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Cover Story

Can owners refuse charterers' order if it may jeopardise the safety of a vessel?

Introduction

In *CM P-MAX III Limited v Petroleos Del Norte SA (MT Stena Primorsk)* [2022] EWHC 2147 (Comm), the Commercial Court of the High Court of England and Wales (the "**Court**") has ruled that an owner can legitimately refuse orders from the charterer where such orders may jeopardise the safety of a vessel. As the owner cannot be satisfied that the vessel could berth and discharge her load whilst remains to be "safely afloat", the owner may reject the charterer's request to berth on safety grounds.

The claim

In this case, the claimant (the "**Owner**") chartered a tanker (the "**Vessel**") to the defendant (the "Charterer") for a single voyage. The Owner claimed against the Charterer for demurrage in the sum of US$143,153.64. The contract provided for a single allowance of 72 hours of laytime for loading and discharging with demurrage payable at the rate of US$22,500 per day pro rata. The Charterer defended on the basis that the time was suspended because the Owner was in breach of the charterparty (the "**Charterparty**") when the Owner decided to leave the discharge terminal within 12 minutes of berthing on 31 March 2019 and subsequently refused to comply with the Charterer's request to return on berth at 2100 on 1 April 2019.

The Owner argued that both the decisions to leave and to berth and commence discharge on 31 March 2019 and 1 April 2019 respectively were based on the safety reasons as permitted by the Charterparty and so it did not amount to any breach or fault by the Owner.

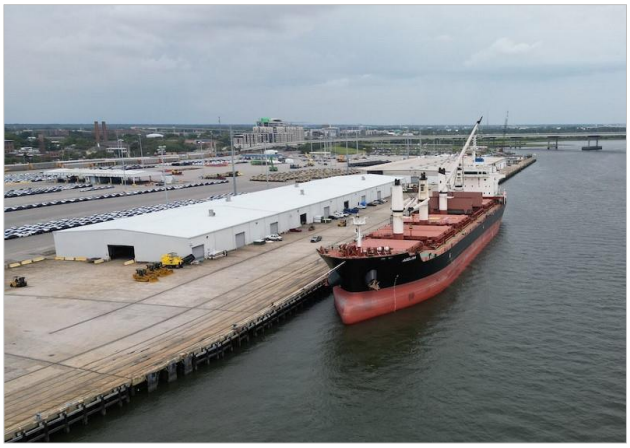
The Charterparty

Part 2 of the Charterparty included the following highlighted provisions:

> Clause 3(1): "*Subject to the provisions of this Charterparty the vessel shall perform her service with* ***utmost despatch*** *and shall proceed as ordered…as she may safely get and there,* ***always safely afloat****, discharge the cargo.*"
>
> Clause 3(2): "*Owners shall be responsible for and indemnify Charterers for any time, costs, delays or loss including but not limited to use of laytime, demurrage,…due to any failure whatsoever to comply fully with Charterers' voyage instructions…* ***Owners shall adhere to Charterers' voyage instructions as long as such orders are considered safe by the Master of the ship.***"
>
> Clause 15: "*Any delays for which laytime/demurrage consequences are not specifically allocated in this or any other clause of this Charterparty and which are beyond the reasonable control of Owner or Charterer shall count as laytime or, if Vessel is on demurrage, as time on demurrage.*"

The facts

The Vessel loaded cargo of oil at Bilbao and was to head for port of discharge Paulsboro on the Delaware river. Prior to arrival, the Master sought a waiver of the under keel clearance ("**UKC**") policy in order to berth and discharge the cargo. On 27 March 2019, the Master sent the relevant UKC calculations to Northern Marine Management Limited ("**NMM**"), the Vessel's technical operator, with a detailed risk assessment. Upon considering the calculations, NMM confirmed on 28 March 2019 that it was prepared to grant an "*one off waiver for the NMM UKC policy…on 31 March 2019*" to cover both the transit from anchorage and the berthing.



<u>Decision to leave the berth on 31 March 2019</u>

Upon arrival on 31 March 2019, the terminal informed the Master that for the first 7 to 9 hours, unloading would need to take place at a reduced rate of 5,000 barrels per hour. The Master opined that the Vessel needed to maintain a discharge rate of 15,799 barrels per hour to keep a safe UKC, and so he decided to leave the berth and return to the anchorage.

<u>Decision to refuse to berth and commence discharge on 1 April 2019</u>

On 1 April 2019, the Charterer noted that Crown Point was able to discharge the cargo at the rate of 10,000 barrels per hour and requested that the Vessel be permitted to discharge at the next high tide which would be 2100 on 1 April 2019.

The Master contacted NMM with detailed UKC calculations on the basis that the Vessel was all fast at 2100 with no delays, discharge could commence within 3 hours and on the basis that "*no allowance for delays, berthing, connections or technical failure ship or terminal*".

However, since the UKC policy is a function of deepest navigational draft which decreased during discharge, the required UKC varied. At 2100, the UKC policy would not be met and

so a waiver, permitting the Vessel to berth despite a breach of the UKC policy, would be required. NMM refused to grant the waiver on the reason that there would be "*very little margin for safety and ensuring adequate UKC*" and if there were any delays and if delays were prolonged, UKC would be "severely compromised, with the risk of the vessel touching bottom". Therefore, NMM concluded that there were "*insufficient controls to mitigate the risks*".

Legal principles

The Court ruled that the terms of the Charterparty underline both the importance of operating the Vessel safely and the importance attached to decisions made by the Master. The Court opined that Clause 3(1) (as highlighted above) sets the tone of the Charterparty by requiring that the Vessel, once loaded, to proceed with "utmost despatch" to the nominated port of discharge and there "always safely afloat" discharge the cargo. Therefore, the Court concluded that the requirement to proceed with "utmost despatch" is not absolute but is tempered by the requirement to remain safely afloat. As to Clause 3(2) (also as highlighted above), the Court opined that it sets out an obligation for the Owner to comply with the Charterer's voyage instructions, but again, such obligation is not absolute. The Court emphasized that an instruction not considered safe by the Master can be disregarded.

Upon referring to authorities, the Court concluded that a charterer needs to establish some "fault" on the part of the owner or those the owner is responsible for in order to suspend the time for demurrage purposes. However, if the owner acts in a way authorised by the charterparty, the owner would unlikely to be at fault.

Regarding the UKC policy, the Court held that it represented a fetter on the Master's freedom to decide where the Vessel went and if the UKC was to be breached, the Master needed to consult with the Owner's agent. In this case, the Court observed that the UKC policy was binding and must not be breached without consent. Careful risk assessment and a UKC calculation before a waiver can be considered underlines the importance of the UKC policy. The Court further noted that as the UKC policy formed an integral part to the Charterparty and was governed by Part 1 of the Charterparty, it would take precedence over the general terms of Part 2.

Upon examining the facts and the experts evidence, the Court concluded that the Master's request for a waiver on 1 April 2019 was realistic and NMM's refusal was also entirely appropriate. Therefore, the decision to leave the berth on 31 March 2019 was ruled to be appropriate without putting the Owner in breach of the Charterparty, and time runs against the Charterer. As to the refusal to berth and commence discharge on 1 April 2019, the Court held that the Owner was entitled to reject on safety grounds and there was no fault on the part of the Owner, the Master, nor NMM. Accordingly, the Court allowed the Claim.

Key takeaways

Safety is always the prime consideration. The Court's decision confirmed that there will be a reluctance to overrule decision made by a Master when making a call over the safety of the vessel so long as the decision was not groundless or unreasonable. Accordingly, an owner may legitimately refuse orders from the charterer when it may jeopardise the safety of a vessel.

