead of the other vessel (i.e. the "stand-on vessel").*"

Rule 16 requires that a give-way vessel "shall, so far as possible, take early and substantial action to keep well clear."

Rule 17 provides for the obligation of the stand-on vessel to "keep her course and speed", except where it appears to the stand-on vessel that the give-way vessel is not complying with the Rules or when action by both vessels has become necessary to avoid a collision.

What are the Narrow Channel Rules ?

Rule 9 of the Collision Regulations is known as the "Narrow Channel Rules", which requires vessels proceeding along the course of a narrow channel to keep as near to its starboard outer limit as is safe and practicable (rule 9(a)).

The Narrow Channel Rules also provides guidelines for not only crossing, but also

overtaking and anchoring situations as follows:

"*9(b) A vessel of less than 20 metres in length or a sailing vessel shall not impede the passage of a vessel which can safely navigate only within a narrow channel or fairway.*

(c) A vessel engaged in fishing shall not impede the passage of any other vessel navigating within a narrow channel or fairway.

(d) A vessel shall not cross a narrow channel or fairway if such crossing impedes the passage of a vessel which can safely navigate only within such channel or fairway. The latter vessel may use the sound signal prescribed in Rule 34(d) if in doubt as to the intention of the crossing vessel.

(e)(i) In a narrow channel or fairway when overtaking can take place only if the vessel to be overtaken has to take action to permit safe passing, the vessel intending to overtake shall indicate her intention by sounding the appropriate signal prescribed in Rule 34(c)(i). The vessel to be overtaken shall, if in agreement, sound the appropriate signal prescribed in Rule 34(c)(ii) and take steps to permit safe passing. If in doubt she may sound the signals prescribed in Rule 34(d).

(ii) This Rule does not relieve the overtaking vessel of her obligation under Rule 13.

(f) A vessel nearing a bend or an area of a narrow channel or fairway where other vessels may be obscured by an intervening obstruction shall navigate with particular alertness and caution and shall sound the appropriate signal prescribed in Rule 34(e).

(g) Any vessel shall, if the circumstances of the case admit, avoid anchoring in a narrow channel."

When will the Narrow Channel Rules displace the Crossing Rules?

After considering the cases of *The Empire Brent* (1948) 81 Ll L Rep 306, *The Glenfalloch* [1979] 1 Lloyd's Rep 247, *The Leverington* (1886) 11 PD 117 and *The Ashton* [1905] P 21, the Supreme Court concluded that the Narrow Channel Rules and the Crossing Rules can be applied simultaneously.

The interplay between the Narrow Channel Rules and the Crossing Rules vary for each of the three broad groups of vessels categorized by the Supreme Court as follows:

Group	Situations covered	Will the Crossing Rules be displaced?
Group 1	Vessels which are approaching the entrance of the channel, heading across it, but not intending or preparing to enter it at all, on a route between start and finishing points unconnected with the narrow channel	No, the Crossing Rules applies. The Crossing Rules applies as between a vessel leaving the channel, approaching its entrance, and a vessel in Group 1, regardless which of them had the other on her starboard side. This is because the approaching vessel in Group 1 is not preparing or intending to enter the channel.
Group 2	Vessels which are intending to enter, and on their final approach to the entrance, adjusting their course to arrive at their starboard side of it	Yes, the Narrow Channel Rules will displace the crossing rules. That is because the approaching vessel is both preparing and intending to enter it, and already shaping (i.e. adjusting her course and speed to do so) on her final approach.
Group 3	Approaching vessels which are intending and preparing to enter, but are waiting to enter rather than entering	No, the Crossing Rules still applies. No necessity arises for the Crossing Rules to be overridden until the approaching vessel is actually shaping to enter, adjusting her course and speed to arrive at the entrance on her starboard side of it on her final approach.

Bearing in mind the principle enunciated by Lord Wright in *The Alcoa Rambler* that the Crossing Rules should be applied wherever they can, the Supreme Court considers that the Crossing Rules should not be overridden in the absence of an express stipulation, unless there is a compelling necessity to do so. Accordingly, the Court did not see such necessity for Group 3 cases.

Applying these to the facts, the Supreme Court held that the Crossing Rules would be overridden only **when the approaching vessel is shaping to enter the channel, adjusting her course so as to reach the entrance on the starboard side of it on her final approach**. As Alexandra 1 is simply picking up a pilot before entering a river, it is not a sufficient act of preparation to displace the Crossing Rules. Alexandra 1, as a give-way vessel, was held to have failed to keep well clear as required by the Crossing Rules.

