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Whether the Collision Liability Clause in the H&M Insurance Cover the Liability Arising from Contact between Goods Carried by the Insured Vessel with Another Vessel?

During the navigation of a specialized vessel (hereinafter referred to as "the Insured Vessel") carrying a heavy-lift cargo (hereinafter referred to as "the Cargo"), the Cargo contacted with another vessel (hereinafter referred to as "the Contacted Vessel") causing damage to her (hereinafter referred to as "the Contact Accident"). There wasn't any physical contact between the two vessels. Whether the owner of the Insured Vessel (hereinafter referred to as "the Owner") has the right to claim the indemnity from the H&M insurer for the liability borne by him to the Contacted Vessel in accordance with the Collision Liability Clause? This article will focus on addressing this issue.

Before analyzing the Collision Liability Clause, it's necessary to analyze the meaning of collision between vessels in maritime law first.

1. The meaning of ship collision at maritime law

1) The meaning of collision under Chinese Law

According to Maritime Code of the People's Republic of China (hereinafter referred to as "Chinese Maritime Code"), physical contact is one of the prerequisites for ship collision;[1] but where a vessel has caused damage to another vessel and

[1] *Chinese Maritime Code*, Article 165 Paragraph 1: Collision of vessels means an accident arising

persons, goods or other property on board that vessel, either by the execution or non-execution of a manoeuvre or by the non-observance of navigation regulations, even if no collision has actually occurred, the provisions of the Chapter of Collision in Chinese Maritime Code shall apply.[2] Collision with physical contact is usually called "direct collision" while collision without physical contact is usually called "indirect collision". As prescribed by Article 170 of Chinese Maritime Code, the provisions of the Chapter of Collision equally apply to indirect collision, which mainly refers to the provisions on liability for collision, including the apportionment of liability, the liable party, and the limitation of liability, etc.

Provisions on the Trial of Compensation for Property Damage in the Ship Collision and Allision (Fafa [1995] No.17, hereinafter referred to as "Provisions on Compensation for Ship Collision and Allision") issued by The Supreme People's Court of the People's Republic of China (hereinafter referred to as the "Supreme Court") in 1995 defines ship collision as "in the sea or navigable waters connected to the sea, two or more ships have or not have physical contact, causing property damage",[3] which doesn't distinguish indirect collision from direct collision, implying that ship collision should include indirect collision.

The Provisions on Several Issues in the Trial of Ship Collision Disputes (Fashi [2008] No.7, hereinafter referred to as "The Provisions on Ship Collision Disputes") cited the provisions of Chinese Maritime Code to define ship collision, and provides that indirect collision "equally subject to The Provisions on Ship Collision Disputes".[4]

According to aforementioned Chinese laws and provisions, we believe that ship collision referred to under

from the contact of vessels at sea or in other navigable waters adjacent thereto. Vessels referred to in the preceding paragraph shall include those non- military or public service ships or craft that collide with the vessels mentioned in Article 3 of this Code.

[2] *Chinese Maritime Code*, Article 170.

[3] *Provisions on Compensation on Ship Collisions and Touches* Article 16 Paragraph 3.

[4] *The Provisions on Ship Collision Disputes*, Article 1: Ship collision referred in the Provisions means the ship collision stipulated in Article 165 of *Chinese Maritime Code*, collisions between river boats are excluded. The damage accidents referred in Article 170 of *Chinese Maritime Code* apply to the Provisions.

Chinese law is limited to the collision with physical contact, i.e. direct collision, although some provisions in these laws and provisions equally apply to indirect collision.

2) The definition of ship collision in international conventions

Article 1 of International Convention for the Unification of Certain Rules of Law with respect to Collision between Vessels, 1910 (hereinafter referred to as Convention on Ship Collision) stipulated that "Where a collision occurs between sea-going vessels or between sea-going vessels and vessels of inland navigation, the compensation due for damage caused to the vessels, or to any things or persons on board thereof , shall be settled in accordance with the following provisions, in whatever waters the collision takes place". And Article 13 stipulated that "This Convention extends to the making good of damages which a vessel has caused to another vessel, or to goods or persons on board either vessel, either by the execution or non-execution of a manoeuvre or by the non-observance of the regulations, even if no collision had actually taken place". It can be concluded from these provisions that ship collision referred in Convention on Ship Collision doesn't include indirect collision, but the application of this convention extends to indirect collision. China joined in Convention on Ship Collision on March 5 1994, and the definition of ship collision in Chinese laws and regulations is basically consistent with that in Convention on Ship Collision.

The definition of ship collision in Lisbon Rules 1987 drafted by Committee Maritime International is "any accident involving two or more vessels which causes loss or damage even if no actual contact has taken place". The ship collision is not limited to the physical contact between vessels, and indirect collision also belongs to vessel collision.

3) The definition of ship collision under English law

The United Kingdom has acceded to Convention on Ship Collision, so the definition of ship collision in the

convention applies in the United Kingdom.

2. The meaning of ship collision in collision liability clause in the H&M Insurance

1) The meaning of ship collision in H&M Insurance clauses of the People's Insurance Company (Group) of China Limited

H&M Insurance Clauses of the People's Insurance Company (Group) of China Limited (2009 Version) (hereinafter referred to as H&M Insurance Clauses of PICC) stipulate that "this Insurance covers any legal compensation liability of the insured due to any collision of the insured vessel with other vessels and any allision of the insured vessel with any fixed or floating object or other objects". This insurance clause neither defines ship collision, nor clarifies whether indirect collision is covered. If construed according to Chinese laws and provisions on ship collision, the "collision" means direct collision and indirect collision is excluded. However, both Chinese Maritime Code and Convention on Collision between Vessels stipulate that the liability caused by indirect collision applies to the same provisions as that caused by direct collision. Then, whether the collision liability in insurance clause extends to indirect collision liability? Judgements of Chinese courts and arbitral awards have different conclusions. Even if the conclusion is the same, the reasonings in the judgements and awards are different. In the case of the *Niobe*, English court held that the literal meaning of collision contained in the insurance clause was physical contact collision. Though the insured tow vessel didn't contact with another vessel, its impact through the tug resulted in the collision of its tug with another vessel. In this circumstance, the insurer of the tow should assume insurance liability to the assured tow. The English court also held that the tug and the insured tow should be regarded as one ship. From this perspective, collision of the tug with another vessel should be regarded as collision of the insured tow with another vessel as well. We will

analyse the case of the *Niobe* and some other Chinese relevant cases in detail hereinafter.

Coastal and Inland Vessel H&M Insurance Clause of the People's Insurance Company (Group) of China Limited (2009 Version) (hereinafter referred to as Coastal and Inland Vessel H&M Insurance Clause of PICC) stipulates that "the insurer covers the insured's legal liabilities to any direct lost and expense due to the insured vessel's collision with other vessels or the vessel's allision with any wharf, port facility or navigation buoy including the loss of cargo carried on the collided vessel". As same as H&M Insurance Clauses of PICC, Coastal and Inland Vessel H&M Insurance Clause of PICC neither defines the ship collision nor clarifies whether indirect collision is covered, but wave damage are expressly excluded from the cover of the insurance clause. On the one hand, wave damage is only one form of indirect collision, even if the insurer's liability for wave damage is excluded in the insurance clause, there may still be disputes between the parties to the insurance contract as to whether it covers indirect collisions other than wave damage; on the other hand, Chinese Maritime Code and provisions issued by the Supreme Court only apply to collisions between a sea vessel and any vessel or vessels other than used for military or government service,[5] so if the insured vessel is an inland vessel, the definition of collision in the Coastal and Inland Vessel H&M Insurance Clause can't be construed according to Chinese Maritime Code and the provisions issued by Supreme Court.

2) The definition of ship collision in insurance clauses of the Insurance Institute of London

Institute Time Clauses-Hulls, both its 1983 version and 1995 version (hereinafter referred to as "*ITC Clauses"*) stipulates that "The Underwriters agree to indemnify the Assured for three-fourths of any sum

[5] *Chinese Maritime Code*, Article 165 Paragraph 2: Ships referred to in the preceding paragraph shall include those non-military or public service ships or craft that collide with the ships mentioned in Article 3 of this Code.

or sums paid by the Assured to any other person or persons by reason of the Assured becoming legally liable by way of damages for……where such payment by the Assured is in consequence of the Vessel hereby insured coming into collision with any other vessel". In English cases, judges hold that the literal meaning of "coming into collision" is a collision with physical contact, i.e. direct contact. The contact can be with either hull or accessories of another vessel or other vessels.[6] But English cases illustrate that even if there isn't any physical contact between the insured vessel and another, the insurer shall assume insurance liability when the insured vessel causes damage to another in some circumstances.[7]

3. Analysis of relevant cases

In the case of the *Niobe* judged by House of Lords (Supreme Court of the United Kingdom), the majority of the judges held that the collision between the tug and another vessel should be covered by the H&M insurance of the insured tow. The first reason is that the "collision" in the collision liability clause includes collision not only with physical contact but also collision without physical contact. The second reason is that the tug and the tow should be regarded as one ship. Chinese courts and arbitral tribunals have inconsistent understandings of collision in the collision liability clause of H&M insurance. Some holds that indirect collision should be included, but some others hold opposite opinion.

1) The case of *the Niobe*

In the case of the *Niobe*, the H&M insurance clause in dispute stipulates that "If the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof, become liable to pay to the persons interested in such other ship or vessel, or in the freight thereof, or in the goods or effects on board thereof, any sum or sums of money, not-exceeding the value of the ship hereby assured, we will severally pay the assured such proportion". The tug towing the Niobe

[6] *Law of Marine Insurance and Average,* Arnould, P23-27 the case of the *Niobe*

[7] *Law of Marine Insurance and Average*, Arnould P23-27, the case of the *Niobe*

came into collision with another vessel, the Niobe assumed most of the liability to the collided vessel because of its failure to keep a proper look-out. The owner of the Niobe and the insurer disputed over the issue whether the insurer should assume the insurance liability according to the collision liability clause.

The majority of the judges in the House of Lords held that the literal meaning of "collision" in the collision liability clause is a collision with physical contact. Though there wasn't any actual contact between the Niobe and the collided vessel, it should be considered as a collision between them because the impact of the Niobe caused the collision between the tug and the collided vessel and the consequential damage to the collided vessel. In other words, the "collision" in the collision liability clause should not be limited to a collision between the hull of the insured vessel and another vessel; the accessories and devices of the insured vessel, even if not covered by the insurance clause, will come into collision with another vessel which should be covered by the insurance clause, if the collision is caused by the impact of the insured vessel. Furthermore, if the impact of the insured vessel causes a vessel come into collision or allision with another vessel or other objects, the collision or allision should also be covered by the insurance clause. All the above circumstances could be considered as indirect contact. Some other judges of House of Lords held that the tug and the tow should be considered as one ship in the consideration of then existing English maritime law, so the collision between the tug towing the Niobe and the collided vessel should be considered as a collision between the Niobe and the collided vessel. The dissenting judge however believed that the insurance clause was very clear that the meaning of "collision" as stipulated in the insurance clause was a collision with physical contact which should not be extended in interpretation.

2) The case of *MV Deyue*

In this case, both the first and the second instance court, Guangzhou

Maritime Court and High People's Court of Guangdong Province, judged that indirect collision was excluded from the cover of the insurance clause in dispute. The reason was that the insurance clause clearly stipulated that it covered the collision between the insured vessel and another. The collision between the vessel towed by the insured vessel and another couldn't be considered as one between the insured vessel and another. In this case, the barge towed by MV Deyue came into collision with another vessel, after compensation to the owner of the collided vessel, the owner of MV Deyue claimed the insurer to assume its insurance liability.

The first instance court of this case, Guangzhou Maritime Court, held that the owner of MV Deyue should take responsibility for the indirect collision between the barge and the collided vessel, but indirect collision liability wasn't covered by the insurance clause and therefore it shouldn't be borne by the insurer.