US FMC proposes new demurrage and detention billing requirements

The Federal Maritime Commission ("**FMC**"), the independent federal agency responsible for regulating the US international ocean transportation system, proposed on 7 October 2022 a new rule (the "**Proposed Rule**") to regulate the demurrage and detention billing practices of vessel operating common carriers (VOCCs), non-vessel-operating common carriers (NVOCCs), and marine terminal operators (MTOs).

The Proposed Rule is made in response to a requirement of the Ocean Shipping Reform Act of 2022 ("**OSRA**") (which was signed into law by the US President Joseph R. Biden on 16 June 2022) and investigation (Fact Finding 28) of conditions and practices of VOCCS and MTOs related to demurrage, detention, and per diem charges.

The Proposed Rule requires VOCCs, NVOCCs, and MTOs to issue bills for demurrage or detention only to parties that they have a contractual relationship with, to be clear regarding the nature of the charges, and issue invoices within 30 days after the charges stop accruing, and provide 30 days to dispute the charges with clear information about how charges should be disputed.

The FMC further suggested in the Proposed Rule four actions to be taken:

1. Adopting the list of minimum information that common carriers must include in demurrage or detention invoices as mandated in OSRA and codified at 46 U.S.C. 41104(d)(2).
2. Adding to the list referenced immediately above additional information that must be included in or with a demurrage or detention invoice.
3. Further defining prohibited practices by clarifying which parties may be billed for demurrage or detention charges.
4. Establishing billing practices that billing parties must follow when invoicing for demurrage or detention charges.

US FMC seeking public comment on proposed "unreasonable refusal to deal" rule

The Federal Maritime Commission ("**FMC**"), the independent federal agency responsible for regulating the US international ocean transportation system, sought public comments in response to a Notice of Proposed Rulemaking ("**NPRM**") issued on 13 September 2022 which purported to implement a requirement of the Ocean Shipping Reform Act of 2022 ("**OSRA**") to define "unreasonable refusal to deal or negotiate" with respect to vessel space accommodation provided by an ocean common carrier.

One of the OSRA provision requires that an ocean common carrier shall not unreasonably refuse to deal or negotiate with respect to vessel space accommodation. The NPRM outlines the 3 elements necessary to establish a breach – complainants alleging an unreasonable refusal to deal with respect to vessel space accommodation will need to satisfy:

1. That the respondent is an ocean common carrier;
2. That the respondent refuses to deal or negotiate with respect to vessel space; and
3. That the refusal is unreasonable.

In deciding whether a refusal to deal was unreasonable, the FMC may consider factors such as whether the ocean common carrier followed a documented export strategy, engaged in good faith negotiations, and articulated legitimate transportation factors.

The burden of proving the refusal to deal was reasonable would be on the ocean common carriers, instead of the shippers. The NPRM, if finalised, is expected to be applicable to both import and export shipments.

The NPRM proposes a burden-shifting regime that would allow ocean common carriers to establish why it was not unreasonable to refuse vessel space to a particular complainant. As the circumstances of each shipment are unique, the FMC acknowledges it is impossible to regulate for every possible scenario, and accordingly, cases alleging a violation will be factually driven and considered on a case-by-case basis.

US congressman introduces the Clean Shipping Act of 2022 targeted to clean up massive emissions-generating maritime shipping industry

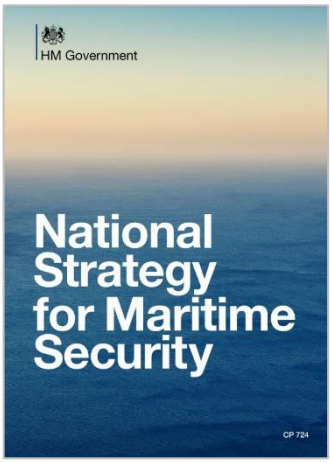
A new bill, the Clean Shipping Act (the "**Bill**"), was introduced in the US Congress on 12 July 2022. The Bill was modelled after Europe's Fit for 55 initiative and was aimed at zeroing out pollution from all ocean shipping companies that do business with the US It is expected that the Bill would be enforced by the US Environmental Protection Agency. Pursuant to the Bill:

1. There will be carbon intensity standards set for fuels used by ships. The Bill sets progressively tighter carbon intensity standards for fuels used by ships consistent with a 1.5° Celsius decarbonization pathway. These standards would require lifecycle carbon dioxide-equivalent reductions of 20% from 1 January 2027, 45% from 1 January 2030, 80% from 1 January 2035, and 100% from 1 January 2040, relative to the 2024 emissions baseline.

2. The emissions of pollutants from in-port ships are targeted to be eliminated by 2030. By 1 January 2030, all ships at-berth or at-anchor in US ports would emit zero GHG emissions and zero air pollutant emissions.

According to the introducer of the Bill, Congressman Lowenthal, the shipping industry emits almost 1 billion tons of climate pollution per year and the shipping industry could account for 17% to 18% of all global emissions by 2050 if steps aren't taken to correct it. The Bill might be an effective solution.

UK new five-year maritime security strategy to target latest physical and cyber threats



The UK has launched a new five-year maritime security strategy (the "**Strategy**") that sets out the guiding principles for the country's approach to managing threats and risks, including leveraging its seabed mapping community and tackling illegal fishing and polluting activities at sea.

The Strategy, which is meant to enhance capabilities in technology, innovation and cyber security, redefines maritime security as upholding laws, regulations, and norms to deliver a free, fair, and open maritime domain. The UK Government recognises any illegal, unreported and unregulated fishing and environmental damage to the seas as a maritime security concern. The UK Government has also established the UK Centre for Seabed Mapping, which seeks to enable the UK's world-leading seabed mapping sector to collaborate to collect more and better data, in order to enhance the UK's maritime security knowledge.

Seabed mapping provides the foundation dataset that underpins almost every sector in the maritime domain, including maritime trade, environmental and resource management, shipping operations and national security and infrastructure within the industry. The UK's Secretaries of State from the Department for Environment, Food and Rural Affairs, the Department for Transport, the Foreign, Commonwealth and Development Office, the Home Office and the Ministry of Defence will focus on 5 strategic objectives:

1. Protecting homeland: delivering the world's most effective maritime security framework for the UK borders, ports and infrastructure.
2. Responding to threats: taking a whole system approach to bring world-leading capabilities and expertise to bear to respond to new, emerging threats.
3. Ensuring prosperity: ensuring the security of international shipping, the unimpeded transmission of goods, information and energy to support continued global development and economic prosperity.
4. Championing values: championing global maritime security underpinned by freedom of navigation and the international order.
5. Supporting a secure, resilient ocean: tackling security threats and breaches of regulations that impact on a clean, healthy, safe, productive and biologically-diverse maritime environment.

It is believed that a proactive maritime security strategy is essential to keeping trade routes and energy supplies secure, especially for an island nation, and the Strategy can improve collaboration of the industry and governments across the world, help deliver a more secure maritime environment and help provide confidence to the shipping community.

Fimbank p.l.c. v KCH Shipping Co., Ltd

[2022] EWHC 2400 (Comm)

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Introduction

This is an appeal against a partial final award granted by an arbitral tribunal, relating to the claim made by Fimbank p.l.c. (the "**Claimant**") against KCH Shipping Co., Ltd (the "**Defendant**"). The Claimant brought claims to the tribunal as holder of various bills of lading for misdelivery of cargo after discharge from the stockpiles against the Defendant as the carrier.

Issues in question

By way of incorporation from the charterparty, the bills of lading were subject to the Hague-Visby Rules, including Article III rule 6 which discharge the carrier from liability in respect of the goods unless suit is brought within one year of their delivery or of the date when they should have been delivered.