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Important: The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

本期專題

所有稱為「提單」的文件都是承運合約及所有權文件嗎？

簡介

眾所周知，現代的提單具有以下三個功能：

1. 承運人確認以指定船隻承送貨物到指定目的地的收據；
2. 承運合約條款的備忘錄；及
3. 貨物的所有權文件。

然而，在實際商業運作上，「提單」一詞亦可以籠統地用來稱呼不具上述功能的文件。最近新加坡的 *The Luna and another appeal* [2021] SGCA 84 一案說明，法院如何判斷一份稱為「提單」的文件事實上是否具有承運合約及所有權文件的效力。

案情

答辯人是燃油交易商及供應商。燃油交易過程包括在孚寶碼頭（Vopak Terminal，「**孚寶碼頭**」）的儲油缸儲存及混合燃油，然後將產品出售。有時候，燃油會以船上交貨的方式出售，交付到燃油補給船，然後答辯人的客戶會將補給船上的燃油轉售予在新加坡的遠洋輪船。上訴人包括多艘用於供應燃油給其他船隻的燃油補給船（「**補給船**」）的船東及一名光船租約租船人。

答辯人根據三份於 2014 年 9 月及 10 月訂立的銷售合約（「**銷售合約**」）出售多批燃油予 OW Bunker 的附屬公司（「**買方**」）。銷售合約納入了答辯人的「船用燃油銷售一般條款及細則」（2013 年 2 月版本），並訂明燃油價款在燃油量證書日期後 30 日屆滿時才到期支付。

根據銷售合約，買方指明由補給船在孚寶碼頭裝運燃油。在裝運時，孚寶碼頭就燃油交付發出了多份文件，包括燃油量證書，以及一式三份稱為「提單」的文件（「**孚寶提單**」）。每項裝運完

成後不久，孚寶碼頭便會將燃油量證書、孚寶提單及其他文件發送予答辯人。答辯人會將燃油量證書正本速遞予買家，但保留孚寶提單至收到付款為止。同時，補給船會在裝運後數日內，在無須出示孚寶提單正本的情況下交付燃油到不同的遠洋輪船。

OW Bunker 於 2014 年 11 月無力償債，買家拖欠付款。其後答辯人根據孚寶提單要求上訴人交付燃油，並另行扣押補給船。

高等法院裁定，孚寶提單具有作為提單的合約效力，而上訴人向答辯人承諾了只在有出示孚寶提單的情況下才可交貨。上訴人不服上訴。

主要爭論點

上訴的主要爭論點是，雙方原意是否希望孚寶提單具有合約及所有權文件的效力。

新加坡上訴法院的裁決

新加坡上訴法院 (「**法院**」) 指出，與解釋合約不同，法院在確定合約是否存在時不受口頭證據規則所約束，並且有權考慮案件的所有相關情況，以就雙方發出孚寶提單時的客觀意向作出適當推論。

法院注意到銷售合約的多項特徵：

1. 買方獲答辯人提供 30 日信貸期，期間買方將轉售燃油並以出售所得款項向答辯人付款；
2. 燃油的所有權及管有權在裝運時轉移至買家；
3. 燃油裝運到補給船後，是由買家而非答辯人向上訴人發出指示，將燃油交付到遠洋輪船；
4. 燃油在裝運後不久及在 30 日信貸期屆滿前便交付，令答辯人實際上無法取回燃油管有權或要求交付；及
5. 銷售合約明顯地完全沒有提及提單。

法院從上述特徵推斷，答辯人及買方的用意不可能是只准買方在出示孚寶提單正本的情況下才可合法地買賣燃油。因此，在答辯人與買方之間，孚寶提單明顯是一份非重要文件，它並無合約效力，亦沒有作為承運合約或所有權文件的效果，沒有亦不能提供提單的傳統功能。

此外，卸貨港是典型提單中的重要條款，但孚寶提單卻沒有指明卸貨港。孚寶提單欠缺目的地港口這一點，反映它並非用作承運合約或所有權文件。各方亦預期交付燃油到多艘遠洋輪船。因此，法院的結論是，儘管孚寶提單被稱為「提單」，但卻並非典型的提單，亦不具有承運合約或所有權文件的效力。所以上訴人上訴得直。