The owner of MV Deyue appealed against the judgement of the first instance made by Guangzhou Maritime Court. The owner of MV Deyue claimed that MV Deyue was the centrum of the tow in dispute, and it controlled and commanded all the actions of both itself and the barge. The barge was just like a limb of MV Deyue following all her instructions and was the extension of her cargo hold. MV Deyue and the barge were connected by towline to be an integrated object and the insured vessel should be deemed as the whole integrated object when it came into collision with another vessel. The collision of the integrated object and another vessel should be considered as a direct collision between MV Deyue and the collided vessel, even if there was not any physical contact between MV Deyue and the collided vessel.

The second instance court, affirming the judgement of the first instance court but not addressing the issue that either a direct collision or an indirect collision existed between MV Deyue and the collided vessel, held that:

a) According to the interpretation of the insurance clause at question, the collision liability covered should be limited to direct collisions between the insured vessel and another vessel. And the insurance clause provides that the scope of the vessel referred to in the contract was limited to "the hull, lifeboats, machinery, equipment, apparatus, rigging, fuel and materials".

b) During the tow, MV Deyue and the barge were separate vessels. The connection between them was not enough to cause the barge to be considered as a part of MV Deyue. MV Deyue was in the position of controlling and instructing and the barge was controlled and instructed. Their positions were decided by their power and other equipment and the nature of tow, which had no connection with the insurance contract. So, it couldn't be concluded that the collision between the barge and another vessel should be considered as one between MV Deyue and that collided vessel.

c) If the liability caused by collision between the barge and another vessel is expected to be covered by the insurance contract, the insurer and the assured can specifically provide accordingly in the insurance contract. But it's clear that the insurance contract in dispute didn't include such a provision.

3) The case of *MV Zhenxing*

In this case, the arbitral tribunal of China Maritime Arbitration Commission held that according to the provisions of the insurance clause in dispute, "collision" means a collision with physical contact, the parties to the insurance contract didn't show any expression of intent to cover indirect collision liability. Besides, in the context of Insurance Clause PICC 1986 Version, there wasn't any provision about indirect collision in Chinese laws and regulations. In this case, the owner of MV Zhenxing took the hull insurance from PICC in 1992 and the insurance clause used was all risk insurance on the terms of the Hull & Machinery Insurance Clause issued

by PICC on January 1, 1986. In November 1993, because of improper manoeuvre of MV Zhenxing, the Jimena thereby came into collision with several other vessels. Shanghai Maritime Court characterized the cause of action as case for damage and compensation caused by indirect collision, and judged that the owner of MV Zhenxing should be blamed for 30 percent of the collision liability and compensate the loss accordingly. The owner claimed that the insurer should assume the insurance liability for MV Zhenxing's indirect collision liability according to the insurance contract in the arbitration.

The arbitral tribunal, dismissing the claim of the owner of MV Zhenxing, held that:

1. Unless otherwise agreed, the meaning of "collision" in the context of compensation for damage on tort due to collision should be consistent with that in collision liability in hull & machinery insurance clause. The issue as to whether indirect collision is included in the collision liability clause should be judged according to the relevant laws and regulations when the insurance clause was issued and the terms of the insurance contract.

2. In terms of the relevant laws and regulations, Hull & Machinery Insurance Clause of PICC 1986 Version was issued on January 1 1986, though there were many academic discussions on indirect collision at that time, none of Chinese laws and regulations concern the issue as to whether indirect collision should be included in the scope of collision.[8]

3. In terms of the terms of the insurance contract, the collision liability clause didn't demonstrate whether indirect collision was included according to its literal meaning. During the investigation during the arbitration proceedings, both parties couldn't prove whether they expected to cover indirect collision liability when they came into the insurance

[8] *Chinese Maritime Code* came into effect on July 1 1993.

contract in 1992. In fact, both parties didn't think of this issue at that time. The English version of Hull & Machinery Insurance Clause of PICC 1986 Version demonstrates that this clause cover "the insured vessel coming into collision or contact collision or contact with any other vessel…". This provision inflected the intention of both parties is to cover direct collision with physical contact only.

4. According to the common understanding and practice of the international insurance industry at the material time, the definition of collision in hull insurance clause was narrow and didn't include collisions without physical contact.

4) The case of *MV Fushan*

In this case, both Qingdao Maritime Court of the first instance court and High People's Court of Shandong Province of the second instance court supported the request of the owner of MV Fushan for indemnity from the insurer. The courts held that: first, in the circumstance that the insurance contract didn't stipulate the definition of collision, "collision" should be constructed that indirect collision was included according to the contra proferentem principle to insurers under Insurance Law; second , according to Provisions on Compensation on Ship Collisions and Allisions, indirect collision should be included in the scope of collision. In this case, MV Fushan suddenly turned in its voyage, another vessel ran aground due to avoiding the Fushan. After compensation to the owner of the damaged vessel, the owner of MV Fushan claimed against the insurer to assume its insurance liability.

The first instance court held that:

a) Collisions with physical contact (direct collision) and collisions without physical contact (indirect collision) are treated the same under Chinese Maritime Code. The basis of liability, elements of liability, determination and calculation of the scope of damages applicable to both of

them are all same. It can be therefore concluded that indirect collision has already been included in the scope of collision under Chinese laws and regulations.

b) The insurance policy in dispute stipulates that damages due to collision is covered, but collision is not defined in this clause while indirect collision isn't listed in the exclusion clause of the insurance contract, arising from which the dispute between the insurer and the insured. According to PRC Insurance Law, when there is a dispute on the construction of the insurance clause, the unfavorable one to the insurer should be adopted. So, the "collision" in the insurance clause in dispute should include the circumstance stipulated by Article 170 of Chinese Maritime Code, i.e. the indirect collision.

The second instance court, affirming the judgement of the first instance court, held that:

a) According to the relevant provisions of Chinese Maritime Code, Provisions on Ship Collision Disputes, and Convention on Ship Collision, it can be concluded that the scope of collision in the insurance clause shall include indirect collision.

b) Indirect collision wasn't listed in the exclusion clause in the insurance contract. Article 30 of Insurance Law stipulates that "Where there are two or more interpretations of the contract clause, the People's Court or arbitration institute shall adopt the interpretation which is in the interest of the insured party and the beneficiary". And Article 17 of Insurance Law stipulates that "An insurer shall expressly illustrate exclusion of liability clauses in an insurance contract in the insurance application form, insurance policy document or any other insurance certificate to the attention of the policyholder, and make an explicit explanation in writing or verbally to the policyholder in respect of the

contents of such clauses; where there is no highlighting or explicit explanation, such clauses shall be invalid". So, the insurer shall assume its insurance liability for losses caused by indirect collision of MV Fushan.

4. The nature of the Cargo's contact with another vessel and the liability of the insurer

The Cargo onboard contacted with another vessel causing the damage to the latter. If contact accident was caused due to improper operation or driving of the carrying vessel, after the compensation of the carrying vessel to another vessel, whether the insurer of the carrying vessel has the right to recover its liability from the insurer? According to the above analysis of the meaning of the collision liability clause in the insurance contract, the definition of ship collision under maritime law and Chinese and English relevant cases, we believe that the issue can be analyzed from the following perspectives:

1) The Cargo is not part of the Vessel, so the insurer is not obliged to assume any insurance liability.

Where the insurance clause does not define the scope of the Vessel and also not stipulates whether the liability due to the Cargo's contact with another vessel is covered or not, from the literal meaning of the clause, given that the Cargo is not in the scope of the Vessel and the Cargo is also not a kind of accessory of the Vessel,[9] the liability of the Vessel due to the Contact by the Cargo with another vessel shall not be covered by the insurer.

2) The Cargo can be considered as a part of the Insured Vessel, so the Cargo's Contact with another vessel can be considered as a direct collision between two Vessels and therefore the liability of which

[9] *Chinese Maritime Code*, Article 3: "Ship" as referred to in this Code means sea-going ships and other mobile units, but does not include ships or craft to be used for military or public service purposes, nor small ships of less than 20 tons gross tonnage. The term 'ship' as referred to in the preceding paragraph shall also include ship's accessories. "Ship's accessories generally include machinery, anchors, anchor chains, compasses, lifeboats, windlasses, cargo lifts, etc.

shall be assumed by the insurer.

In the case of the *Niobe*, the majority of the judges held that the tug and the tow in question should be considered as "one ship", and listed some examples of similar cases where the tug and the tow in dispute were considered as one ship. They also held that where a vessel in tow has control over, and is answerable for, the navigation of the tug, the two vessels—each physically attached to the other for a common operation, that of the voyage of the vessel in tow, for which the tug supplies the motive power—have been said to be for many purposes properly regarded as one vessel. Though the tug and the tow could be regarded as one vessel, the majority of the judges held the direct collision between either the tug or the tow with another third vessel should be regard as the indirect collision between the other vessel with the third vessel.

The relationship between the Cargo and the carrying Vessel is closer than that between the tug and the tow. The Cargo was loaded on the Vessel's cargo deck closely attached with the Vessel. During the whole voyage, the Cargo was fully controlled by the Vessel or the crew of the Vessel. So, it can be said not only that the Cargo and the Vessel were combined into one object, but also that the Cargo had become a part of the Vessel. The Cargo's contact with another vessel can be considered as the contact between the two vessels. For this reason, the insurer should assume its insurance liability. Furthermore, from the perspective of tort liability, the owner of the Cargo totally lost control of the Cargo during the voyage, all the liabilities of the accidents in relation to the Cargo due to the improper operation of the Vessel or its non-observance of the navigation regulations shall be undertaken by the Vessel. This analysis can arrive the conclusion that there was a collision between the carrying Vessel and another Vessel.

3) **The Cargo is not part of the Insured Vessel, but the Cargo's contact with another vessel constitutes an indirect**

collision between the two vessels. The collision liability clause can be extended to indirect collision, so the insurance indemnity liability for the indirect collision shall be assumed by the insurer.

According to Article 170 of Chinese Maritime Code and Article 13 of Convention on Ship Collision, an indirect collision has the following characteristics:

a) no physical contact between the vessels;
b) one or more vessels commit default in proper operation or observation of the navigation regulations;
c) damage is caused to another vessel and persons, goods or other property on that vessel;
d) there is causative connection between the default and the damage.

The Cargo contacted another due to the improper of the Vessel causing the damage to the latter, and as a result, the owner of the carrying Vessel compensates the other vessel for the damage caused by the contact. This collision is of the characteristics of indirect collision. So, this accident can be characterized as an indirect collision between the two vessels.

We concluded in the above discussions that indirect collision does not belong to "collision" under Chinese laws and regulations and Convention on Ship Collision. In respect of insurances clauses such as Hulls Insurance Clauses of PICC and ITC Clauses, some of Chinese and English judgments held that the literal meaning of "collision" is limited to direct collisions of physical contact. In the case of the *Niobe*, however, the scope of the definition of collision is extended with the majority of the judges holding that indirect collision was also covered.

In the case of *MV Zhenxing*, taking into account of the relevant legal backgrounds of the case at the material time and the expression of intent of the parties to the insurance contract, the arbitral tribunal held that there wasn't any provisions about indirect collision in Chinese laws and

provisions, and no evidence can prove that the parties to the insurance contract had any expression of intent to cover indirect collision liability. In our opinion, the method of exploring the expressions of intent of the parties to the insurance contract makes sense. Though some of current Chinese laws and provisions include some provisions on indirect collision, indirect collision is still not covered in the definition of collision by Maritime Code and the Supreme People's Court. So, according to the way the case of MV Zhenxing was judged, indirect collision is not covered by the hull insurance. Unless otherwise agreed that indirect collision is included in the definition of collision, the meaning of ship collision in insurance clauses shall be consistent with that in the laws and provisions, in other words, the collision is limited to direct collision of physical contact.