In circumstances which the Claimant says led it to misunderstand the identity of the carrier, the Claimant only served its Notice of Arbitration on the Defendant on 24 April 2020, which was more than one year after delivery of the goods or the date when they should have been delivered – that being the time bar period. In this circumstances, the tribunal has to determine:

1. Whether the time bar clause under Art. III, r. 6 of the Hague-Visby Rules applies to claims for misdelivery of cargo after discharge from the vessel. ("**the 1st Question**")

2. Whether clause 2(c) of the Congenbill form (i.e. the document which contains the bills of lading in question) disapplies the Hague-Visby Rules to the period after discharge. ("**the 2nd Question**")

Findings of the arbitral tribunal

The tribunal found that: (i) the Hague-Visby Rules time bar can in principle apply to claims relating to misdelivery occurring after discharge; and (ii) clause 2(c) of the Congenbill form does not disapply the Hague-Visby Rules time bar to the period after discharge. The Claimant's claim was thus time-barred. In this circumstances, the Claimant brought this appeal to the King's Bench Division against the tribunal's finding in relation to the 1st and the 2nd Questions.

Objective of the time-bar clause

The Court first considered the object and purpose of Art. III, r.6 and finds that supportive of the Defendant's position that the time bar clause does apply to claims for misdelivery after discharge. In

Compania Portorafti Commerciale S.A. v Ultramar Panama Inc. (The Captain Cregos) [1990] 1 Lloyd's Rep.310, Bingham LJ authoritatively stated the objective of the time-bar clause, saying that it is, "like any time bar, intended to achieve finality and, in this case, enable the ship owner to clear his books". If the time bar clause does not apply to claims for misdelivery after discharge, the ship owner cannot clear his books even after the time bar period in case of any claim for misdelivery after discharge. This interpretation runs against the objective of providing for the time-bar clause.

Problems of the Claimant's contention

The Court moved on to identify a number of anomalies that would arise if the Claimant's contention was correct that the time bar clause disapplies to delivery after discharge. First, most deliveries will be at some point after discharge over the ship's rails and may take place in a number of different ways outside the control of the carrier. It would be odd if the critical distinction for time bar purposes depended on this because it is difficult to ascertain a precise time at which discharge ends. There is also no obvious analytical or sound commercial reason why it should since the receiver has control over when and how it surrenders the bill of lading and organises the receipt of the goods ashore.

The Court cited other anomalies of the Claimant's contention as identified by the tribunal. Where the claimant does not present the bill of lading to the carrier or his agent when the vessel has arrived to give discharge, this means that the carrier either has to refuse for an undefined (and perhaps un-indemnified) period, or discharge into the custody of an agent and – on the Claimant's case – lose all protection of Art. III r.6. The Tribunal considered that "This is not commercially sensible or even reasonable".

Potential implication of terms

Even if the above analysis is wrong, the Court would still uphold the decision of the tribunal to the effect that the same result can be reached by the implication of a term, as was recognised by the English Court of Appeal in *The MSC Amsterdam* [2007] 2 Lloyd's Rep 622. In that case, the Court held that parties are free to agree on terms other than the Hague Rules (or the Hague-Visby Rules) for periods outside the actual period of the carriage. If parties have made no agreement for the period after discharge, it might be easy to say that the parties have impliedly agreed that the obligations and immunities contained in the Hague Rules continue after actual discharge until the goods are taken into the custody of the receiver.

For the above reasons, the Court answered the 1st Question in the affirmative that the time bar clause also applies to misdelivery after discharge. The 2nd Question in fact stems from the reasoning in The MSC Amsterdam mentioned above. The Claimant contended that clause 2(c) in the bills of lading disapplies the application of the time bar clause in the present case. The Court, based on the facts and circumstances of the case, dismissed the Claimant's contention.

In conclusion, in general the time bar clause under Art. III r.6 of the Hague-Visby Rules also applies to a claim for misdelivery after discharge. However, parties are free to agree on terms other the Hague-Visby Rules for periods outside the actual period of the carriage.

MUR Shipping BV v RTI Ltd

[2022] EWCA Civ 1406

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Introduction

The contract of affreightment (the "**Contract**") in question was between MUR Shipping BV (the "**Owner**") as the owner and RTI Ltd (the "**Charterer**") as the charterer. The Contract was dated 9th June 2016 and contained a force majeure clause. This is an appeal by the Charterer against the decision of the court below that the Owner is entitled to rely on a force majeure clause because of the imposition of sanctions by the United States on a company associated with the Charterer, leading to the difficulty of the charterer in paying freight in US dollars.

Force majeure clause and events

The Contract defined a force majeure event as an event or state of affairs which met all the criteria listed at clause 36.3(a) to (d). Clause 36.3(d) criterion was that the event could not be overcome by the reasonable endeavours from the party affected. The Contract also provided that payment is to be made in US dollars.

After the Owner and the Charterer entered into the Contract, the US Department of Treasury's Office of Foreign Assets Control imposed sanctions on United Company Rusal Plc ("**Rusal**"), which was the majority owner of the Charterer. The Charterer was not itself added to the sanction list.

Procedural history

In the arbitral tribunal, the arbitrators found that although it would not have been unlawful for the Charterer to make payments of freight in US dollars, it was highly probable that any such payment would have been delayed because all banks would be highly alert in processing payment by a majority-owned subsidiary of an entity named on the sanction list.

However, the arbitrators accepted the Charterer's argument that this difficulty could be overcome by reasonable endeavour of Charterer in making payments in Euro and bearing the cost of converting those euros into dollars. Hence, the difficulty owing to the imposition of sanctions on Rusal did not satisfy the criterion in Clause 36.3(d), so the Owner was not entitled to rely on the force majeure clause.

On appeal to the Commercial Court by the Owner, the Commercial Court allowed the appeal. The essential reason was that the contract required payment in US dollars and that "a party is not required, by the exercise of reasonable endeavours, to accept non-contractual performance in order to circumvent the effect of a force majeure or similar clause."

The Charterer then brought the present appeal before the English Court of Appeal on the issue whether the force majeure event or state of affairs could have been overcome by reasonable endeavours from the Owner as the party affected. It arises on the basis that the Charterer's contractual obligation was to pay freight in US dollars.

Focus on the adverse consequences

The primary concern of the Court of Appeal is whether acceptance of the Charterer's proposal to pay freight in Euros and to bear the cost of converting those euros into dollars would overcome the state of affairs caused by the imposition of sanction on Rusal. Therefore, the question is whether, in order to overcome the state of affairs in question, it was essential for the contract to be performed in strict accordance with its terms.

The Court held that a problem or state of affairs can be overcome if its adverse consequences are completely avoided. In this connection, the Court noted the arbitrators' finding that the Charterer's proposal to pay in Euro would have presented "no disadvantages" to the Owner and could have been accepted with "no detriment" to it. Accordingly, the Court upheld the arbitrators' conclusion that the force majeure could have been "overcome by reasonable endeavours from the Party affected" and concluded that the Owner was not entitled to rely on the force majeure clause in the present case.

Eastern Pacific Chartering Inc v Pola Maritime Ltd

[2022] EWHC 2095 (Comm)

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Introduction

This case is a trial of a claim and counterclaim arising under a trip time charter (the "**Charterparty**") dated 18 September 2019 of a bulk carrier called "DIVINEGATE" (the "**Vessel**") under which Eastern Pacific Chartering Inc (the "**Claimant**") chartered the Vessel to Pola Maritime Ltd (the "**Defendant**").