要點

本案說明，法院會採用全面的方式來確定一份「提單」事實上是否承運合約或所有權文件，並在作出判斷時考慮相關合約安排。本案的裁決亦反映，燃油業界慣用的交易方式與提單的真正意義未必兼容。賣方如欲保障自己的權益，最好重新審視及修改現有的安排。

鹽田港全面復運，清除積壓貨櫃或需一個月

今年較早時候，中國鹽田港及鄰近的華南蛇口港因爆發新冠肺炎疫情而導致大量貨物自 2021 年 5 月起積壓在港口。據報全球多達 5%貨運能力因疫情而在中國受阻。

對比今年 3 月一艘大型貨櫃船擱淺的蘇彝士運河阻塞事故，當時阻塞了埃及航道，令接近 600 艘船隻漂流 6 日及全球經濟損失約 700 億港元，這次鹽田港暫停運作的影響預期將更為嚴重。

雖然港口運作已逐步恢復，但全球供應鏈未能立即回復正常。儘管鹽田官員已作出行政承諾，清除積壓的貨櫃，但擠塞情況只是從港口轉移到工廠。

在新冠肺炎疫情期間，人們無法外遊，以致購物支出的激增。商戶的產品迅速售光，但卻因港口擠塞而無法補貨，因而積壓訂單。因為無法付運而積壓在工廠的貨物實際上阻礙了工廠其他的生產，更延誤整個全球供應鏈。

中國能源危機減產下，中美即期運費下降但運費仍上升

由中國運送一個 40 呎貨櫃到洛杉磯的即期運費，在經歷連月急升後，終於在 9 月至 10 月回落約 51%。價格大跌部分原因是中國工廠因能源緊縮而削減產能。

另一方面，即期運費亦受年尾假期訂單減少影響而下降，因為自疫情爆發以來，運輸成本高昂，零售商未能趕及在假期前將貨品上架。事實上，過去一年貨櫃價格上漲及全球港口的擠塞，已令即期運費大幅飆升。不少平價貨品的小型生產商已開始減少產量及拒接訂單，以保持邊際利潤。

儘管即期運費下降，但由於多個港口受疫情影響而封閉及停運，全球主要港口的貨櫃分布不均，跨太平洋的運費仍較去年同期高出約 4 倍，亦較疫情前水平高出超過 10 倍。這個問題更由於投機者「在運費上漲及港口擠塞的優勢下大量購入貨櫃位」而加劇。由於市面貨櫃嚴重短缺，企業通常願意透過這些「黃牛黨」購買昂貴的貨櫃位。

據觀察，即期運費僅反映了中國國慶期間工廠停工的因素，尚未顯示價格長期下降的趨勢。由於相關需求基本因素維持強勁，加上市場預期貨運量將於 10 月底回升，即期運費不太可能出現大幅調整。

大勢所趨：航運業界如何走向環保

歐盟將會討論是否將歐洲航運業界納入歐盟排放交易體系。航運業現正受到更大壓力，須減少業界的碳排放以共同達致 2050 年前實現淨零碳排放的國際目標，即歐洲綠色政綱的核心目標。多個國際組織均提出削減碳排放的措施，例如國際航運公會（ICS）計劃實施全球碳排放徵費，以加快全球航運業界的減碳進程；而國際海事組織（IMO）的目標是在 2030 年前將國際航運的碳密度降低 40%。

鑒於全球預期實施徵收碳排放徵費，航運業界可選擇一些減排方法：

1. 安裝機械節能系統以提升主引擎、輔助引擎或鍋爐的效能。例如，餘熱回收系統可重用主引擎產生的廢氣中的熱能，節省約 3-5%的能源。
2. 改善船體結構及推進系統。例如，升級改造球鼻艏可使主引擎的燃料消耗減少最多 5%。
3. 實施操作措施，例如在最佳引擎負載下操作機器、緩慢操作及按妥善程序進行例行保養，以大幅減少碳排放。
4. 觀察速度與燃料消耗的情況，並根據最佳效能、設計以及吃水深度、船體尺寸、環境等其他因素，將燃料效率提升至最高。

儘管無碳燃料（例如氨、氫及電池）等技術可協助航運業界減碳，但考慮到融資成本、所涉風險及欠缺發展所需的基礎設施，其可行性仍存疑。能源收集系統（例如配備風帆的船隻）可配合替代燃料一併使用，以提高船隻效率。

對於如何在 2030 年前達到 40%減排目標，航運業界目前仍未有明確的解決方案，但無論是國際航運公會還是國際海事組織的方案，相信都會涉及額外的成本及制訂新的規例。