In the case of *MV Fushan*, the second instance court held that according to the contra proferentem principle in Insurance Law, where the insurance clause is based on standard one prepared by the insurer and there are two or more different interpretations of the clause, the court or the arbitral institution shall interpret the clause in favor of the insured. In our opinion, the prerequisite of the application of the *contra proferentem* principle is the existence of different interpretations of the clause, but both parties disputing on the meaning of the clause cannot necessarily introduce the application of the principle. And the *contra proferentem* principle can only be used if the true meaning of the clause can't still be determined after by reference to the literal meanings of the words and sentences used in the contract, the systems and the purpose of the contract, the relevant customary and practice and the principle of equitable. In the case of *Xue Mei v The People's Insurance Company (Group) of China Limited Rugao Branch* ((2015) tongzhongshangzhongzi No.0173), the judges held that "The principle of literal interpretation means that a term should usually be interpreted according to its commonest meaning. If the term has a special legal meaning or other specific professional meaning, it should be interpreted according to

its legal meaning or special meaning". In the case of *Jia Yanwei v The People's Insurance Company (Group) of China Limited Xingtai Branch* ((2018) Jin0115minchu No.8640), the tribunal applied the principle of literal interpretation and held that by reference to the provisions of Regulation for the Implementation of the Law of the People's Republic of China on Road Traffic Safety, the nature of semi-trailer is a motor vehicle which can tow one trailer. The claim of the insurer that "two trailers are towed when a semi-trailer tow a trailer" was rejected by the judges. It can be concluded from the two cases that if the law or judicial interpretation has stipulated the meaning of the terms of the insurance contract, the stipulations can be directly used to eliminate the disputes between the parties on the meanings of the terms, and there is no need to use the *contra proferentem* principle to determine the meaning of the contract terms.

In respect of the ship collision liability clause in the insurance contract, to interpret the meaning of collision according to the definition in Chinese Maritime Code, the collision is limited to direct collision; moreover, the parties of the insurance contract didn't agree otherwise. In such circumstances, the meaning of collision in the insurance contract can be to be limited to direct collision. However, Article 149 of Explanations and Answers to Practical Questions in the Trial of Foreign-Related Commercial and Maritime Cases (Part One) issued by the PRC Supreme People's Court Civil Department No. 4 (hereinafter referred to as the "Explanations and Answers") stipulates that where collision liability is covered by insurer, both direct collision and indirect collision shall be included in the definition of collision. Though the Explanations and Answers can't be used as the legal basis of judging a case by the court, it shows the Supreme People's Court's position to extend the interpretation of the collision liability clause in insurance contracts.

5. Conclusions and Suggestions

According to the above analysis,

contact between the Cargo and the Contacted Vessel could be characterized as different natures and the liability of insurer should be judged accordingly:

a) The Cargo is not part of the insured Vessel, according to the collision liability clause in the insurance contract, the insurer shall not assume any insurance liability;
b) The Vessel and the Cargo are regarded as one object and the Contact shall be deemed as a direct collision between the Vessel and the Contacted Vessel due to which the insurance indemnity liability shall be assumed by the insurer.
c) The Contact causing damage to the Contacted Vessel can be deemed as an indirect collision between the two vessels, and the interpretation of collision liability clause shall be extended to include indirect collisions due to which the liability shall be assumed by the insurer.

For avoidance of any dispute, we suggest that when the owner and insurer enter into any hull insurance contract, especially the insured vessel is a specialized vessel carrying heavy-lift cargos, it be provided specifically whether contact between the cargo carried by the insured vessel and another vessel is covered.

船舶险碰撞责任条款是否包括被保险船舶所载货物与他船接触产生的责任？

某特种船运输的大件货在航行途中与他船发生接触并造成他船损坏，该船船壳并未与他船发生接触，特种船船东赔偿他船损失后是否有权要求船舶险保险人按照保险合同中的碰撞责任条款承担保险赔偿责任？本文将分析和解答这个问题。

在分析保险合同碰撞责任条款前，有必要先分析海商法中船舶碰撞的含义。

一、 海商法中船舶碰撞的含义

(一) 中国法下船舶碰撞的含义

根据《中华人民共和国海商法》（以下简称“《海商法》”）的规定，“接触”为船舶碰撞的要件之一；[1]船舶之间没有发生接触，但因一船操作不当或违反航行规则造成其他船舶以及船上的人员、货物损坏或人员伤亡的，同样适用《海商法》船舶碰撞一章的规定。[2]接触碰撞一般被称为“直接碰撞”，而非接触碰撞一般被称为“间接碰撞”。按照《海商法》第一百七十条规定，“间接碰撞”适用《海商法》中船舶碰撞一章的规定，主要就是指关于碰撞责任的规定，包括归责原则、责任主体、责任限制等。

最高人民法院在 1995 年发布的《最高人民法院关于审理船舶碰撞和触碰案件财产损害赔偿的规定》（法发[1995]17 号）中，将船舶碰撞定义为“在海上或者与海相通的可航水域，两艘或者两艘以上的船舶之间发生接触或者没有直接接触，造成财产损害的事故”。[3]该规定没有区分直接碰撞和间接碰撞，将间接碰撞也纳入了船舶碰撞的范畴之内。

最高人民法院在 2008 年发布的《最高人民法院关于审理船舶碰撞纠纷案件若干问题的规定》（法释[2008]7 号）中，关于船舶碰撞的概念直接引用了《海商法》的规定，并规定间接碰撞

[1] 《海商法》第一百六十五条第一款规定：“船舶碰撞，是指船舶在海上或者与海相通的可航水域发生接触造成损害的事故。”

[2] 《海商法》第一百七十条规定：“船舶因操作不当或者不遵守航行规章，虽然实际上没有同其他船舶发生碰撞，但是使其他船舶以及船上的人员、货物或者其他财产遭受损失的，适用本章的规定。”

[3] 《最高人民法院关于审理船舶碰撞和触碰案件财产损害赔偿的规定》第十六条第三款。

“适用本规定”。[4]

根据上述与船舶碰撞有关的中国法规，我们认为中国法下的船舶碰撞仅限于船舶之间发生接触的情况，即直接碰撞。间接碰撞并不涵盖于船舶碰撞的范畴之内，尽管关于船舶碰撞的法规适用于间接碰撞产生的责任。

(二)国际公约中船舶碰撞的概念

《关于统一船舶碰撞若干法律规定的国际公约》（以下简称“《1910 年船舶碰撞公约》”）第一条规定：“海船与海船之间、海船与内河船舶之间发生碰撞，船舶或者船上财物、人身遭受损害的赔偿，应按本公约的规定处理，而不论碰撞发生在任何水域。”同时，该公约第十三条规定：“本公约扩大适用于一船由于进行或者不进行某种操纵，或者由于不遵守航行规则，而给他船或者任意船上的货物或者人员造成的损害的赔偿，即使碰撞实际上未曾发生。(This Convention extends to the making good of damages which a vessel has caused to another vessel, or to goods or persons on board either vessel, either by the execution or non-execution of a manoeuvre or by the non-observance of the regulations, even if no collision had actually taken place.) 由此可见，《1910 年船舶碰撞公约》中定义的船舶碰撞实际上也不包括间接碰撞，而仅是规定该公约扩大适用于船舶之间的间接碰撞的赔偿问题。我国于 1994 年 3 月 5 日加入了《1910 年船舶碰撞公约》，关于船舶碰撞的含义与公约的约定基本一致。

国际海事委员会于 1987 年起草的《船舶碰撞损害赔偿国际公约草案》（《里斯本规则草案》）关于船舶碰撞的定义：船舶碰撞系指船舶间即使没有实际接触，发生的造成灭失或损害的任何事故。船舶碰撞不局限于船舶之间的接触，间接碰撞也属于船舶碰撞。

(三)英国法下船舶碰撞的概念

英国加入了《1910 年船舶碰撞公约》，关于船舶碰撞适用的是公约的规定。

二、 保险合同碰撞责任条款中船舶碰撞的含义

(一)人保保险条款中船舶碰撞的含义

《中国人民财产保险股份有限公司船

[4] 《最高人民法院关于审理船舶碰撞纠纷案件若干问题的规定》第一条规定：“本规定所称船舶碰撞，是指海商法第一百六十五条所指的船舶碰撞，不包括内河船之间的碰撞。海商法第一百七十条所指的损害事故，适用本规定。”

舶保险条款（2009 版）》（以下简称“《人保船舶保险条款》”）碰撞责任条款中约定：“本保险负责因保险船舶与其他船舶碰撞或触碰任何固定的、浮动的物体或其他物体而引起被保险人应负的法律赔偿责任。”该保险条款没有对“碰撞”的含义做进一步的说明，也没有说明是否将间接碰撞纳入该保险条款的承保范围。如果适用海商法下船舶碰撞的定义解释保险条款中的船舶碰撞，碰撞责任条款中的“碰撞”应解释为直接接触碰撞，不包括间接碰撞。不过，不论是《海商法》还是《1910 年船舶碰撞公约》均规定，间接碰撞的赔偿责任适用与直接碰撞相同的规定。那么保险条款中的碰撞责任是否应扩大适用于间接碰撞责任呢？就这个问题，中国的法院判决和仲裁裁决有不同的结论，即使结论相同，法官或者仲裁员的裁判思路也不同。在英国法下，英国法院在 *Niobe* 轮案中认为，保险合同中碰撞责任条款的字面意思是接触碰撞，尽管被保险船舶与他船未发生直接接触，不过，在被保险船舶的作用之下拖带船舶与他船发生接触碰撞，保险人仍应向被保险船舶承担保险赔偿责任；英国法院也认为，拖带船舶和被保险船舶应被视为一条船舶（one ship），从这个角度考虑，拖带船舶与他船发生接触碰撞，应视为被保险船舶与他船发生接触碰撞。我们将在下文中详细介绍并分析中国法院和仲裁庭在这个问题上的思路以及英国法院对 *Niobe* 轮案的判决。

《中国人民财产保险股份有限公司沿海内河船舶保险条款（2009 版）》（以下简称“《人保沿海内河船舶保险条款》”）中约定“本公司承保的保险船舶在可航水域碰撞其它船舶或触碰码头、港口设施、航标，致使上述物体发生的直接损失和费用，包括被碰船舶上所载货物的直接损失，依法应当由被保险人承担的赔偿责任”。《人保沿海内河船舶保险条款》与《人保船舶保险条款》类似，并未对船舶碰撞的概念进行进一步说明，也未在保险条款中约定是否承保间接碰撞，仅在除外责任部分明确排除了浪损所造成的损失、责任及费用。一方面，浪损仅是间接碰撞的一种形式，即使在保险条款中排除了保险人对浪损应承担的责任，保险合同双方之间仍有可能就保险合同是否承保浪损之外的间接碰撞产生争议；另一方面，前文述及的中国的《海商法》及最高人民法院发布的规定仅适用于海船与任何其他非用于军事的或者政府公务的船艇发生碰撞的情况，[5]若保险合同双方采纳《人保沿海内河

[5] 《海商法》第一百六十五条第二款规定：“前款所称船舶，包括与本法第三条所指船舶碰撞的任何其他非用于军事的或者政府公务的船艇。”

船舶保险条款》签订某内河船舶的保险合同，当被保险船舶与另一内河船舶发生碰撞的，则不能适用《海商法》及最高人民法院发布的关于船舶碰撞的两个规定来解释“碰撞”的含义。

(二)伦敦保险业协会保险条款中船舶碰撞的含义

《83/95 年伦敦保险业协会定期船舶保险条款》（Institute Time Clauses-Hulls，以下简称 “ITC 条款”）的碰撞责任条款中规定：“由于被保险人的法律责任而支付给第三者的损害赔偿金额，保险人同意赔付该金额的四分之三。负责赔偿的损害包括：……这些费用应是被保险船舶在与任何其他船舶碰撞之后，由被保险人所支付的。”（“The Underwriters agree to indemnify the Assured for three-fourths of any sum or sums paid by the Assured to any other person or persons by reason of the Assured becoming legally liable by way of damages for……where such payment by the Assured is in consequence of the Vessel hereby insured coming into collision with any other vessel。”）根据英国判例中法官的观点，类似表述中的 “碰撞” (Coming into Collision) 从字面意思解释应仅指有接触的碰撞，即直接碰撞，接触不仅包括船壳接触也包括船舶属具接触。[6]不过，虽然被保险船舶与他船未发生直接接触，英国法院判例表明在某些情况下，保险人对于被保险船舶给他船造成的损失，仍应承担保险赔偿责任。[7]