The Claimant claimed outstanding hire, bunkers and other expenses. There is no dispute as to the claim of the Claimant. The dispute is as to whether the Defendant can answer the claim by its two counterclaims. The Defendant sought deduction from hire and also claimed damages for breach of the Vessel's performance warranty. It also made a separate counterclaim as damages in tort on grounds of the Claimant's allegedly wrongful arrest of a different vessel, the POLA DEVORA.

Breach of the performance warranty

Regarding the first counterclaim for breach of performance warranty, the Charterparty provided that the Vessel should have been able to achieve a minimum speed of 12.5 knots on a maximum consumption of 21.525mt of fuel oil (the "**Eco-speed**") in a good weather condition (the "**Performance Warranty**"). The Defendant contended that the Master did not comply with instructions to proceed at Eco-speed which amounted to a breach of the Performance Warranty entitling the Defendant to recover damages for resulting loss of time or deduct the same amount from the claim.

It was a common ground between parties that the simplest and most conventional way to prove these types of breach is to establish that during periods of good weather the Vessel did not achieve the warranted speed and performance and pro-rate the underperformance against the entire period under review (the "**Good Weather Method**").

In light of this common ground, the Claimant further argued that there was no good weather period during the whole voyage to serve as the basis for a reliable assessment of the Vessel's ability to meet the warranted performance. In the absence of such period, no underperformance or breach as alleged can be established. The Performance Warranty is the agreed benchmark and in the absence of good weather the Owners get the benefit of the doubt because this is practical and reflects many decades of practice. In any event, the Vessel met the warranted good weather speed on the period closest to good weather in the whole voyage.

The Court rejected this contention, ruling that the Good Weather Method was not the sole and exclusive available means to establish these types of breach of Performance Warranty. It does not preclude the use of an alternative method to prove underperformance. However, any alternative method must be established as reliable and consistent with the express performance warranty, especially in circumstances where the Good Weather Method has been adopted for many years in an area of significant expertise, resources and innovation. The Court found in favour of the Defendant in this issue and held that there was an underperformance.

Wrongful arrest

Regarding the counterclaim for wrongful arrest, the Court found that the Claimant's arrest of POLA DEVORA was indeed unlawful because the Defendant was not a beneficial owner of POLA DEVORA but only an entity who operated that vessel by a time charter.

However, the Claimant was not guilty of wrongful arrest. A claim for wrongful arrest was analogous to a common law action for malicious prosecution, and the test was whether the arrest proceedings had been begun or continued in bad faith or with such gross negligence as to imply malice. The first limb of the test is to determine whether the arresting party's belief as to beneficial ownership was honestly or maliciously held. The second limb is a more objective determination of whether malice was to be implied.

In the present case, since the arrest was caused by a genuine and understandable mistake by the Claimant with no bad faith or gross negligence, the counterclaim for damages for wrongful arrest would be dismissed.

In conclusion, the Court allowed the claim by the Claimant but also held that the underperformance counterclaim succeeded to the extent that a 16-hour loss of time would be set off against the Claimant's claim. However, the counterclaim for damages for wrongful arrest would be dismissed.

Decarbonization and ship-recycling – the Hong Kong Convention

Introduction

Ship recycling is the process of removing steel, machinery and anything of value for reuse of recycling from end-of-life ships. However, current scrapping practice brings up significant health concerns, with shipbreaking being named as the most dangerous job in the world. Workers in developing countries such as Pakistan, Bangladesh and India (also the largest shipbreaking countries in the world) are subject to various risks including threats of gas explosions, death, serious injury, and long-term health issues due to their practice of 'beaching', in which ships are sailed onto beaches and dismantled in the tidal zone. Such workers often lack protective clothing, appropriate tools and proper trainings. The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009 (the "**Hong Kong Convention**") aims to bring positive changes to the industry and improves global shipbreaking conditions.

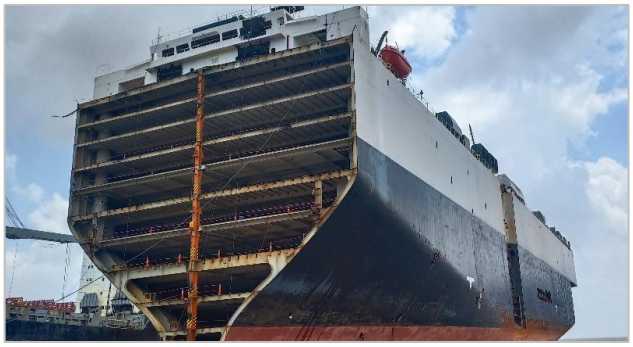

Photo source: Wikimedia Commons

What is the Hong Kong Convention?

The Hong Kong Convention is a multilateral convention adopted at a diplomatic conference held in Hong Kong in 2009, attended by delegates from 63 countries. It establishes standards of ship recycling and determines the responsibility for enforcement. The Hong Kong Convention was developed alongside member states of the International Maritime Organisation (the "**IMO**"), NGOs, and with help from the International Labour Organisation and the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (the "**Basel Convention**").

What is the purpose of the Hong Kong Convention?

The Hong Kong Convention aims to ensure that ships are recycled in a way that no unnecessary risks are posed to one's health, safety or to the environment. It promotes transparency and address health concerns related to ship recycling, such as the presence of hazardous substances i.e. heavy metals and hydrocarbons in ships that are sold for scrapping, which can threaten the working and environmental conditions at the ship recycling yard perimeter.

Acknowledging that dangerous and controversial ship breaking practices often occur in developing countries, the Hong Kong Convention encourages ship owners to carry out ship recycling in facilities in more developed countries, which are more conscious of environmental and ethical issues and with comprehensive laws implemented to protect workers' health as well as the state of the environment. Even so, developing countries

that have ratified the Hong Kong Convention have had improvements in their own measures regarding ship recycling and its consequences.

What are the key features of the Hong Kong Convention?

The Hong Kong Convention, among others, stipulates the following requirements: -

1. Ships that will be recycled will need to provide an Inventory of Hazardous Materials, which is a document identifying all materials on the ship that are on a list of hazardous materials in Appendix 1 to the Hong Kong Convention. Ships will be required to fill in an initial survey, additional surveys during the life of the ship, and a final survey prior to recycling, to declare the existence of such hazardous materials.
2. Ship recycling yards need to provide a Ship Recycling Plan, in which the method each vessel will be recycled is explained in detail. The method adopted needs to be compliant with the guidelines and regulations under the Hong Kong Convention.
3. The Hong Kong Convention will apply to ships over 500 gross tons that are entitled to fly the flag of a Party or operation under its authority, or ships sent to a ship recycling facility that is operating under the jurisdiction of a Party.

What is the current status of the Hong Kong Convention?

The Hong Kong Convention was open for signature between 1 September 2009 and 31 August 2010, and was open for accession afterwards. The Hong Kong Convention will enter into force 24 months after "15 states, representing 40% of world merchant shipping by gross tonnage, combined maximum annual ship recycling volume not less than 3 per cent of their combined tonnage" have ratified it. However, all of these conditions are yet to be satisfied.

As of 2022, 19 countries have ratified the Hong Kong Convention. However, the combined merchant fleets of which constitute only around 29% of the gross tonnage of the world's merchant shipping, failing to reach the 40% threshold. Although 13 years have passed since it was first adopted, the Hong Kong Convention remains ineffective.

Are there other global efforts in encouraging ship recycling?

Although the Basel Convention adopted in 1989 provides controls for the international movement of hazardous wastes, it is considered impractical and unenforceable to the recycling of ships. As the Hong Kong Convention, developed to fill in the gap of the Basel Convention, has not yet come into force, individual member states of the Basel Convention have taken their own initiative to regulate ship recycling.