官員：香港應提高其國際航運樞紐地位

第一屆世界航商大會 (「大會」) 於 2021 年 10 月 20 日在香港舉行。是次活動是由招商局集團聯同波羅的海國際航運公會、國際航運商會以及香港船東會一同發起。

香港律政司司長鄭若驊在開幕致詞中強調，香港在「一國兩制」下具有航運法管及提供爭議調解服務的獨有優勢。她指出航運及貿易活動明顯已轉移至東方，這意味著市場對航運相關的金融及法律服務需求更大。在全球十大貨櫃碼頭港口中，中國囊括了七個，當中三個是大灣區的城市 (即深圳、廣州及香港)，因此上述趨勢是必然的。

鄭若驊亦認為，隨着「十四五」規劃及大灣區發展規劃明確支持香港鞏固及提升其作為亞太地區國際法律及爭議解決服務中心的地位，香港的航運業界及相關服務有了新的增長動力。

中聯辦副主任尹宗華強調，香港必須鞏固及提升其國際航運中心的地位。他指香港航運業的優勢包括：祖國豐富的市場資源、連接世界的優越地理位置和提供專業服務並且致力創新。

但航運業亦有其挑戰。正如招商局集團主席繆建民表示，三大主要挑戰為：供應鏈失衡、創新的需要和減碳。航運業需要綠色生態，包括平衡不同地區之間的減碳進程，並建立公平的碳交易系統。

Maersk AS v Mercuria Energy Trading SA

[2021] EWHC 2856 (Comm)

本案涉及貨櫃船公司馬士基 (「**被告人**」) 與一家全球商品貿易公司摩科瑞 (「**索償人**」) 之間的爭議。索償人從一名土耳其賣家購買了 4,000 公噸粗銅錠，而被告人透過其土耳其代理與賣家訂立運輸合約，將粗銅錠運到中國。

在貨櫃抵達中國後，索償人發現貨櫃內的貨物被偷換成鵝卵石。索償人對裝貨港的土耳其貨櫃碼頭營運商提出索償，並要求被告人對碼頭營運商的行為及不作為承擔轉承責任。

被告人發出的提單載有合約索償時限及專屬司法管轄權條款，任何索償必須在相關貨品交付日期後一年內提出，否則被告人將獲免除所有責任，而英國倫敦高等法院則具有專屬司法管轄權，可就提單下的所有爭議作出裁決。

索償人於 2021 年 8 月 13 日在土耳其對被告人展開法律程序，並於 2021 年 8 月 25 日送達其申索陳述書。根據土耳其法律，訴訟前必須進行調解。因此，索償人向土耳其法院提交調解申請。該調解僅包括兩次簡短電話通話，表明無法解決有關爭議。被告人向土耳其法院請求延長送達抗辯書時限後提交抗辯書，但並無對其司法管轄權提出任何質疑，至 9 月 20 日才向英國法院申請禁止訴訟令(「**禁訴令**」)。

訴訟時限免責辯護造成的損害

索償人反對禁訴令，理由是被告人可提出訴訟時限為免責辯護，而此辯護在訴訟繼續在土耳其法院進行的情況下並不能為被告人所用。但法院不同意，因為索償人當初大可按照提單在倫敦申請保護性申索。儘管提單是被告人的土耳其代理人代其訂立，但這並非索償人在土耳其提出索償的妥善理由。法院重申，專屬司法管轄權條款是十分重要的條款，不應輕易地撤銷。索償人故意在土耳其而非其應選擇的訴訟地點倫敦展開法律程序，無疑會令訴訟時限在倫敦開始計算，因此索償人不應就其自己選擇不在倫敦申請保護令狀的後果提出反對。

延誤

索償人進一步指稱，被告人應該知道索償人有意在土耳其展開法律程序，但延誤了相當長的時間才提出反對。

法院指出，一般而言，如果申請人在外國訴訟尚未有太大進展之前盡快申請禁令，法院將會批准申請。法院認為本案被告人並非沒有盡快提出禁令申請。被告人沒有責任在得知土耳其訴訟程序後便立即申請禁訴令。被告人在收到令狀至申請禁訴令的一個月期間，從未表示不會倚賴其合約權利，此權利在合約下受到嚴謹保障，不應輕易被剝奪。