三、 相关案例分析

在以下英国上议院（现在的英国最高法院）审理的 *Niobe* 轮案中，多数大法官的结论是拖轮与他船发生接触碰撞属于被拖带船舶保险碰撞责任条款中的碰撞，支持该结论的理由，一是碰撞责任条款中的碰撞不仅包括直接接触（Direct contact）也包括间接接触(Indirect contact)，二是拖带船舶与被拖船舶可视为一船(One Ship)。我国法院和仲裁庭对于船舶险碰撞责任条款中的碰撞理解不统一，有法院和仲裁庭认为应仅限于接触碰撞，也有法院认为还应包括间接碰撞。

(一)英国法院 *Niobe* 轮案

在 *Niobe* 轮案中，船舶保险条款约定保险人对于被保险人因被保险船舶与它船碰撞而承担的赔偿责任给与补偿（If the ship hereby insured shall

[6] *Law of Marine Insurance and Average*, Arnould, P23-27 *Niobe* 案

[7] *Law of Marine Insurance and Average*, Arnould P23-27, *Niobe* 案

come into collision with any other ship or vessel, and the insured shall in consequence thereof, become liable to pay to the persons interested in such other ship or vessel, or in the freight thereof, or in the goods or effects on board thereof, any sum or sums of money, not-exceeding the value of the ship hereby assured, we will severally pay the assured such proportion)。拖带 Niobe 轮的拖轮与它船发生碰撞, Niobe 轮因疏于瞭望向碰撞他船承担了大部分的赔偿责任。Niobe 轮船东与保险人就前述保险条款的解释发生争议，核心问题是保险人按照上述条款是否应向被保险人 Niobe 轮船东承担保险赔偿责任。

上议院大法官认为，上述保险条款中的“collision”的字面意思是接触碰撞（Contact), Niobe 轮没有与他船发生实际接触（Actual Contact)，不过，在 Niobe 轮的作用和影响下导致拖轮与他船发生实际接触并造成他船损坏，该情形也属于上述保险条款约定的碰撞。换言之，上述保险条款中的“collision”不应局限于被保险船舶本身与它船接触，被保险船舶的属具或装置，即使不在承保的范围内，如果在被保险船舶的作用下（Impact）与它船发生接触碰撞，也属于上述保险条款的范围；另外，在被保险船舶的作用下（Impact)，造成他船或其他物体与第三者船发生接触碰撞的，同样也属于上述保险条款的范围。该解释可被理解为是间接接触（Indirect Contact)。另有上议院大法官认为，按照当时英国海商法对拖带船和被拖带船之间关系的理解，两船应被视为一艘船（One Ship)，因此，拖带 Niobe 的拖轮与他船接触碰撞，应被视为 Niobe 轮与他船接触碰撞。上议院也有大法官持不同意见，认为保险条款约定的很清楚，碰撞是指被保险船舶与他船接触，不应对此做扩大解释。

(二) “德跃”轮案

该案中一审广州海事法院和二审广东省高级人民法院均认定保险合同中的碰撞不包括间接碰撞，理由主要是保险合同中明确约定的是被保险船舶与他船碰撞，被保险船舶拖带的船舶与他船碰撞不能被视为是被保险船舶与他船发生碰撞。该案中“德跃”轮拖带的驳船与他船发生碰撞，“德跃”轮船东对被撞船船东进行赔偿之后，要求保险公司赔付。

本案一审法院广州海事法院认为，“德跃”轮对驳船与他船的碰撞负有间接碰撞责任，但间接碰撞责任不属于船

舶保险条款列明的保险责任，因此不应由保险公司承担。

“德跃”轮船东不服广州海事法院做出的一审判决，因而提出上诉。“德跃”轮船东认为，“德跃”轮是本次拖航运输的中枢，它控制和指挥着自身和驳船的行为，驳船仅仅是被动接受中枢指令的肢体，是货舱的延伸，两者通过拖缆连为一体。在发生拖带一体物与他船发生碰撞时，本案所涉船舶保险条款中碰撞责任所指的被保险船舶应视为已包括了拖航运输中整个拖带一体物。“德跃”轮与驳船作为一体物与他船发生的碰撞，应视为直接碰撞。这种直接碰撞并不一定要求“德跃”轮与他船实际接触。

本案二审法院维持了一审法院判决，但回避了“德跃”轮与被撞船舶之间存在直接碰撞还是间接碰撞的问题，认为：

1. 根据对保险合同条款的分析，保险人承保的碰撞责任指的是被保险船舶本身与他船发生的碰撞。保险合同条款明确船舶的范围仅包括合同中约定的“船壳、救生艇、机器、设备、仪器、索具、燃料和物料”。
2. 在拖带作业中，“德跃”轮与驳船仍是各自独立的船体，二者之间的连接不足以认为驳船已经成为了“德跃”轮的一部分。在拖带作业中，“德跃”轮处于控制和支配地位，驳船处于被控制和被支配地位，这是两船的动力等方面的配备情况及拖带作业的性质决定的，与保险合同没有联系，因此不能得出结论驳船与他船的碰撞应被视为“德跃”轮本身与他船发生的碰撞。
3. 如果要将驳船与他船发生的碰撞所造成的损失和责任包含在保险责任内，仍需保险人与被保险人双方对该项内容作出专门约定，但该案中的保险合同并无此项约定。

(三) “振兴”轮案

该案中，中国海事仲裁委员会（以下简称“海仲”）仲裁庭认为按照对涉案人保 86 船舶险保险条款的解释，船舶碰撞是指接触碰撞，保险人和被保险人双方没有将间接碰撞包括在碰撞责任条款中的意思表示，此外，在人保 86 条款当时的背景下，有关船舶碰撞的国内法律中也没有规定间接碰撞。该案中，“振兴”轮船东于 1992 年向保险公司投保了船舶险，使用的保险条款为中国人民保险公司 1986 年 1 月 1 日《船舶保险条款》的一切险。1993 年 11 月，因“振兴”轮操作不当导致“吉米尼”轮与多艘船舶发生碰撞，上海海事

法院将该碰撞案认定为无接触碰撞损害赔偿案，判定“振兴”轮船东承担30%的碰撞责任并赔偿相应损失。“振兴”轮船东要求船舶险保险人根据保险合同约定承担其船舶间接碰撞责任。

仲裁庭驳回了“振兴”轮船东的仲裁请求。仲裁庭认为：

1. 船舶碰撞侵权损害赔偿中的“船舶碰撞”与船舶保险合同项下船舶碰撞责任赔偿中的“船舶碰撞”，除非有特别的约定，含义应当是一致的。船舶碰撞是否包括船舶无接触碰撞，应当依据人保1986年条款颁布时的法律规定和双方当事人在保险合同中的约定进行解释和认定。
2. 就法律规定而言，人保1986年条款于1986年1月1日公布，虽然国内外学者对此问题多有论述，但中国当时尚无任何法律涉及船舶碰撞是否应包括船舶无接触碰撞的问题。[8]
3. 就双方当事人在保险合同中的约定而言，人保1986年条款在一切险的碰撞责任项下从文字上看，未表明碰撞是否包括无接触碰撞。在仲裁调查过程中，双方当事人均未能举证证明1992年达成保险合同时有将无接触碰撞责任包括在碰撞责任内的共同意思表示，事实上，双方当事人均未想到这一点。人保1986年条款的正式英文译本表明保险责任仅包括“the insured vessel coming into collision or contact collision or contact with any other vessel…”这也反映出保险人和被保险人的缔约意向是接触碰撞责任。
4. 按照当时国际保险业界的通常理解和实践，保险合同内的船舶碰撞概念是狭义的，不包括无接触碰撞。

(四) “浮山”轮案

该案中，一审青岛海事法院和二审山东省高级人民法院均支持了“浮山”轮船东要求保险公司赔付的请求，主要理由，一是认为在保险合同对船舶碰撞具体含义没有约定的情况下，依据《保险法》规定的对保险人不利解释原则，认定碰撞包括了间接碰撞，二是依据前述《关于审理船舶碰撞和触碰案件财产损害赔偿的规定》的规定，认为船舶碰撞包括间接碰撞。该案中，“浮山”轮在航行中突然转向，他船为躲避“浮山”轮发生搁浅，“浮山”轮船东赔偿被撞船舶船东后要求保险公司对其进行赔付。

[8] 中国《海商法》于1993年7月1日实施。

一审法院认为：

1. 我国海商法对船舶间发生的直接接触而造成的碰撞损害（学理上称为“直接碰撞”）与尽管船舶间没有直接发生接触但同样造成损害（学理上称为“间接碰撞”）的法律处理结果是完全相同的，二者的责任基础、责任的构成要件、损害赔偿范围的确定与计算等均完全相同，所以海商法实际上已将间接碰撞纳入了“船舶碰撞”的范围之内。
2. 本案所涉保险单的保险条款虽规定对船舶“碰撞”造成的损失予以赔偿，但却并未给船舶碰撞下一个明确的定义，亦未在免责条款中列明本案所属的间接碰撞属于青岛人保的免赔范围，以致引起保险人（青岛人保）与被保险人（浮山航运）之间对此发生争议。根据保险法的规定，对保险条款发生争议时的解释原则，应作有利于被保险人的解释，故本案保险单所规定的保险条款中的船舶碰撞，应包括我国海商法第一百七十条所规定的情况。

二审法院支持了原审法院的观点。认为：

1. 根据《海商法》、最高法院《关于审理船舶碰撞和触碰案件财产损害赔偿的规定》、《1910 年船舶碰撞公约》中的有关规定，可以确定本案船舶保险条款所指碰撞应当包括无接触碰撞。
2. 双方当事人所签保险合同中“碰撞责任”的除外责任中也未说明对间接碰撞不负赔偿责任。《保险法》第三十条规定：“对于保险合同的条款，保险人与投保人、被保险人或者受益人有争议时，人民法院或者仲裁机关应作有利于被保险人和受益人的解释。”《保险法》第十七条规定，“保险合同中规定有关于保险人责任免除条款的，保险人在订立保险合同时应当向投保人明确说明，未明确说明的，该条款不产生效力。”所以，青岛人保应对浮山航运船舶间接碰撞所造成的损失承担保险赔付责任。

四、 船载货物与他船接触的性质及保险公司的责任

船载货物与他船发生接触并造成他船损失，如系由于载货船舶操作或驾驶不当造成，载货船舶对他船承担赔偿责任后，是否有权要求船舶险保险人承担赔偿责任，结合上述对船舶险碰撞责任条款含义的分析、海商法下船舶碰撞含义的分析，以及相关中外案例的分析，我们认为可以从以下几个

角度进行分析：

(一)船载货物不是保险合同下船舶的一部分，保险人因此不承担保险赔偿责任。

如果碰撞责任条款没有约定被船舶的范围，也没有约定保险人对于船载货物与他船发生接触并造成他船损害是否承担保险责任，从字面解释看，由于货物不在船舶的范围之内，货物也不属于船舶的属具，[9]因此，被保险人因船载货物与他船接触造成他船损害而承担的赔偿责任，并不属于保险人承保的责任。