For instance, the European Union adopted that EU's Ship Recycling Regulation (the "**EU Regulation**"), which entered into force on 30 December 2013. This EU Regulation incorporates the requirements of the Hong Kong Convention into EU law, and includes additional safety and environmental requirements related to ship recycling. For example, the Inventory of Hazardous Materials required by the EU Regulation has more substances listed as prohibited in comparison to that of the Hong Kong Convention. The EU Regulation also includes the European List of approved ship recycling facilities, which is updated regularly.

Several countries are also starting to recognise the significance of responsible ship recycling, including Bangladesh, which became the

world's largest shipbreaking country in 2018. It set up a new ship recycling act, which implied that they would ratify the Hong Kong Convention by 2023. It is anticipated that this would cause a ripple effect and lead to other countries stepping forward to ratify the Hong Kong Convention as well.

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本期專題

若租船人的指令可能危及船隻安全，船東可否拒絕遵循？

簡介

在 *CM P-MAX III Limited v Petroleos Del Norte SA (MT Stena Primorsk)* [2022] EWHC 2147 (Comm) 一案中，英國高等法院商事法庭(「**法庭**」)裁定，若租船人的指令可能危及船隻的安全，船東拒絕執行有關指令是合法的。由於船東不認為其船隻能在停泊卸貨的同時保持「安全浮動」，因此船東可基於安全理由拒絕租船人的停泊要求。

申索

在本案中，索償人(「**船東**」)向被告人(「**租船人**」)出租一艘油輪 (「**該船隻**」) 作單次航行。船東向租船人追討 143,153.64 美元的滯期費。雙方的租船合同(「**租船合同**」)容許單一次 72 小時的裝卸時間，滯期費率為每日 22,500 美元(按比例計算)。租船人抗辯指，由於船東於 2019 年 3 月 31 日停泊後 12 分鐘內便決定離開卸貨碼頭，其後並拒絕按租船人要求於 2019 年 4 月 1 日 2100 時(下午 9 時) 返回泊位，屬違反租船合同，因此應暫停計算裝卸時間。

船東則認為，於 2019 年 3 月 31 日離開及於 2019 年 4 月 1 日停泊並開始卸貨的決定，均基於租船合同所允許的安全理由，因此船東沒有違約或過失。

租船合同

租船合同第 2 部分載有以下摘錄的條文：

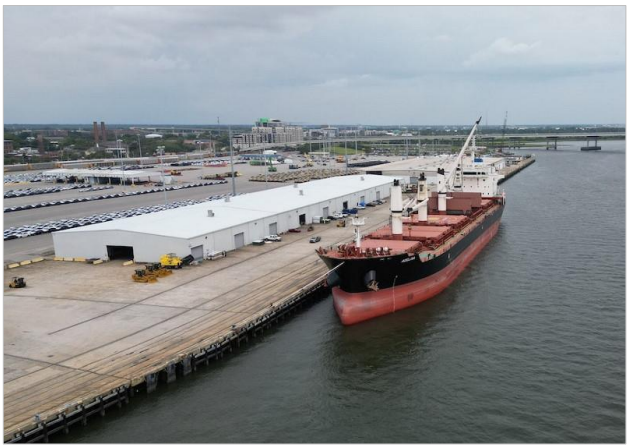
> 第 3(1) 條：「在本租船合同條文的規限下，船隻須**盡速**履行其服務及按指令.....安全地前往，並在**時刻安全浮泊**的情況下卸貨。」
>
> 第 3(2) 條：「船東須負責並向租船人彌償任何時間、費用、延誤或損失，包括但不限於..... 因未能完全遵守租船人的航程指示而導致裝卸

時間、滯期費的使用。..... **只要船長認為租船人的航程指示符合安全，船東便須遵照該等指示。**」

第 15 條：「在本條或本租船合同其他條款任何並無具體分配裝卸時間 / 滯期費後果並且超出船東或租船人合理控制範圍的延誤，須被計入裝卸時間或（若該船隻滯期）滯期時間。」

案情

該船隻在西班牙畢爾巴鄂市裝載原油，運往美國特拉華河保羅斯伯勒港卸貨。到達前，船長要求獲豁免船底水深（under keel clearance，UKC）政策，以便停泊及卸貨。2019 年 3 月 27 日，船長將有關船底水深的計算發送給該船隻的技術營運商 Northern Marine Management Limited（「**NMM**」），附以詳細的風險評估。在考慮上述計算後，NMM 於 2019 年 3 月 28 日確認將「於 2019 年 3 月 31 日.....單次豁免 NMM 的船底水深政策」，適用於往來碇泊處及往來泊位。



2019 年 3 月 31 日離開泊位的決定

該船隻於 2019 年 3 月 31 日到達後，碼頭通知船長首 7 至 9 個小時的卸貨速度需減慢至每小時 5,000 桶原油。船長認為該船隻需保持每小時 15,700 桶原油的卸貨速度，才能維持安全的船底水深，因此決定離開泊位並反回碇泊處。

2019 年 4 月 1 日拒絕停泊和卸貨的決定

2019 年 4 月 1 日，租船人發現 Crown Point 能以每小時 10,000 桶的速度卸貨，因此要求准許該船隻於下次潮漲時（即 2019 年 4 月 1 日 2100 時）卸貨。

船長聯絡 NMM 並提供詳細的船底水深計算。計算基礎是該船隻於 2100 時完全繫緊，沒有延誤，可在 3 小時內開始卸貨，以及「船隻或碼頭的延誤、停泊、接駁或技術故障不獲減免」。

然而，由於船底水深政策計算的是最深航行吃水深度，此深度會隨卸貨而減少，因此所需的船底水深會改變。於 2100 時，該船隻未能符合船底水深政策，因此須取得豁免，讓該船隻在違反政策的情況下停泊。NMM 拒絕給予豁免，理由是「安全及確保船底水深充足的空間很小」，若有任何延誤及延誤時間增加，船底水深便會「嚴重受影響，船底有觸礁的風險」。因此，NMM 的結論是「沒有充分的管控措施以緩減風險」。

法律原則

法庭認為，租船合同的條款同時強調安全操作該船隻的重要性以及船長所作之決定的重要性。法庭認為租船合同第 3(1) 條已為合同定調，規定該船隻裝載貨物後須「盡速」前往指定卸貨港，並在「時刻安全浮泊」的情況下卸貨。因此，法庭認為「盡速」前進的要求並非絕對的，而是受保持安全浮泊的要求所牽制。至於租船合同第 3(2) 條，法庭認為雖然它列明船東有責任遵守租船人的航程指示，但同樣並非絕對的責任。法庭強調，船長可以不理會其認為不符合安全的指示。

在參考案例後，法庭認為，租船人需證明船東（或由船東負責的人士）有若干「過失」，才可暫停計算滯期時間。但如果船東是按租船合同許可的方式行事，則不大可能構成過失。

至於船底水深政策，法庭認為它限制了船長決定該船隻前往何處的自由，若要違反船底水深規定，船長需與船東的代理人商討。在本案中，法庭注

意到船底水深政策是具約束力的，未經同意不得違反，需經謹慎的風險評估及船底水深計算，才可考慮豁免，這突顯了船底水深政策的重要性。法庭進一步指出，由於船底水深政策構成租船合同的組成部分，並且受租船合同第 1 部分管限，因此船底水深政策凌駕於租船合同第 2 部分的一般條款。

在審視案情及專家證據後，法庭裁定船長於 2019 年 4 月 1 日提出獲豁免的請求是務實的做法，而 NMM 拒絕給予豁免也是完全適當的，因此裁定於 2019 年 3 月 31 日離開泊位是適當的決定，並無令船東違反租船合同，亦不需暫停計算滯期時間。