此外，土耳其法院僅被要求就延長提交抗辯書的時限作出裁定及參與合共 17 分鐘的訴訟前電話調解。外國訴訟程序並無很大進展，允許禁訴令亦不會對各方造成損害。

基於上述理由，法院裁定，索償人違反合約，在錯誤的法院提起訴訟，及在沒有合理解釋下未能保護其自身利益，被告人沒有理由被剝奪其訴訟時限的權利。因此，法院批准被告人的禁訴令申請。

The Caraka Jaya Niaga III-11

[2021] SGHC 43

新加坡高等法院（「**法院**」）就 2017 年 4 月 3 日兩艘名為「Grand Ace 12」號和「Caraka Jaya Niaga-11」號的船隻間發生的一宗撞船事故頒下裁決。「Grand Ace 12」號的註冊船東及轉管租約承租人（統稱「**原告人**」）以及「Caraka Jaya Niaga-11」號的轉管租約承租人（「**被告人**」）均聲稱因這宗撞船事故而蒙受損失。

根據新加坡《1911 年海事公約法》(《**海事公約法**》) 第 8 條，任何法律程序（包括反申索）在損害、損失或傷害造成之日起計兩年後喪失時效。原告人於 2019 年 3 月 29 日向被告人發出一份對物訴訟令狀（「**對物令狀**」)，而被告人於 2019 年 5 月 13 日（即喪失訴訟時效後）以另一份對物令狀提出反申索，但於 2020 年 5 月 13 日尚未送達而失效。被告人於 2019 年 6 月 12 日申請延長訴訟時限但被法院拒絕，並沒有就該決定提出上訴。因此，被告人對原告人提出的反申索已喪失訴訟時效。

碰撞船隻的船東可追討的損失金額將取決於雙方應攤分的責任，其中一方可能承擔比另一方更大的責任。因此，淨付款方最終將向淨收款方支付一筆淨款額，這就是「單一責任原則」，見 *The Khedive* [1882] 7 App Cas 795 一案。

被告人要求根據單一責任原則，減少應向索償人支付的賠償金額。被告人認為，訴訟時限僅禁止其針對索償人提出新的訴訟。根據英國 *MIOM 1 Ltd v Sea Echo ENE (No 2)* [2012] 1 Lloyd's Law Reports 140 一案，被告人強調，雖然他在訴訟時限過後才提出反申索，但這一點與評定損害賠償無關，因為他只是就原告人的索償提出抗辯，而非提出新的訴訟。原告人則認為這論點是「避開訴訟時效的後門」，不應得到認可。

法院首先將 *Sea Echo* 案與本案區分開來，因為該案的原告人在法院審理責任問題期間，從來沒有提出訴訟時限的爭論點，直到法院在裁定責任問題後需就訟費作出決定時，才提出相關的問題。由於該案的原告人延誤提出訴訟時限的爭論點，因此不得提出。此外，與本案的被告人不同，*Sea Echo* 案的被告人積極尋求延長時效，而法院亦表示願意批准。

考慮到《海事公約法》第 8 條訂明的 2 年訴訟時效的性質，法院認為此限制屬程序性質，僅禁止未及時提出索償的一方所尋求的補償，但不會取消相關索償的所有權利。這一點也適用於反申索。

在分析單一責任原則過往的應用情況後，法院認為應用此原則的前設是兩艘碰撞船隻均有過失，而且必須有有效或能夠確立的申索及反申索。在此前提下，法院會作出單一項裁決，裁定淨收款方就平等責任以外的部分獲得損害賠償。如果單一責任原則在訴訟時限過後仍適用，則會出現淨付款方可以輕鬆地拒絕提起訴訟但仍能倚賴單一責任原則的荒謬結果。

此外，單一責任原則並非一種減少被告人須向原告人支付金額的抵銷形式(儘管實際上可能有此效果)。法院強調，此原則是程序上的機制，與抵銷無關。

基於上述理由，法院偏離了 ***Sea Echo*** 一案的裁決，裁定單一責任原則只會在訴訟時效未過的情況下減少淨付款方應付的金額，被告人因訴訟時效已過而無權倚賴單一責任原則。

Shanghai Shipyard Co. Ltd. v Reignwood International Investment (Group) Company Limited