(二)船载货物可被视为船舶的一部分，货物与他船发生直接接触，可视为船舶与他船发生直接接触碰撞，保险人应承担保险赔偿责任。

在 *Niobe* 轮案中，多数法官认为涉案拖轮与驳船可以视为“一船”，并且列举了许多将拖轮与驳船视为一体的碰撞判例。他们认为，当拖轮提供动力，驳船掌控整个航程时，两船紧密合作，共同应对海上风险，因此两船可以被视为一船。尽管拖轮与驳船可以视为一船，但多数法官仍认为拖轮和驳船中的一船与第三者船发生直接接触碰撞，二船中的另一船与第三者船之间发生了间接碰撞。

船与船载货物的关系与拖轮与驳船的关系相比较而言，可谓是更加紧密：货物装载在船舶的装货甲板之上，在空间上二者紧密结合在一起；货物被装上船后，在整个海上航程中，该货物完全由船舶或者船上的船员掌控。此时，船舶与货物不仅可以说是结合为一体，甚至可以说货物已经成为了完全受该船舶支配的该船舶的一部分。因此货物与他船发生直接接触，可以视为运载货物的船舶与他船发生直接接触。船舶险保险人应当按照保险合同的约定承担相应的碰撞责任。另从侵权责任角度来说，航行过程中，货方完全失去了对该大件货的掌控，因载货船舶操作不当或者不遵守航行规章造成的与货物有关的事故，过错在载货船舶，相应的赔偿责任亦应由载货船舶承担，这也从侧面佐证了与他船发生碰撞的应该是装载大件货的船舶的观点。

(三)船载货物不是保险合同下船舶的一部分，但货物与他船发生接触并造成他船损坏，属于船舶与他船发生间接碰撞，保险合同中的碰撞责

[9]《海商法》第三条规定：“本法所称船舶，是指海船和其他海上移动装置，但是用于军事的、政府公务的船舶和 20 吨以下的小型船艇除外。前款所称船舶，包括船舶属具。”[9]船舶属具一般包括机械、锚、锚链、罗经、救生艇、起锚机、起货机等。

任条款可扩大解释包括间接碰撞，保险人因此应承担保险赔偿责任。

根据《海商法》第一百七十条和《1910年船舶碰撞公约》第十三条[10]的规定，间接碰撞具有以下特征：①船舶间未发生接触；②有过错，即船舶操作不当或者不遵守航行规章；③有损失，即其他船舶以及船上的工作人员、货物或者其他财产遭受损失；④损失与过错之间存在因果关系。

因船舶操作不当，造成船载货物与他船接触并造成他船损坏，载货船舶向他船承担相应的赔偿责任。该情况基本符合船舶间接碰撞的特征，可以定性为两船之间发生了间接碰撞。

前文中我们分析了中国的国内立法和《1910年船舶碰撞公约》中的船舶碰撞的概念均不包括间接碰撞；《人保船舶保险条款》和ITC条款中船舶碰撞的含义，部分中国法院案例和英国案例认为，从字面解释来看，两个保险条款中的船舶碰撞是指接触碰撞，均不包括船舶的间接碰撞。但在*Niobe*轮案中英国法院对船舶碰撞的含义做了扩大解释，认为保险人承保的船舶碰撞应当将间接碰撞包含在内。

"振兴"轮案中，仲裁员结合保险条款制定之时的法律背景和保险人与被保险人订立保险合同时的意思表示，认为保险条款制定之时中国尚未出台关于无接触碰撞的法规，并且没有任何证据表明保险合同双方订立保险合同的意思表示中包括了承保间接碰撞的内容。我们认为仲裁员探寻当事人订立合同之时的真实意思表示的思路是合理的。虽然现在我国出台的一些法规中包括了间接碰撞的内容，但结合现行法规，间接碰撞仍未被纳入船舶碰撞范围之内，因此按照"振兴"轮案的仲裁思路，保险合同中的船舶碰撞仍不包含间接碰撞。在保险合同双方没有另行约定保险合同中的船舶碰撞包括船舶之间的间接碰撞的情况下，该碰撞仅指法律上的碰撞，也就说我们所谓的"直接碰撞"。

在"浮山"轮案中，二审法院根据《保险法》中的不利解释原则，认为保险条款作为一种格式条款，当保险人与被保险人对合同条款有两种以上解释时，人民法院或者仲裁机构应当作出有利于被保险人的解释。我们认为，适用不利解释原则的前提应当是合同条款内容存在疑义，合同双方对合同条款存在争议不代表合同条款内容存在疑义。

[10]《1910年船舶碰撞公约》第十三条规定："本公约的规定扩及于一艘船舶对另一艘船舶造成损害的赔偿案件，而不论这种损害是由于执行或不执行某项操纵，或是由于不遵守规章所造成。即使未曾发生碰撞，也是如此。"

并且不利解释应当仅在使用文义解释、体系解释、目的解释、参照习惯或惯例解释、公平解释等解释方法穷尽之后仍无法消除疑义的情况下才能适用。薛梅与中国人民财产保险股份有限公司如皋支公司财产损失保险合同纠纷案（(2015)通中商终字第 0173 号）中法官认为：“文义解释原则，是指通常情况下应当按照该用语最常用、最普遍的含义进行解释，若是这一文字具有专门的法律含义或者其他特定的专业性含义，则应当按其法律含义或专门含义去解释。”在贾彦伟与中国人民财产保险股份有限公司邢台市分公司财产损失保险合同纠纷案（(2018)津 0115 民初 8640 号）中，法官结合《中华人民共和国道路交通安全法实施条例》的有关规定，利用文义解释的方法将半挂牵引车的性质界定为“机动车，还可以再牵引一辆挂车”，驳回了保险公司主张的“半挂牵引车再牵引挂车，就属于牵引 2 辆挂车”的观点。从这两个案例可以看出，法律或者司法解释已经对保险合同的某些用语做出规定的，按照法律或司法解释的规定来解释保险条款的含义即可消除当事人之间的争议，无需再采用不利解释原则确定合同用语的含义。

就保险合同中的碰撞责任条款而言，如果适用《海商法》中船舶碰撞的含义去解释保险合同中的船舶碰撞，因《海商法》规定的船舶碰撞仅指直接接触碰撞，不包括船舶之间间接碰撞，并且保险合同的双方对碰撞的含义又没有做出任何相反约定，因此，保险条款中的船舶碰撞含义应仅指直接接触碰撞，不包括船舶之间的间接碰撞。不过，最高人民法院民四庭曾发布的《涉外商事海事审判实务问题解答一》（以下简称“《解答》”）第 149 条就如何理解保险条款中船舶碰撞的含义认为，船舶保险条款中规定了船舶碰撞属于保险责任范围，其中的碰撞包括船舶在海上或者与海相通的可航水域发生接触造成损害的事故，即直接碰撞，也包括《海商法》第 170 条规定的船舶因操纵不当或者不遵守航行规章，虽然实际上没有同其他船舶发生碰撞，但是使其他船舶以及船上的人员、货物或者其他财产遭受损失的间接碰撞。虽然该《解答》不能作为法院审理案件的依据，不过这表明了最高院将保险合同中碰撞责任条款做扩大解释的立场。

五、 结论和建议

结合前文分析内容，船载货物与他船发生接触并造成他船损坏的，船载货物船壳险保险人的责任可能存在以下几种可能的情形：

(一)由于货物不属于被保险船舶的一部分，根据保险合同中的碰撞责任条款，保险不承担保险责任；

(二)船货一体，货物与他船接触可视为船舶与他船接触，保险人应承担赔偿责任；

(三)货物与他船发生接触并造成他船损坏的，构成两船间接碰撞，保险合同中的碰撞责任条款扩大解释包括间接碰撞，保险人应承担保险赔偿责任。

为避免出现纠纷，我们建议船东与保险公司在签订保险合同时，尤其是在被保险船舶是运输大件货的特种船的情况下，在保险条款中明确约定是否承保船载货物与他船发生接触的责任。

The Definition and Application of Perils of Sea, Piracy, Theft and Malicious Acts under English Marine Insurance Law

-- Mckeever v. Northernreef Insurance Co SA[1]

Generally, the hull and machinery policy will cover the marine risks, including perils of sea, piracy, theft and malicious acts. The question is, under the English marine insurance law, how to understand the meaning of such risks? For instance, in the certain marine accident, how to figure out the real proximate causation of the loss of the vessel? Who shall bear the burden of proof, the assured or the insurer, as to whether the vessel is seaworthy, whether the insured's negligence exists and whether the certain condition agreed in the insurance contract is satisfied? How to assess and determine the quantum of insurance indemnity?

Recently, the English court judgment of *Mckeever v. Northernreef Insurance Co SA* further clarifies and answers the above issues. The judgement of this case is beneficial to the insurance companies to deal with the similar insurance claims under English marine insurance law.

1. Introduction:

Creola was a 15-m sailing yacht owned by Mrs Mckeever (claimant). On 19 March 2014, the yacht ran aground on a reef in the Sulu Sea. The hull had not been breached so there was little water inside, but the

[1] [2019] 2 Lloyd's Rep 161.

yacht could not be refloated and Mrs Mckeever abandoned her, having secured and padlocked the hatches. She and her crew member were picked up by a fishing vessel, Mighty One. The claimant returned the following day to find that the yacht had been looted, several windows had been broken and many items had been stolen. The yacht was towed to a shipyard and it was there found that water to the depth of 6 in had entered a section of the yacht, notwithstanding the absence of any apparent breach in the hull.

The yacht was insured by the defendant, a Uruguayan insurance company, and the policy covered marine risks, including perils of the seas, piracy, malicious acts and theft. The policy also stated in Clause 4.1 that the yacht was covered “subject to the provision of this insurance and that is maintained in a condition conducive to its use”.

The defendant did not deny the insurance liability but the compensation was still unpaid. The claimant sued to the High Court, though the defendant did not appear at the trial, the jurisdiction of the English court was not challenged and the defences were submitted. The issues were as follows:

1) Was the damage to the vessel proximately caused by insured perils?
2) How to distribute the burden of proof between the insured and insurer?
3) How to assess and determine the quantum of insurance indemnity?

2. Judgment:

1) Whether the grounding is a peril of the seas and whether it proximately caused the loss of the yacht?

Firstly, as for the burden of proof, it is the insured who shall prove that the proximate causation of the loss is one of the insured perils. If the insurer refuses to indemnify the damage, it must prove that any exception clauses can be applied.

According to judgment, Lord Julia

DIAS QC accepted that the claimant has established on a balance of probabilities that all the damage, except that caused by water ingress, was proximately caused by the grounding which belonged to the insured perils covered by the policy. Clearly, the grounding was not the natural and inevitable result of the action of the wind and waves, but owns the characteristic of fortuity. In addition, there was no suggestion that the grounding was deliberate or due to willful misconduct of the insured.

2) Whether the vessel was under proper maintenance? Can the insurer refuse to pay the compensation due to the lack of maintenance?

The insurer alleged that the yacht was only covered "subject to the provision of this insurance and that it is maintained in a condition conducive to its use" (clause 4.1). The defendant's case under this point is based on the following reasons:

a) The yacht's electronic map system was five years old and therefore out of date and inadequate.
b) The paper charts on the yacht were outdated.

The judgment held that the statement "maintained in a condition conducive to its use" was a promise which meant if the claimant breached it, the insurer could refuse to indemnify the damage. As for the burden of proof, the Lords stated that it was the insured, instead of the insurer, who shall prove relevant facts. Furthermore, the Lord did not accept the claimant's arguments that this promise was a "promissory warranty" provided in Section 33(1) of the *Marine Insurance Act 1906* and that the insurer shall take the burden of proof of it. However, the judgment held that the clause 4.1 of maintenance requirements was concerned only with the structural condition of the yacht, regardless of the charts and navigation equipment. Hence, the court did not accept the insurer's argument that it can escape the liability because of the problematic paper charts and electronic map system which referred

to the insured's lack of maintenance.