至於船東拒絕在 2019 年 4 月 1 日停泊及開始卸貨，法庭裁定船東有權基於安全理由拒絕，船東、船長及 NMM 均沒有過失。因此，法庭批准船東的申索。

要點

船隻的安全必定是首要的考慮因素。法庭的裁決確認，只要船長的決定並非欠缺理據或不合理，法庭不會輕易凌駕船長為船隻安全作出的決定。因此，如果租船人的指令可能危及船隻的安全，船東拒絕執行有關指令是合法的。

聯邦海事委員會就滯期費及貨櫃延滯費建議新規定

於 2022 年 10 月 7 日，美國聯邦海事委員會（負責監管美國國際海上運輸系統的獨立聯邦機構）建議制定新的法規（「**擬議法規**」），以規管有船公共承運人（VOCC）、無船公共承運人（NVOCC）及碼頭營運商（MTO）收取滯期費及貨櫃延滯費的做法。

聯邦海事委員會是因應《2022 年海運改革法案》（已獲美國總統拜登於 2022 年 6 月 16 日簽署為法律）的規定，以及關於有船公共承運人及碼頭營運商的滯期費、貨櫃延滯費和按日收費條款及做法的調查結果（事實裁斷 28），而提出擬議法規。

在擬議法規下，有船公共承運人、無船公共承運人及碼頭營運商只可向與他們有合約關係的人士收取滯期費或貨櫃延滯費，並須清楚列明收費的性質、於費用停止產生後 30 日內發出發票、提供 30 日時間讓對方就費用提出爭議，並清楚說明如何就費用提出爭議。

聯邦海事委員會在擬議法規中進一步提議採取四項行動：

1. 採納《2022 年海運改革法案》（已編纂為美國法典 46 U.S.C. 41104(d)(2)）規定公共承運人在滯期費或貨櫃延滯費發票中必須包含的最低限度資訊的清單。
2. 在上述清單加入滯期費或貨櫃延滯費發票必須包含的額外資料。
3. 進一步定義違規做法，釐清可對甚麼人士收取滯期費或貨櫃延滯費。
4. 制定收費方在發出滯期費或貨櫃延滯費發票時必須跟隨的做法。

聯邦海事委員會就擬議「無理拒絕處理」法規徵詢公眾意見

美國聯邦海事委員會 (負責監管美國國際海上運輸系統的獨立聯邦機構) 就 2022 年 9 月 13 日刊發的擬議法規通知 (「擬議法規通知」) 徵詢公眾意見。當局有意實施《2022 年海運改革法案》的規定，界定何謂「無理拒絕處理或磋商」公共承運人提供的船上貨艙空間。

《2022 年海運改革法案》其中一項條文規定，公共承運人不得無理拒絕處理或商討船上貨艙空間事宜。擬議法規通知概述了證明違反這項規定所需符合的三項元素：

1. 答辯人是公共承運人；
2. 答辯人拒絕處理或磋商船上貨艙空間事宜；及
3. 上述拒絕是無理的。

在判斷是否無理拒絕處理時，聯邦海事委員會可考慮多項因素，例如公共承運人是否遵照紀錄在案的出口戰略、是否真誠磋商以及是否有言明的合法航運因素。

證明拒絕處理屬合理的舉證責任在於公共承運人而非付運人。若擬議法規通知落實，預期將同時適用於進口及出口貨運。

擬議法規通知提出的舉證責任轉移制度容許公共承運人就某項投訴證明為何拒絕船上貨艙空間並非不合理。由於每宗貨運個案的情況均獨一無二，聯邦海事委員會認同，要規管所有可能發生的情況是不可能的，因此，違規個案將按其個別情況審理。

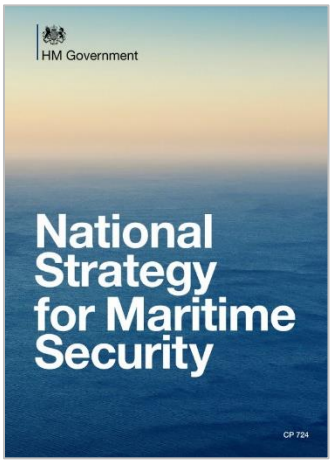
美國國會提出《2022 年潔淨航運法案》消除航運業的大量排放

美國國會於 2022 年 7 月 12 日提出新的《潔淨航運法案》(「該法案」)，以歐盟的「減碳 55」措施為藍本，規定所有與美國有業務往來的航運公司將污染排放量減至零。預計該法案將由美國國家環境保護局執行。根據該法案：

1. 將設立船用燃料的碳含量標準。該法案將逐步收緊船用燃料的碳含量標準，與攝氏 1.5 度減碳路線圖相符。上述標準要求船隻運作周期的二氧化碳等量排放達到以下減幅：相比 2024 年的排放量基線，於 2027 年 1 月 1 日前減少 20%，2030 年 1 月 1 日前減少 45%，2035 年 1 月 1 日前減少 80%，及 2040 年 1 月 1 日前減少 100%。
2. 至於港內船隻，目標訂為 2030 年前完全禁止污染物排放，所有在美國港口靠泊或碇泊的船隻由 2030 年 1 月 1 日起不得排放任何溫室氣體或空氣污染物。

提出該法案的美國眾議員魯文索指出，航運業每年排放接近 10 億公噸氣候污染物，假如不採取減排措施，至 2050 年航運業將造成全球 17-18% 的碳排放。該法案可能是有效的解決方案。

英國提出新的五年海洋安全戰略以應對最新的實體及網絡威脅



英國提出新的為期五年的海洋安全戰略 (「**該戰略**」)，就管理威脅及風險的方針制定指導原則，包括善用其海床製圖業界及對付非法捕魚和海上污染活動。

該戰略旨在提升科技、創新和網絡安全的能力，並將海洋安全重新定義為法律、法規和規範，以實現自由、公平和開放的海上領域。英國政府將任何非法、未經申報及不受管制的捕魚及海洋環境損害視為海洋安全問題。英國政府亦成立了英國海床製圖中心，務求讓領先全球的英國海床製圖業界合作收集更多及更全面的數據，藉此提升英國海洋安全知識。

海床製圖提供的基礎數據為海洋領域的幾乎所有範疇提供基礎，包括海上貿易、環境和資源管理、航運運作、國家安全及業界基建。英國的環境食品與鄉郊事務大臣、交通大臣、外交國協及發展事務大臣、內政大臣及國防大臣將集中於五項戰略目標：

1. 保護國土：為英國的邊境、港口和基建提供全球最有效的海洋安全框架。
2. 應對威脅：採取整全系統的方針，提供全球領先的能力和專業知識，以應對新出現的威脅。
3. 確保經濟繁榮：保障國際航運安全，貨物、資訊及能源的流通無礙，以支撐持續的全球發展和經濟繁榮。
4. 倡導價值：倡導建基於航行自由及國際秩序的全球海洋安全。
5. 支持海洋安全及韌性：應對安全威脅以及影響海洋環境潔淨、健康、安全、富饒及生物多樣性的違規行為。

積極的海洋安全戰略普遍被視為對確保貿易路線及能源供應安全至關重要，尤其對於島國。該戰略可促進世界各地業界及政府合作，有助締造更安全的海洋環境，並增強航運業界的信心。

Fimbank p.l.c. v KCH Shipping Co., Ltd

[2022] EWHC 2400 (Comm)

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簡介

Fimbank p.l.c.（「**索償人**」）是多份提單的持有人，它就承運人 KCH Shipping Co., Ltd（「**被告人**」）在堆貨場卸貨後錯誤交貨提出仲裁索償。本案是就仲裁庭頒下的局部最終裁決提出的上訴。