[2021] EWCA Civ 1147

在本案中，英國上訴法院 (「**上訴法院**」) 就一份造船合同項下最後一期付款的擔保是否可以強制執行作出裁決。

上訴人上海船廠船舶有限公司 (「**造船商**」) 在上海經營一間船廠，提供造船及維修服務。答辯人華彬國際投資 (集團) 有限公司 (「**擔保人**」) 是一間香港公司，提供投資服務。雙方於 2011 年 9 月 21 日訂立一份造船合同，據此，造船商同意建造一艘離岸鑽井船 (「**該船隻**」)，總代價為 2 億美元，分三期支付，最後一期付款 (「**最後一期付款**」) 須於該船隻交付時支付。擔保人是購買鑽井船的財務投資者，並支付首兩期付款。後來，一間由擔保人間接及部分持有的公司根據約務更替安排成為了造船合同的買方 (「**買方**」)。

於 2011 年 11 月 17 日，擔保人以造船商為受益人訂立了一份「不可撤銷的付款擔保」(「**該擔保**」)，並承諾 (其中包括) :

1. 「不可撤銷、絕對及無條件地」保證買方妥為及如期支付合同價款的最後一期付款。(第 1 條)
2. 若買方於款項到期的 15 日內未能如期支付最後一期付款，在造船商提出要求的情況下，擔保人須立即向造船商支付所有尚欠的最後一期付款。(第 4 條)
3. 若買方與造船商就 (1) 買方是否有責任支付最後一期付款及 (2) 造船商是否有權追討最後一期付款存在爭議，而有關爭議被提交仲裁，擔保人則有權暫停及延遲付款，直至仲裁裁決頒布並命令買方支付最後一期付款。(第 4 條的限制條款)
4. 擔保人的責任不會因造船商與買方之間的任何爭議而受到影響或損害。(第 7 條)

2016 年 12 月，由於該船隻被指含有多項重大及關鍵缺陷，造船商與擔保人就該船隻是否處於可交付狀態發生爭議。造船商要求對擔保人強制執行擔保。

<u>商事法庭的裁決</u>

商事法庭的 Knowles 法官裁定，該擔保是一項「有條件擔保」(see-to-it guarantee 或 surety guarantee)，據此，擔保人僅在買方有責任支付最後一期付款的情況下才須承擔責任。有條件擔保與「憑索即付」

擔保的不同之處是，擔保人在憑索即付擔保下的責任於對方提出要求之時產生，不論合約買方是否有責任支付最後一期付款。造船商就 Knowles 法官的裁決向上訴法院提出上訴。

該擔保是否可強制執行

上訴法院首先強調，擔保人的身分不會對文件性質構成任何影響。文件的性質完全取決於其措詞，而上訴法院將按既有的釋義規則進行解釋。文件的措詞應按照其具體商業背景作整體解讀。上訴法院澄清，依賴涉及類似措詞文件的案例僅在有限情況下(例如文件中採用的整體措詞及合約背景大致相同) 才有幫助。

上訴法院應用上述規則解釋該擔保中的關鍵措詞，裁定這是一項憑索即付擔保，理由如下：

1. 擔保以全大寫的「絕對及無條件」一詞描述擔保人的責任，對商人而言有相關責任並不取決於買方的責任之意。
2. 擔保人承諾「以主要債務人而不僅是保證人」的身分提供擔保，明確表示該文件並非有條件擔保。而在擔保人收到書面要求後便會「立即」觸發其付款責任，這一點也證明這是一項憑索即付擔保。
3. 第 7(a) 條訂明，擔保人的責任不受造船商與買方之間的任何爭議影響，清楚顯示這並非有條件擔保。然而，第 4 條的限制條款規定，若買方與造船商之間有任何爭議而提交仲裁，除非仲裁裁決命令買方支付最後一期付款，否則擔保人並無須支付任何款項。上訴法院裁定，第 4 條的限制條款只是修改了雙方的權利，第 7 條「任何」爭議一詞足以涵蓋造船合同項下產生的所有爭議。擔保人的責任並不取決於第 4 條的條件。
4. 第 4 條的限制條款應詮釋為支持造船商的案情。儘管根據限制條款的條文，在仲裁命令要求買方支付最後一期付款前擔保人無須承擔任何責任，但擔保人無權質疑仲裁庭的決定，付款責任在仲裁裁決作出之時便會產生。因此，第 4 條並非引入保證責任的條件，而是憑索即付保證的一部分。

造船商認為，擔保人在提出有效要求前，必須證明雙方存在爭議及仲裁已開始，才會觸發第 4 條的限制條款規定。否則，在收到有效要求後，造船商有權立即根據該擔保獲得付款。上訴法院同意造船商的詮釋，因為爭議的存在及提交仲裁均為第 4 條的條件。一旦作出有效要求，造船商已享有的獲付款權利將不會暫時撤銷。