3) **Whether the vessel was seaworthy? Who bored the burden of proof on the seaworthiness?**

It is well established that the burden of proving unseaworthiness is on the defendant insurer. The insurer alleged that the C-Maps were out of date while the claimant argued that she already purchased the latest one which showed no changes in navigation for the course she was taking and the court accepted the insured's statement. However, the claimant admitted that C-Maps were not entirely accurate and for that reason they were used in conjunction with paper charts. Therefore, the Lord thought the evidence as to the charts is less clear, in particular, there was no evidence to support that the claimant had purchased the latest Admiralty charts. Nevertheless, Mr Menz, the crew member, proved that before the grounding, he checked both the paper chart and the electronic system and confirmed that they had set a course several miles to the reef which was marked. The court accepted the Mr Menz's evidence and stated that the defendant can only gained traction if a more up-to-date paper charter was available which would have shown the reef on which the yacht grounded.

4) **Whether the assured's negligence existed and whether the insurer could escape the liability on ground of that?**

The policy stated in clause 12.14 that the claim can be excluded for the damage which was caused by the insured's negligence. For this point, the insurer alleged that the insured did not keep a proper lookout and the charts were out of date. In court's views, the burden of proof was clearly on the defendant insurer to bring itself within the exception, however, it failed to do so. Firstly, the relevant exception clause only excluded the personal negligence of the assured, not others, for example the crew. Then, as for the charts, the insurer could not prove that if the latest charts existed, it would mark the reef

on which the yacht grounded. Lastly, according to the insured's evidence, it kept a proper lookout while the accident happened.

5) How to understand the definition of "piracy"?

The fact showed that the looters broke the window of the yacht and opened the hatches which led to the water ingress, finally, the machine inside the yacht broke down as a result. The insured claimed that the damage was caused by piracy, malicious act and theft which were covered in the policy, therefore, the assured shall be liable to the loss.

According to *The Andreas Lemos*[1] "piracy" means "forcible robbery at sea". Besides, based on The Theft Act 1968, "robbery" requires a threat of violence or use of force directed at some person. In addition, several precedents suggest that piracy relates to a threat of violence or use of force at some person within an attended vessel. However, in the current case, the looters simply broke into an abandoned vessel. There was no authority to suggest that theft from an unattended vessel on the high seas amounted to an act of piracy. Therefore, piracy was not the causation of water ingress.

6) How to understand the definition of "malicious acts"?

The insured further argued that the water ingress was caused by malicious acts covered by the policy. In *The B Atlantic*[2], Lord Mance held that the concept of "acting maliciously" should be understood as relating to situations where a person acts in a way which involves an element of spite or ill-will or the like in relation to the property insured or at least to other property or perhaps even a person, and consequential loss of, or damage to, the insured vessel or cargo. Moreover, only the loss of insured vessel or property caused by such malicious acts could be reimbursed by the insurer.

[1] *Athens Maritime Enterprise Corporation v Hellenic Mutual War Risks Association (Bermuda) Ltd* [1982] 2 Lloyd's Rep 483, page 491 col 1.

[2] *Atlasnavios-Navegação Lda v Navigators Insurance Co Ltd* [2018] 2 Lloyd's Rep 1

The looters deliberately smashed the windows and the hatches so as to gain the properties from the yacht, which resulted in the water ingress and the damage to the machineries and equipments. The looters were indeed acting with the requisite spite and ill-will even if they did not specifically intend the water ingress which subsequently occurred. However, applying the decision of the Supreme Court in *The Salem*[3], the smashing of the yacht's windows and hatches was the by-product of looting its properties, therefore, it was not a malicious act.

7) Whether theft is the proximate cause of water ingress?

The insured claimed that theft was the proximate cause of water ingress, so the insurer should be liable for the damage to the machineries and equipments caused by the water ingress. The court held that while the water ingress can be regarded as having resulted in a general sense from the theft, its proximate cause was the forcible entry rather than the theft of the machineries and equipments and only when the latter is the purpose of the forcible entry, theft is the proximate cause of the water ingress.

8) Whether the water ingress was caused by perils of the seas?

Although the court held that neither piracy nor malicious acts or theft was the proximate cause of the water ingress, the damage to the machineries and equipments caused by the water ingress is nonetheless recoverable. According to the court's decision in *The DC Merwestone*[4], an ingress of seawater is *prima facie* to be regarded as a peril of the seas where the cause of the ingress is fortuitous. A negligent act of the crew is fortuitous for this purpose and a resulting water ingress can therefore be regarded as a peril of the seas, whereas an ingress caused by the deliberate act of the crew in scuttling the vessel is not.

9) How to assess and determine the quantum?

[3] *Shell International Petroleum Co Ltd v Gibbs* [1981] 2 Lloyd's Rep 316

[4] *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2013] 2 Lloyd's Rep 131

The correct measure of indemnity in respect of the damage to the yacht is the diminution in market value not exceeding the reasonable cost of repairs. By comparing several survey reports, the court accepted that the pre-casualty value of the yacht was US$380,000. Referring to the quotations given by several salvage companies, the post-casualty value of the yacht was US$60,000, e.g. a diminution in value of US$320,000. As for the cost of repairs, because the yacht was not actually repaired, the court referred to the quotation of Penuwasa boat yard and held that it is appropriate to apply a 20 percent uplift to the Penuwasa quotation to take account of the likelihood of further damage emerging and also to cover any freight, import duties and taxes that would have been payable and the probable need to bring in an external repair team if the yacht were repaired at the yard. This would bring the likely repair costs to US$331.000.

10) Whether the salvage expenses are reasonable?

The court held that in circumstances where the items had already been stolen from the yacht and it was not clear how long it would take before she could be refloated, the insured engaged the fishing boat Mighty One to stand guard over the yacht and of removing the yacht from the reef and towing her to the shipyard, all these salvage measures were reasonably incurred. Given that all the expenses were itemized and satisfactorily vouched by the insured, they should be recoverable from the insurer.

3. Conclusions

In this case, the Court detailedly analyzed the causality between insured perils and marine accidents, the definition of insured perils, the distribution of burden of proof between the insurer and the insured and the measure of indemnity. In general, this case is quite helpful for the insurer to handle similar insurance claim。

英国海上保险法关于海上风险（Perils of Sea）、海盗（Piracy）、偷窃（Theft）、恶意行为（Malicious Acts）风险的理解和适用

-以 *Mckeever v. Northernreef Insurance Co SA*[1]一案为例

船舶险保险合同通常约定保险人承保海上风险（Perils of Sea）、海盗（Piracy）、偷窃（Theft）、恶意行为（Malicious Acts）风险。根据英国法，这些风险应如何理解？在某一特定海上事故中，应如何判断该等风险是否是造成被保险船舶损失的近因？证明船舶是否适航、被保险人是否存在疏忽、保险合同约定的某项承保条件是否满足，举证责任在保险人一方还是被保险人一方？如何评估和确定保险赔偿金额？这些海上保险法的基本问题在英国高等法院近期审理的 *Mckeever v. Northernreef Insurance Co SA* 案中得以进一步的澄清和解答。该案判决思路对保险公司处理涉及英国保险法的保险理赔工作有一定的帮助。

一、 案情简介

Creola 是一艘长 15 米的游艇，游艇所有人是 MacKeever 夫人。2014 年 3 月 19 日，该游艇在苏禄海搁浅到礁石上。船体没有断裂，只有少量海水进入船舱。由于无法脱浅，MacKeever 夫人决定弃船，并在弃船前给船舱上锁。MacKeever 夫人和一名船员被附近的渔船 Might One 救起。第二天，当 MacKeever 夫人返回搁浅船舶所在地时发现游艇已被人洗劫，游艇的窗户被打破，船上的财物被盗，海水进入船舱达 6 英寸高。游艇被拖带到 Penuwasa 船厂，但一直没有修理。MacKeever 夫人向被告保险公司投保了保险，保险合同约定保险公司承保的风险包括海上风险（Perils of Sea）、海盗（Piracy）、恶意行为（Malicious Acts）、偷窃（Theft）。保险合同还约定，保险人应按照保险合同的约定承担保险责任，并且被保险人应妥善保养并维护船舶以有利于船舶使用。

被告保险公司并没有表示拒绝赔偿，但却一直未支付赔偿金。被保险人诉至英国法院，被保险人对法院管辖没有提出异议并对被保险人的索赔提出答辩。法院就以下主要争议问题做出裁判：

(一)造成游艇损坏的近因（Proximate Cause）是否是保险合同约定的承保风险；

(二)被保险人和保险人的举证责任分

[1] [2019] 2 Lloyd's Rep 161

配；

(三)如何评估和确定保险赔偿金额。

二、 法院判决

(一)搁浅事故是否属于海上风险？搁浅事故是否是造成游艇损坏的近因？

首先关于举证责任，被保险人应举证证明造成游艇损坏的近因是保险合同约定的承保风险，而保险人如果拒赔，则应举证证明存在保险合同约定的免赔或拒赔情形。

法院认为，适用盖然性标准判断（Balance of Probabilities），原告提供的证据能够证明游艇损坏（除了海水进入船舱造成的损坏）的近因是搁浅事故，而搁浅事故属于保险合同约定的海上风险（Perils of Sea）。搁浅事故并不是风和海浪造成的必然的、不可避免的后果，搁浅事故符合海上风险具有的偶然性（Fortuity）的特征和属性。没有证据表明被保险人存在故意的不当行为（Willful Misconduct）。

(二)船舶是否已妥善维护和保养？保险人是否可以此为由拒绝赔偿？

保险人主张，根据保险合同的约定，保险人的赔偿责任应符合合同的约定，同时，被保险人应妥善保养和维护被保险船舶以满足其使用，否则保险人可以不赔。保险人的理由是，船舶的电子海图已经用了 5 年，电子海图已过期；纸质版海图也已过期。

法院认为，首先，保险合同关于“被保险人应妥善保养被保险船舶以满足其使用”的约定，性质上属于被保险人的承诺，也就是说保险人承诺他将妥善地保养和维护船舶，如果被保险人违反此项承诺，则保险人可以不承担赔偿责任。对于该项承诺，法院认为举证责任应在被保险人一方，而不在保险人一方。法院不接受被保险人提出的，该项承诺属于英国海上保险法第 33 条规定的承诺性保证（Promissory Warranty），应由保险人承担举证责任的主张。不过，法院认为关于“妥善维护和保养船舶”的承诺与船舶结构状况有关，与海图和其他助航设备无关，因此，法院不接受保险人提出的因电子海图和纸质版海图存在问题因此被保险人未履行妥善保养和维护船舶的承诺从而拒绝赔偿的主张。

(三)船舶是否适航？证明适航与否的举证责任在被保险人还是保险人？

证明船舶不适航的举证责任在保险人，而不在被保险人，这是英国海上保险

法已经非常明确的举证原则。保险公司主张电子海图过期，而被保险人主张，她已购买了更新的电子海图，不过，更新后的海图表明事故发生时船舶选择的航线与海图更新之前的航线没有任何变化，法院接受被保险人的该项举证和主张。被保险人承认，电子海图的内容不完整，需要与纸质版海图结合使用，被保险人称，在事故发生之前已购买并使用最新版的纸质版海图，但法院认为被保险人的举证不能令人信服。不过，被保险人一方的船员证明，在事故发生之前比较了电子海图和纸质海图，并且他和 MacKeever 夫人也的确设定了一条航线，该航线距离海图上标注的礁石几海里。法院接受了被保险人提出的依赖海图设定的航线不存在触礁风险的主张。除非保险人能够证明，存在一份更新的纸质版海图，该海图显示了涉案船舶选择的航线上确实存在搁浅礁石，否则被保险人以助航设备过期为由主张船舶不适航的主张并不成立。

(四)被保险人是否存在疏忽？保险人是否能够以被保险人存在疏忽为由拒赔？

保险合同约定，如果被保险人存在疏忽，保险人可以免赔。保险人提出被保险人的疏忽在于海图过期（不论是电子海图还是纸质版海图），另外被保险人没有保持恰当的瞭望。法院认为，证明被保险人存在疏忽的举证责任在保险人，保险人未能完成举证责任。首先，疏忽是指被保险人本人的疏忽，船员的疏忽不能简单被视为被保险人的疏忽；其次，关于海图的问题，保险人未能证明如果有新的海图，该份新海图会显示在被保险人选择的航线上有触碰搁浅的礁石；第三，通过被保险人的举证，可以证明保险事故发生之时，被保险人保持了恰当的瞭望。