爭議問題

提單納入了租船合同的條款，因而受《海牙威士比規則》規限，包括須遵守第 III 條第 6 項規則，即任何訴訟須於交貨或本應交貨日期起計一年內提出，否則承運人無須就貨物承擔責任。

由於索償人表示因若干情況而誤會了承運人的身份，索償人於 2020 年 4 月 24 日，即交貨或本應交貨日期後超過一年，才向被告人送達仲裁通知書，因此訴訟時效已過。在此情況下，仲裁庭需要裁斷：

1. 《海牙威士比規則》第 III 條第 6 項規則的時效條款是否適用於從船隻卸貨後錯誤交貨的申索（「**問題一**」)。
2. 金康合同（即載有涉案提單的文件）第 2(c) 條是否令《海牙威士比規則》不適用於卸貨後的期間（「**問題二**」)。

仲裁庭的裁斷

仲裁庭裁斷：(i) 《海牙威士比規則》的時效原則上適用於關於卸貨後錯誤交貨的申索；及 (ii) 金康合同第 2(c) 條並沒有令《海牙威士比規則》的時效不適用於卸貨後的期間。因此，索償人的申索已喪失時效。索償人就仲裁庭對問題一及問題二作出的裁斷向王座法院提出上訴。

時效條款的目的

法院首先考慮第 III 條第 6 項規則的宗旨及目的，並認為該規則支持被告人的主張，即時效條款適用於就卸貨後錯誤交貨提出的申索。在 *Compania Portorafti Commerciale S.A. v Ultramar Panama Inc. (The Captain Cregos)* [1990] 1 Lloyd's Rep.310 一案中，英國上訴法院 Bingham 法官在其權威性判詞指出，該時效條款的目的「正如任何時效條款一樣，旨在令事情能夠了結，而在本案中，就是令船東能夠了結事情」。假如條款不適用於就卸貨後錯誤交貨提出的申索，一旦需要就卸貨後的錯誤交貨提出申索，在時效過後船東仍無法了結事情。這種解釋有違時效條款的目的。

索償人的主張的問題

法院接着指出，假如索償人的主張正確（即時效條款不適用於卸貨後的錯誤交貨）將會發生的若干反常問題。首先，大部分情況下貨物交付都是在船舷卸貨後若干時間內發生的，而且可能以承運人控制範圍以外的各種方式進行。完成卸貨的確切時間難以確定，假如時效期限目的的分野是取決於卸貨的時間便會很奇怪，而且也沒有明顯合乎邏輯或妥善的商業理由為何應該如此，因為何時及如何交出提單及安排在岸上收貨是由收貨人控制的。

法院亦引述仲裁庭指出索償人的主張的其他問題：如果船隻到埗時索償人不向承運人或其代理出示提單卸貨，那麼承運人只好在無定義（及可能無彌償）的期間內拒絕卸貨，或卸貨予代理人保管並（就索償人的情況而言）失去第 III 條第 6 項規則的保障。仲裁庭認為「這在商業上並不明智或合理」。

潛在的默示條款

即使上述分析有誤，法院仍然會維持仲裁庭的裁決，即透過默示條款達致相同結果：見英國上訴法院 ***The MSC Amsterdam*** [2007] 2 Lloyd's Rep 622 一案。在該案中，法院裁定雙方可以就實際承運以外的期間自由議定《海牙規則》或《海牙威士比規則》以外的條款。如果雙方沒有就卸貨後的時間作出約定，可視為雙方已默示同意《海牙規則》所載的責任及豁免在實際卸貨後仍然有效，直至貨物轉移至收貨人保管。

基於上述理由，就問題一而言，法院裁斷時效條款適用於卸貨後的錯誤交貨。問題二實際上源自上述 ***The MSC Amsterdam*** 一案的論證。索償人認為在本案中時效條款不適用於提單第 2(c) 條，法院根據本案的事實及情況駁回索償人的主張。

總括而言，《海牙威士比規則》第 III 條第 6 項規則下的時效條款一般適用於卸貨後錯誤交貨的申索，但雙方可以就實際承運以外的期間自由議定《海牙威士比規則》以外的條款。

MUR Shipping BV v RTI Ltd

[2022] EWCA Civ 1406

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簡介

MUR Shipping BV (「**船東**」) 及 RTI Ltd (「**租船人**」) 於 2016 年 6 月 9 日訂立了一份包運合同 (「該合同」)。租船人因其一間聯屬公司受到美國制裁而難以用美元支付運費，下級法院裁定船東有權因此倚賴該合同所載的不可抗力條款。租船人就下級法院裁決提出的上訴。

不可抗力條款及事件

該合同將「不可抗力事件」定義為符合第 36.3(a)至(d) 條列載的所有準則的事件或狀況。第 36.3(d) 條的準則是受影響一方以合理努力仍無法克服的事件。該合同亦規定須以美元付款。

在船東與租船人訂立該合同後，租船人的主要擁有人 United Company Rusal Plc (「**Rusal**」) 被美國財政部外國資產控制辦公室實施制裁。但租船人本身並無被列入制裁名單。

訴訟歷程

在仲裁中，仲裁員認為雖然租船人以美元支付運費並不違法，但付款很可能受到延誤，因為任何銀行在處理由受制裁實體持有大多數股份的附屬公司所作出的付款時，都會非常警剔。然而，仲裁員接納租船人所指，租船人可作出合理的努力，以歐元付款並承擔將歐元轉換為美元的費用，以克服此困難。因此，因 Rusal 被制裁而產生的困難並不符合第 36.3(d) 條的準則，故船東無權倚賴不可抗力條款。

船東向商事法庭上訴得直，主要原因是合約規定以美元付款，而「訂約方無須作出合理的努力去接受非合約訂明的履約方式，以規避不可抗力條款或類似條款的效力。」

其後租船人就船東（作為受影響一方）是否能透過合理的努力克服不可抗力事件或狀況，向英國上訴法院提出上訴。此問題源於租船人須以美元支付運費的合約責任。

著眼於不利後果

上訴法院主要關注的是，接受租船人以歐元支付運費及承擔歐元轉換為美元的費用的建議，是否能克服因 Rusal 受制裁而導致的狀況。因此問題是，為了克服有關狀況，嚴格按照合約條款履行合約是否屬必要？

法院認為，如果完全避免了某個問題或狀況的不利後果，便可說是克服了該問題或狀況。就此而言，法院注意到仲裁員裁斷租船人提出以歐元付款的建議對船東「不會造成不利」，可在「不損害」船東的情況下接納此建議。因此，法院維持仲裁員的結論，即不可抗力事件是能夠「透過受影響一方的合理努力克服」，並裁定船東在本案中無權倚賴不可抗力條款。

Eastern Pacific Chartering Inc v Pola Maritime Ltd

[2022] EWHC 2095 (Comm)

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<u>簡介</u>

Eastern Pacific Chartering Inc（「**索償人**」）於 2019 年 9 月 18 日與 Pola Maritime Ltd（「被告人」）訂立一份航次期租合同（「**租船合同**」），將「DIVINEGATE」號散裝貨船（「**該船隻**」）出租予被告人。本案是因租船合同而起的申索及反申索的審訊。

索償人向被告人追討未付的船租、燃油費及其他開支。雙方對於索償人的申索並無爭議，爭議在於被告人可否以其提出的兩項反申索回答索償人的申索——被告人要求從船租作出扣減，並就索償人違反該船隻的性能保證追討損害賠償。被告人亦因索償人不當扣押另一船隻「POLA DEVORA」號，而以侵權為由提出另一項反申索追討損害賠償。