基於上述理由，上訴法院推翻商事法庭的裁決，裁定造船商勝訴。

Euronav NV v Repsol Trading SA (mt MARIA)

[2021] EWHC 2565 (Comm)

在本案中，英國商事法庭（「**法院**」）就應採用哪個時區來釐定租船合同的訴訟時效何時生效作出裁決。

索償人 Euronav N.V. 是「MARIA」號船隻（「**該船隻**」）的船東（「**船東**」），其與被告人 Repsol Trading S.A. （「**租船人**」） 於 2019 年 10 月 23 日依據 Shellvoy 6 表格訂立了一份航次租船合同（「**租船合同**」），據此出租該船隻從巴西運送原油到美國。

該船隻在巴西和美國延滯，根據船東的發票，產生了約487,000美元的滯期費索償。租船合同第 15(3) 條規定，船東應於卸貨完成後 30 日內發出滯期費索償通知，否則租船人將獲解除有關滯期費的責任。船東向租船人發出索償電郵後，雙方就完成卸貨日期及船東是否已在 30 日內發出通知出現爭議。

1. 如果按照卸貨地點加州的當地時間確定卸貨日期，船東的申索將喪失時效。
2. 相反，如果根據索償通知的收件人（即租船人）或發出人（即船東）所在的時區確定卸貨日期，船東的申索不會喪失時效。

<u>法院的裁決</u>

Henshaw 法官認為，就關於滯期費索償通知的第 15(3) 條而言，卸貨日期須按照卸貨地點的當地時間決定。

法院首先指出適用於商業合約的基本釋義原則，包括：(1) 確定各方選擇用來表達協議的措詞的客觀意思；(2) 如有對立的意思，法院將以較符合商業常識的方式解釋；(3) 法院必須考慮條款的草擬質素，以及某方可能由於在磋商後作出妥協而同意一項未必符合其利益的條款；及 (4) 當文本分析不能妥善解釋協議時，法院亦會考慮事實背景及同類合約中類似條文的目的。

考慮以往案例和評論後，基於以下理由，法院同意卸貨日期應按卸貨地點的當地時間確定：

1. 按照事件發生地點的當前日期編配事件，是平常和自然的做法。同樣地，貨物從船上卸載亦會按照卸貨當地的時間和日期來記錄，而就合約目的而言，訂約雙方很自然也會預期此為完成卸貨的

日期。

2. 採用卸貨地點的當地時間可以清晰和容易地確定卸貨的日期和時間，能提高確定性及減少混淆的機會。
3. 就第 15 條而言，30 日限期的開始及結束並不須採用同一時區，但各方享有 30 日期限的權利不會因此被蠶食，因為這是以曆日而非流逝時間計算的通知期的固有特徵。即使在最極端的情況下，此期限也不會縮短超過約 23 小時，有關差異不會對雙方享有 30 日通知期的權利造成根本上的改變。

鑒於上述理由，法院裁定本案中的船東通知已喪失時效，因此他們無權根據租船合同第 15 條提出滯期費索償。

當「交叉相遇規則」與「狹窄水道規則」訂明的避碰責任互相抵觸時，船隻應怎樣做？

簡介

在最近的 *Evergreen Marine (UK) Limited v Nautical Challenge Limited* [2021] UKSC6 一案中，英國最高法院審視了《1972 年國際海上避碰規則公約》(**《避碰規則》**) 對船舶施加互相抵觸的責任。

上訴人的大型貨櫃船「Ever Smart」號與答辯人的極大型油輪「Alexandra 1」號發生碰撞。在相撞前的 23 分鐘期間，「Alexandra 1」號與「Ever Smart」號一直以穩定的方位駛近對方，而「Alexandra 1」號並非以穩定的航向行駛。

「交叉相遇規則」是甚麼？

《避碰規則》第 15 至 17 條 (「**交叉相遇規則**」) 適用於兩艘機動船交叉相遇而涉及碰撞危險的情況。如果兩艘船隻駛近對方，而各自的羅經航向 (相對於對方而言) 並無明顯改變 (即「穩定方位」)，就是有碰撞的危險。