(五)如何理解海盗风险？

因抢劫者打破了游艇的窗户，打开了舱盖，造成海水进入船舱，导致机器设备发生损坏。被保险人主张，这些损坏是因保险人承保的海盗风险、恶意行为、盗窃风险造成，保险人应承担保险赔偿责任。

根据 *Athens Maritime Enterprise Corporation v Hellenic Mutual War Risks Association (Bermuda) Ltd. (The Andreas Lemos)*一案，海盗是指海上暴力抢劫(Forcible Robbery at Sea)。另根据英国 1968 年盗窃法(The Theft Act)，抢劫(Robbery)是指对某人威胁使用或使用暴力。英国法院过往判例表明，海盗是针对有人看管的船

舶，是对人威胁使用或使用暴力，在该案中，抢劫者抢劫的是一艘被遗弃的无人看管的船舶。没有一个英国法院的先例显示对无人看管的船舶实施的盗窃行为构成海盗行为。因此，法院并不认为海水进入船舱是因海盗风险造成。

(六)如何理解恶意行为？

被保险人还主张，海水进入船舱是保险人承保的恶意行为造成的。英国最高法院在 *The B Atlantic* 一案中对恶意行为的解释是，如果某人的行为含有恶意因素，且该行为是针对被保险的财产，或是针对其他财产或至少是某个人，进而导致被保险船舶或货物损失或损坏，那么该行为构成恶意行为，因该恶意行为造成的被保险船舶或财产的损坏，保险人应该赔偿。

抢劫者为抢劫游艇上的财物，破坏游艇窗户和舱盖，导致海水进入船舱并造成机器设备设备损坏。抢劫者破坏游艇窗户和舱盖的行为确实有恶意因素，即使抢劫者并非有意要让海水进入船舱，但是，适用英国最高法院在 *The Salem* 一案的观点，该案中法院认为抢劫者打碎窗户和舱盖是为了抢劫船上财产而实施的附带行为，该行为不构成恶意行为。

(七)盗窃是否是海水进入船舱的近因？

被保险人主张，海水进入船舱的近因是盗窃，保险人因此应赔偿船舱进水导致的机器设备损坏。法院承认，从广义上看，海水进入船舱的原因是盗窃，但近因是抢劫者采取暴力进入船舱抢劫财物，而不是盗取机器设备，只有当盗取机器设备是抢劫者进入船舱的目的，盗窃险才是海水进入船舱的近因。

(八)船舱进水是否属于海上风险？

尽管法院认为海水进入船舱的近因既不是海盗、也不是恶意行为或盗窃，不过保险人仍应赔偿被保险人遭受的因船舱进水造成的机器设备损失。根据 *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG (The DC Merwestone)*一案的判决思路，如果海水进入船舱的原因具有偶然性，那么初步判断船舱进水应属于海上风险。比如，因船员疏忽导致的海水进入船舱属于海上风险，但因船员有意把船凿沉而造成的船舱进水就不属于海上风险。

(九)如何评估和确定保险赔偿金额？

保险人应赔偿游艇受损前后的价值差额，但不应超过修理金额。法院通过比较几份船舶检验报告，认定受损前游

艇价值 38 万美元。参考游艇受损后几家救助公司给出的报价，法院认定受损后游艇价值为 6 万美元。二者相差 32 万美元。关于修理费，由于没有实际修理，法院参考了 Penuwasa 船厂给出的修理费报价，考虑到该修理费报价不包括船厂进一步检验后可能发现的损坏，以及运费、进口关税等，法院认为船厂的报价可以合理上浮 20%，上浮后修理费金额约 33.1 万美元。

(十)施救费用是否合理？

法院认为，在游艇被抢并且无法确定何时能将游艇脱浅的情况下，被保险人雇用渔船守护游艇、实施脱浅并拖带游艇到修理厂，这些行为是合理的施救措施，鉴于被保险人提供了相应的费用明细，法院认为被保险人可以获得这些施救费用的赔偿。

三、 结论

该案详细分析了承保风险与海上事故之间是否存在因果关系、承保风险的概念、保险人与被保险人之间的举证责任分配、确定保险赔偿金额的方法，对船舶险保险人处理保险理赔案件很有帮助。

Suspension of Time Bar of Claim under Contract of Carriage of Goods by Sea Under Chinese Law

China Maritime Law adopts the one-year time bar provision in Hague-Visby Rules. It provides that the time limit shall stop to run when a suit has been brought within the one-year time period or the liable party has agreed to perform its obligations or the ship in relation to which the cause of action has arisen is arrested. But, it does not permit the parties to extend the one-year time limit by agreement. Disputes sometimes arise in practice as to what "the liable party has agreed to perform its obligations" means. Recently, China Supreme People's Court and Shanghai Maritime Court handed down two judgements on this issue. The two cases are all about the claim against the carrier for wrongful delivery of cargo without the original bills of lading, which can help ascertain if the time limit stops to run in a specific claim.

1. ***Log-win Logistics China v. Binland International Co., Ltd***[1]

Binland International Co., Ltd. ("Binland International") shipped 1428 roasters through its affiliate company Ningbo Auxin Import and Export Co., Ltd. ("Ningbo Auxin") to Log-win Logistics China ("Log-win Logistics") to be carried from Ningbo China to Israel. Log-win Logistics issued NVOCC bills of lading which state that Log-win Logistics is the carrier and Binland International is the shipper. The original bills of lading were delivered by Log-win Logistics

[1] (2019) Zuigaofaminzai No. 117

to Ningbo Auxin. After a period of time when the cargo was shipped, Binland International inquired Log-win Logistics about the whereabout of the cargo and requested Log-win Logistics to deliver the cargo according to its instruction or return the cargo to Binland International. Log-win Logistics replied that they cannot advise the status of the cargo because they were unable to verify the whereabout of the cargo due to their agent at the destination port was bankrupt. Having checked the movement records of the container of the cargo, Binland International became aware that the container was already emptied.

Given that Ningbo Auxin held the original bills of lading, Binland International decided that it is proper for Ningbo Auxin to bring the suit against Log-win Logistics claiming the damages for wrongful delivery of the cargo without the original bills of lading. But, Ningbo Auxin's claim was dismissed by the two instances courts. The courts' grounds are both that Ningbo Auxin is not the competent claimant because it is not the shipper stated on the bill of lading. Then, Binland International brought the suit against Log-win Logistics in its own name on basis of the bill of lading relationship. Obviously, when the suit was commenced, it has been far beyond the expiry date of the one-year time-bar counting from the date when the cargo should have been delivered.

The key issue at the first, second and re-trial instances of Binland International's claim is whether the claim has been time barred. The first instance court held that while Ningbo Auxin commenced the litigation within the one-year time period, Ningbo Auxin is NOT the proper claimant. Thus, the one-year time bar did not stop to run. Consequently, Ningbo Auxin's claim was dismissed by Ningbo Maritime Court.

The second instance court revoked the first instance judgement holding that based upon the email correspondence between Binland International and Log-win Logistics, the latter agreed to return the cargo according to Binland International's

instruction but failed to take the arrangement measures, which suggested that Log-win logistics agreed to perform its obligations and such agreement remained unchanged. As such, the one-year time limit stopped to run when Log-win logistics agreed to return the cargo to Binland International.

Log-win Logistics appealed to the Supreme People's Court. It was held by the Supreme People's Court that when Binland International formally notified Log-win Logistics to return the cargo and advise the expenses of the returning, Log-win Logistics only confirmed receipt of the requirements but not replied any more. These facts didn't suggest that Log-win Logistics agree to perform its obligations. As such, the one-year time-bar didn't stop to run.

2. ***Changzhou Meigao Plastic Pieces Co., Ltd. v. Yu Li***[2]

Changzhou Meigao Plastic Pieces Co, Ltd. ("Changzhou Meigao") shipped 412 packages of lights to Owners Logistics Co., Ltd. ("Owners Logistics"). The lights were to be transported from Shanghai to Brazil. Owners Logistics issued the original NVOCC bill of lading to Changzhou Meigao. The cargo was delivered at the destination port while Changzhou Meigao still hold the original bills of lading. Changzhou Meigao commenced the litigation against Owners Logistics at Shanghai Maritime Court claiming damages for the delivery of cargo without the original bill of lading.

It is common ground during the trial that when Changzhou Meigao brought the suit, the one-year time period counting from the date when the cargo should have been delivered has expired. What Changzhou Meigao argued was that Owners Logistics had agreed to perform its obligations and therefore, the time-bar stopped to run accordingly.

Shanghai Maritime Court hold that the correspondence between Changzhou Meigao and Owners Logistics does not suggest that

[2] (2019) hu72minchu No. 41

Owners Logistics agreed to deliver the cargo against the original bill of lading or agreed to indemnify Changzhou Meigao for the loss suffered due to the wrongful delivery of the cargo. The time bar didn't stop to run and therefore Changzhou Meigao's claim is time-barred.

3. Commentary

The above two cases are all about the claim for damages for carrier's wrongful delivery of cargo without the original bills of lading. For this type of claim, "the agreement to perform the obligation" means that the carrier agrees to deliver the cargo against the original bill of lading or agrees to return the cargo according to the shipper's instruction or agrees to indemnify the shipper for the loss suffered due to the wrongful delivery of the cargo. In other types of claim such as claim for cargo shortage or damage, if the liable carrier agrees to indemnify the cargo receivers for the loss, it should be deemed that the carrier agrees to perform its obligations and the one-year time-bar should discontinue to run.

It shall bear in mind that the correspondence among shipper, receiver and carrier are of great importance to assess whether or not there is an agreement to perform obligations. To avoid missing the time bar, it is suggested that legal advice be sought when it is difficult to make a decision on this issue.

海上货物运输合同索赔诉讼时效中断问题

中国《海商法》吸收了《海牙维斯比规则》中关于海上货物运输合同索赔 1 年诉讼时效的规定，并且规定诉讼时效因请求人提起诉讼、提交仲裁或者被请求人同意履行义务或者相关船舶被申请扣留而中断。中国法律规定合同当事人不得通过达成协议延长诉讼时效。实践中，有时会就“被请求人同意履行义务”的含义发生争议。最近，中国最高人民法院和上海海事法院对与该问题相关的两个无正本提单放货案件做出了判决，这两个案件的判决结果可以帮助我们判断在某一具体索赔中诉讼时效是否中止。

一、 普及国际货运代理（中国）有限公司诉槟榔国际公司案[1]

槟榔国际货运代理（中国）有限公司（以下简称“槟榔国际”）通过其关联公司宁波澳新进出口有限公司（以下简称“宁波澳新”）向普及国际货运代理（中国）有限公司（以下简称“普及国际”）托运 1428 个烤箱，从中国宁波港运至以色列阿什杜德港。普及国际签发了无船承运人正本提单，提单载明普及国际是承运人，槟榔国际是托运人。普及国际将正本提单交付给了宁波澳新。货物装运一段时间后，槟榔国际向普及国际询问货物去向，并要求普及国际按照其指示交付货物或者退运货物。但是，普及国际以其在目的港的代理破产为由，向槟榔国际回复其无法确定货物去向并且无法确认货物情况。经过查询货物所用集装箱的动态记录，槟榔国际得知该集装箱已经被清空。

鉴于宁波澳新持有正本提单，槟榔国际决定由宁波澳新向普及国际提起诉讼索赔无单放货的损失。但是，两审法院均以宁波澳新不是适格原告为由驳回了宁波澳新的诉讼请求。而后，槟榔国际以自己的名义根据提单法律关系对普及国际提起诉讼。很明显，该诉讼开始时已经远远超出了从货物应当交付之日起计算的一年诉讼时效的届满之日。