<u>違反性能保證</u>

就第一項反申索（違反性能保證）而言，租船合同規定，該船隻在良好天氣狀況下應能夠以最多 21.525 公噸的耗油量達到最高 12.5 海浬的速度（「**環保速度**」）（「**性能保證**」）。被告人認為，船長沒有遵守指示以達到環保速度，違反性能保證，故被告人有權就因此損失的時間追討損害賠償或從索償人的申索中扣減相同金額。

雙方同意，證明這類違約事項的最簡單及最傳統的方法，是證明該船隻在良好天氣期間沒有達到保證的速度及性能，然後按比例計算於整個涉案期間的性能欠佳程度（「**良好天氣方法**」）。

基於上述共識，索償人進一步指出，在整個航程中均沒有良好天氣期間可用作評估該船隻能否達到保證性能的可靠基礎，因此無法證明該船隻性能欠佳或違約。性能保證是雙方議定的基準，而在沒有良好天氣的情況下，疑點利益歸於船東，因為這是務實的做法，而且反映數十年來的慣例。無論如何，在整個航程中最接近良好天氣的期間，該船隻達到了良好天氣下的保證速度。

法院不接納索償人的上述觀點，並裁定良好天氣方法並非證明違反性能保證的唯一方法。法院不排除以其他方法證明該船隻性能欠佳，但必須證明替代方法可靠及與明示的性能保證相符，尤其是良好天氣方法在重要的專業、資源及創新領域已沿用多年。在此問題上，法院接納被告人的觀點，並裁定該船隻性能欠佳。

<u>不當扣押</u>

至於就不當扣押提出的反申索，法院為索償人扣押「POLA DEVORA」號確實不合法，因為被告人只

是在期租合同下操作「POLA DEVORA」號而非實益擁有人。

然而，索償人並非不當扣押。不當扣押船隻與普通法下的惡意檢控類似，測試準則是有關扣押程序是否惡意地或嚴重疏忽至可推定為惡意地展開或持續。測試的第一部分是判斷扣押方是真誠還是惡意地相信是實益擁有人；第二部分是較為客觀地判斷是否應推定惡意。

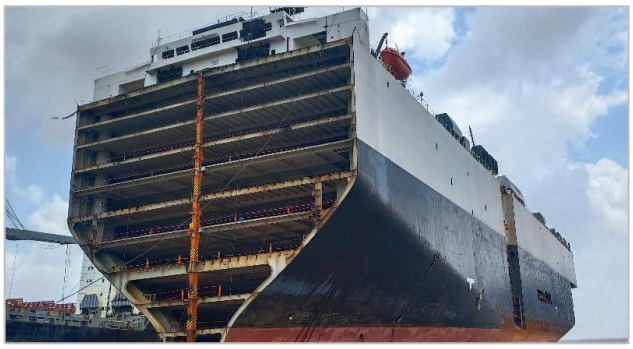
在本案中，由於索償人是因真正及可理解的錯誤而扣押船隻，不涉及惡意或嚴重疏忽，因此法院駁回被告人以不當扣押為由而追討損害賠償的反申索。

總括而言，法院批准索償人的申索，亦批准被告人就該船隻性能欠佳提出的反申索，但僅可從索償人的申索扣除 16 小時的時間損失。被告人就不當扣押追討損害賠償的反申索則被駁回。

減碳與船隻回收：《香港公約》

簡介

船隻回收 / 拆船是指從退役船隻拆出鋼鐵、機械及其他有價值物品重用或回收的過程。然而，拆船行業現時的操作方式會造成重大的健康隱患，亦被視為世上最危險的工種。在一些發展中國家，例如巴基斯坦、孟加拉及印度等全球最大的拆船國，工人面對著各種風險，包括氣體爆炸、死亡、嚴重受傷的威脅以及長遠的健康問題。以上是將船隻沖上海灘在潮汐區拆船這種稱為「沖灘」（beaching）的做法所造成的。這些工人往往欠缺防護衣物、適當工具及妥善培訓。《2009 年香港國際安全與無害環境拆船公約》(**《香港公約》**)旨在為業界帶來正面改變，改善全球拆船行業的操作環境。



照片來源：Wikimedia Commons

《香港公約》是甚麼？

《香港公約》是於 2009 年在香港舉行的外交會議上通過的多邊公約，會上有 63 個國家的代表出席，它就船隻回收 / 拆船制定了標準及確定執法責任。《香港公約》是由國際海事組織成員國及非政府組織在國際勞工組織及《控制危險廢物越境轉移及其處置的巴塞爾公約》(**《巴塞爾公約》**)締約國的協助下制定的。

《香港公約》的目的是甚麼？

《香港公約》旨在確保船隻被回收時不會對人類健康、安全或環境構成不必要的風險，提高拆船操作的透明度及應對健康隱患，例如報廢出售的船隻所含的有害物質（即重金屬及碳氫化合物）可能對工作環境及拆船廠周邊環境造成的威脅。

由於發展中國家往往採用危險和具爭議性的方法拆船，《香港公約》鼓勵船東選擇在較發達的國家的場所拆船，因為這些國家的場所較為著重環境和道德問題，並有全面的法例保障工人健康及保護環境。不過，加入了《香港公約》的發展中國家也就拆船操作及其影響採取了改善措施。

《香港公約》的主要特點是甚麼？

《香港公約》的部分規定如下：

1. 被回收的船隻將需提供一份有害物質清單，識別船上所有屬於《香港公約》附錄 1 有害物質清單範圍內的物質。船東在船隻使用前、在船隻使用期間及在回收船隻前均須填寫問卷調查，申報其船隻是否含有上述有害物質。
2. 拆船廠需提供拆船方案，詳細說明每艘船隻的回收方法，而採用的方法須符合《香港公約》的指引及規定。
3. 《香港公約》適用於總噸位超過 500 公噸，並有權懸掛締約國船旗或在締約國授權下運作的船隻，或運往在締約國管轄範圍內營運的拆船廠的船隻。

《香港公約》目前的狀況如何？

《香港公約》於 2009 年 9 月 1 日至 2010 年 8 月 31 日期間開放簽署，其後供各國簽訂加入。《香港公約》將於「佔全球商船總噸位 40%，合計最高年度拆船量不少於其合計總噸位百分之三

的 15 個國家」簽訂後 24 個月生效。然而，上述條件尚未達成。

截至 2022 年，19 個國家已簽訂《香港公約》，但合計商船船隊只佔全球商船總噸位約 29%，未達到 40%的門檻。雖然《香港公約》獲通過至今已 13 年，但仍未生效。

世界各地有沒有其他鼓勵船隻回收的措施？

儘管於 1989 年通過的《巴塞爾公約》就有害廢物在國際間的轉移作出規管，但被認為不適用於拆船行業及無法執行。由於為填補《巴塞爾公約》的空白而制定的《香港公約》尚未生效，部分《巴塞爾公約》的締約國已自行就拆船行業作出規管。

例如，歐盟採納於 2013 年 12 月 30 日生效的《歐盟拆船規例》(**《歐盟規例》**)，將《香港公約》的規定納入歐盟法律，並加入與拆船有關的額外安全及環境規定。與《香港公約》相比，《歐盟規例》的有害物質清單範圍更廣泛，並載有定期更新的歐洲核准拆船廠名單。

多個國家亦開始認同負責任地拆船的重要性，包括於 2018 年成為全球最大拆船國的孟加拉，其政府訂立了新的拆船法，這意味著該國將於 2023 年或之前簽訂《香港公約》。預期這將產生漣漪效應，驅使更多國家簽訂《香港公約》。

如有查詢，歡迎與我們聯絡：

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