《避碰規則》第 15 條就交叉相遇的情況作出規定：

> 「當兩艘機動船交叉相遇而涉及碰撞危險時，有他船在其右舷的船隻 (即「讓路船」) 須給他船 (即「直航船」) 讓路；如果環境允許，則須避免從他船前方橫越。」

第 16 條規定，讓路船「在切實可行範圍內須盡量及早採取大幅度的行動，遠避他船」。

第 17 條規定，直航船有責任「須保持其航向和航速」，除非直航船發覺讓路船並無遵守避碰規則，或雙方船隻均需採取行動才能避免碰撞。

「狹窄水道規則」是甚麼？

《避碰規則》第 9 條規則被稱為「狹窄水道規則」，規定沿狹窄的水道行駛的船隻，在安全和切實可行時，須盡量靠近該水道或航道在其右舷的外界線 (規則 9(a))。

狹窄水道規則不但提供交叉相遇的指引，還提供以下關於追越及錨泊的指引：

「9(b) 帆船或長度小於 20 米的船隻，不得妨礙只能在狹窄的水道或航道內才能安全航行的船隻的通過。

(c) 從事捕魚的船隻，不得妨礙在狹窄的水道或航道內航行的任何其他船隻的通過。

(d) 如果船隻穿越狹窄的水道或航道會妨礙只能在此種水道或航道內才能安全航行的船隻的通過，則不得作此種穿越。如果後者的船隻對作出穿越的船隻的意圖有懷疑，則可使用規則第 34(d)條中訂明的聲號。

(e)(i) 在狹窄的水道或航道內，如只有在被追越船必須採取行動以允許安全通過

的情況下才能追越，則意圖追越的船隻，須鳴放規則第34(c)(i)條訂明的適當聲號，表示其意圖。被追越船如果同意，須鳴放規則第 34(c)(ii)條訂明的適當聲號，並採取步驟以容許其安全通過。如有懷疑，則可鳴放規則第 34(d)條訂明的聲號。

(ii) 本條不解除作出追越的船隻在規則第 13 條下的責任。

(f) 船隻在駛近可能有居間障礙物遮蔽他船的狹窄的水道或航道的彎頭或區域時，須特別機警和謹慎地駕駛並須鳴放規則第 34(e)條訂明的適當聲號。

(g) 如環境允許，任何船隻均應避免在狹窄的水道內錨泊。」

狹窄水道規則在甚麼情況下取代交叉相遇規則？

在參考 ***The Empire Brent*** (1948) 81 Ll L Rep 306、***The Glenfalloch*** [1979] 1 Lloyd's Rep 247、***The Leverington*** (1886) 11 PD 117 及 ***The Ashton*** [1905] P 21 四宗案例後，最高法院認為，狹窄水道規則及交叉相遇規則是可以同時應用的。

最高法院將船隻情況劃分為三大類，狹窄水道規則與交叉相遇規則的適用情況各自如下：

類別	適用情況	是否取代交叉相遇規則？
第 1 類	船隻駛近水道出入口，朝向橫越該水道的方向，但完全無意或不準備進入該水道，而是在與狹窄水道沒有連接的起點與終點之間的途中	否，交叉相遇規則適用。 交叉相遇規則適用於一艘正在離開水道並駛近其出入口的船隻與一艘第 1 類船隻，而不論兩者之中哪一艘船隻有他船在其右舷，因為駛近的第 1 類船隻並不準備或打算進入水道。
第 2 類	船隻有意進入水道，並正在最終進場，調整其航向以右舷到達	是，狹窄水道規則會取代交叉相遇規則。 因為駛近的船隻正準備及有意進入水道，並已就其最終進場作出修正（即調整航向及速度）
第 3 類	駛近的船隻有意並準備進入水道，但正在等候而非正在進入水道	否，交叉相遇規則仍適用。 此情況下並沒有凌駕交叉相遇規則的必要，直至駛近的船隻實際上在進行修正、調整其航向及速度，以在最終進場時以其右舷到達出入口。

Wright 大法官在 ***The Alcoa Rambler*** 一案中訂明，交叉相遇規則應在任何可行情況下被應用。根據此項原則，最高法院認為，在沒有明確規定的情況下，除非有必要，否則交叉相遇規則不應被其他規則所凌駕。最高法院認為，第 3 類船隻情況中並沒有凌駕交叉相遇規則的必要。

根據上述原則，在本案中，最高法院裁定，僅在**駛近的船隻正在進行修正以進入水道、調整其航向以在最終進場時以其右舷到達出入口**的情況下，交叉相遇規則才會被凌駕。案件中「Alexandra 1」號只是在進入河道前接載領航員登船，這並非足以取代交叉相遇規則的充分準備行為。法院裁定「Alexandra 1」號未有遵守交叉相遇規則中要求讓路船遠離他船的規定。

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