就槟榔国际提起的诉讼，一审、二审、再审的关键问题都是起诉是否已经超出诉讼时效。一审法院认为，当宁波澳新在一年诉讼时效之内提起诉讼之时，宁波澳新不是适格的原告，因此一年的诉讼时效没有发生中断，宁波海事

[1] （2019）最高法民再 117 号

法院驳回了槟榔国际的诉请。

二审法院撤销了一审法院做出的判决。二审法院认为，根据槟榔国际与普及国际之间的邮件通信，普及国际同意依照槟榔国际的指示退运货物，但是一直没有安排货物退运事宜，这表明普及国际同意履行其义务，并且这种同意一直持续未发生改变。据此观点，一年诉讼时效自普及国际同意履行其退运义务时起中断。

普及国际向中华人民共和国最高人民法院申请再审。最高人民法院认为，槟榔国际向普及国际发出正式通知，要求普及国际归还货物并告知货物退运的费用，普及国际仅确认收到了槟榔国际的要求，但没有回复其他内容。这并不能表明普及国际同意履行其义务。鉴于此，一年诉讼时效并没有发生中断。

二、 常州美高塑件有限公司诉余丽案[2]

常州美高塑件有限公司（以下简称“常州美高”）向奥钠物流有限公司（以下简称“奥钠物流”）托运 412 箱各类灯具，由上海运至巴西。奥钠物流向常州美高签发了无船承运人正本提单。在常州美高仍持有正本提单的情况下，涉案货物在目的港被放货。常州美高在上海海事法院对奥钠物流提起诉讼，要求奥钠物流赔偿其无单放货的损失。

诉讼中，双方均认可了常州美高提起诉讼之时，已经超出了自应当交付货物之日起算的一年诉讼时效。常州美高主张，奥钠物流曾同意履行其义务，因此诉讼时效应相应中断。

上海海事法院认为，常州美高和奥钠物流之间的通信不能表明奥钠物流同意依照正本提单交货，或者同意赔偿因其错误交货行为对常州美高造成的损失。因此，常州美高的诉讼请求超出了诉讼时效。

三、 案例评论

上述两个案例都是与对承运人错误无单放货的索赔有关。对于这类索赔，“同意履行义务”指的是承运人同意依照正本提单交付货物，或者根据托运人的指示退运货物，或者同意赔偿托运人因承运人错误交货产生的损失。在其他类型的索赔中，例如货物短量或者损坏的索赔，如果应承担责任的承运人同意赔偿收货人的损失，可以视为承运人同意履行其义务，一年诉

[2] （2019）沪 72 民初 41 号

讼时效则应中断。

应注意，托运人、收货人和承运人之间的通信对于评估承运人是否同意履行其义务至关重要。为避免错过诉讼时效，我们建议，当难以判断承运人是否同意履行其义务时，应寻求专业法律意见。

Some Issues Concerning Validity of Guarantee Contract under Chinese Law

1. Issues

Guarantee contract is commonly used in shipping business, e.g. the refund guarantee, performance guarantee in the shipbuilding and ship finance projects and payment guarantee of freight forwarding fee. It is very important for the creditor that the guarantee received is effective and enforceable.

If a company issues a guarantee without the authorization by the resolution of shareholder's meeting or board of directors, is such a guarantee binding on that company? Can the company's legal representative's signature and the company's seal on the guarantee represent the genuine intention of the company? Does the party who receive the guarantee have the duty of examination of the guarantee? The answers to above questions are not consistent in judicial practice until the Supreme People's Court published "*Notice of Printing and Circulating the Minutes of National Court Civil and Commercial Trial Work Meeting*" (Fa No.254 [2019], hereinafter "Minutes of Meeting 2019") on 8th November of 2019. The Supreme People' s Court unify the test of the validity of the guarantee contract, especially the issues relating to legal representative's act beyond authorization, *"bona fide"* of the creditor, the creditor's duty of examination and guarantee provided by the listed company.

In addition, the international shipping contracts always involve foreign elements and the parties to the guarantee contract could be in different countries or regions. Therefore, while dealing with the cross-border guarantees, creditors shall need to pay attention to the relevant regulations of the registration and filing formalities, particularly, *Judicial Interpretation of Security Law*[30] and *Provisions for Cross-border Guarantee*[31]. Besides, international shipping business can also involve independent guarantees. Creditors shall also need to know the requirements in *Regulations of Some Issues concerning the Trial of Independent Guarantee Cases by the Supreme People's Court*[32].

This article will analyze and discuss above issues.

2. The validity of guarantees provided by company

1) The controversy before promulgation of "*Minutes of Meeting 2019*"

Article 16 of the *Company Law* provides on the validity of guarantee as follows:

> *"Where a company invests in any other enterprise or provides guarantee for others, it shall, according to the provisions of its articles of association, be decided at the meeting of the board of directors or shareholders's meeting or shareholders' assembly. If the articles of association prescribe any limit on the total amount of investments or guarantees, or on the amount of a single investment or guarantee, the aforesaid total amount or amount shall not exceed the limited amount.*
>
> *If a company provides guarantee to a shareholder or actual controller of the company, it must be resolved through the shareholder's meeting or shareholders' assembly.*

[30] *Judicial Interpretation of the Supreme People's Court on Some Issues Regarding the Application of Security Law of the People's Republic of China*
[31] *Provisions on Foreign Exchange Control for Cross-border Guarantee*
[32] *Provisions of the Supreme People's Court on Several Issues concerning the Trial of Independent Guarantee Dispute Cases*

The shareholder as mentioned in the preceding paragraph or the shareholder dominated by the actual controller as mentioned in the preceding paragraph shall not vote on the matter as mentioned in the preceding paragraph. Such matter requires the affirmative votes of more than half of the other shareholders attending the meeting."

In practice, there are controversies relating to the application of above article. For example, where a company provides guarantee for others, must it be resolved by the company's board of directors or shareholder's (general) meeting? is the guarantee valid if it has been signed by the company's legal representative and fixed with the company's seal but not resolved by the company's board of directors or shareholders' meeting? In some cases, the court holds that bylaws are internal regulations which only limit the authorization of legal representative and have no effect on external counterparty, therefore, although without the resolutions of above company's organs, the guarantee is valid if it is signed by the company's legal representative and fixed with the company's seal. For instance, in the case (2017) Zuigaofaminzhong No.610, the Supreme People's Court held that the provision of Article 16 of the Company Law that the guarantee provided by a company must be resolved by shareholder's meeting is the internal procedural rules of the company with the third person having no duty of examination. Besides, whether to call the shareholder's meeting and form a resolution is company's internal control procedure; such internal procedure had no effect on a third party. As such, although the guarantee was not resolved by the shareholder's meeting, such a guarantee was still valid[33].

However, in the case (2016) Zuigaofaminshen No.607, although the Supreme People's Court held that the guarantee was valid, the reasons of the judgement were totally different from that of the above case. In court's

[33] See also, cases (2017) Zuigaofaminshen No.1696, (2016) Zuigaofaminzai No.194, (2016) Zuigaofaminshen No.1007

view, Article 16 of the *Company Law* does not specifically provide that the violation of it would cause the guarantee to be invalid. The court also thought that Article is the mandatory provisions of internal regulatory nature, therefore, the company's internal decision procedure should not restrain third parties. In this case, based on Article 52 of the *Contract Law*[34] and Article 14 of *No.2 Judicial Interpretation of the Contract Law*[35], the court believed that Article 16 of the *Company Law* are mandatory provisions of regulatory nature and violation of Article 16 would not lead to the ineffectiveness of the guarantee. This opinion was the dominant view during that time[36].

In addition, some courts believe that it should be from the perspective of the legal representative's authorities to apply Article 16 of the *Company Law*. Which means that it requires to determine if the legal representative's conduct constitutes ostensible representative which is provided in Article 50 of the *Contract Law*[37]; unless the creditor is in bad faith, the guarantee is valid. In the case (2014) Minshenzi No.1876, the court held that according to Article 16 of *Company Law*, if the company provides guarantees in favor of its shareholder or ultimate controllers, such guarantees must be resolved by shareholders' meeting or shareholders' general assembly. Although that was specifically provided in *Company Law*, the creditor did not require the guarantor company to provide the resolution of shareholder's meetings for examination, thus, the creditor cannot be regarded as a "bona fide third party" and this guarantee was

34 Article 52 of *Contract Law*: *A contract shall be null and void under any of the following circumstances：(5) violating the compulsory provisions of laws and administrative regulations.*

35 Article 14 of No.2 *Judicial Interpretation of Contract Law*: *The "compulsory provisions" means functional compulsory provisions.*

36 See also, (2017) Zuigaofaminshen No.370, (2016) Zuigaofaminshen No.607, (2016) Zuigaofaminshen No.809, (2016) Zuigaofaminzai No.194, (2016) Zuigaofaminzai No.24, etc.

37 Article 50 of *Contract Law: Where a statutory representative or a responsible person of a legal person or other organization oversteps his/her power and concludes a contract, the representative act shall be effective except that the counterpart knows or ought to know that he/she is overstepping his/her powers.*

invalid[38].

2) The uniform test of validity of guarantee after the promulgation of Minutes of Meeting 2019

The *Minutes of Meeting* 2019 provides that Article 16 of the *Company Law* limits the legal representative's authorization, therefore, the validity of the guarantee depends on whether the legal representative acts beyond the authorization and whether the creditor is in good faith. As for the term "*bona fide*", it means that the creditor does not know or should not have known that the legal representative has entered into a guarantee contract outside the scope of his authority. Meanwhile, the creditor shall also have the duty to examine the contents of resolutions of the company's organs.

3) Whether the legal representative's act is deemed to be beyond the authorization to provides guarantee

Article 17 of the *Minutes of Meeting* 2019 specifically provide that to provide the guarantee cannot be solely determined by legal representative; on the contrary, the legal representative's authorization originates from the resolutions of the board of directors or shareholder's meeting. Any legal representative who provides guarantee for others without authorization shall be deemed to be unauthorized representative act. In practice, the people's courts shall, according to the provisions of Article 50 of the *Contract Law*, respectively determine the validity of a guarantee contract upon the identification of "*bona fide*": if the creditor acts in good faith, the contract is valid; otherwise, it is invalid.

4) Determination of "*bona fide*"

According to Article 18 of the *Minutes of Meeting 2019*, "*bona fide*" means the creditor does not know or should

[38] See also, (2018) Zuigaofaminshen No.2144, (2018) Zuigaofaminzhong No.298, (2017) Zuigaofaminshen No. 4565, (2017) Zuigaofaminzai No.209, (2016) Zuigaofaminshen No.2633, etc.

not have known that the legal representative signed a guarantee contract outside the scope of his authority, in other words. Where the legal representative acts beyond the authorization and if the creditor insists that the guarantee is valid, it shall prove that it has examined the formality of the resolution of the guarantor company's organs at the time of conclusion of the guarantor contract according to the provisions of Article 16 of the *Company Law*. It will suffice if the creditor has exercised the reasonable care in the examination. Since Article 16 of the *Company Law* distinguishes between related-party guarantee and non-related-party guarantee, the creditor's duty of examination is also different:

a) to provide guarantee for affiliates

It means that a company provides a guarantee for its a shareholder or ultimate controller. Article 16 of the *Company Law* specifically stipulates that it must be resolved by the (general) meeting of shareholders to provide a guarantee for its affiliates. Where the legal representative acts beyond the authorization and if the creditor claims that the guarantee is valid, the creditor shall prove that it has examined the resolution of the shareholders' (general) meeting and the voting procedures of the resolution comply with the provisions of Article 16 of the *Company Law.* Then, it can be determined that the creditor acts in good faith and the guarantee is valid.

b) to provide guarantee for non-affiliates

It means that the company provides a guarantee for persons other than the shareholder or the ultimate controller of the company. According to Article 16 of the *Company Law*, it is to be provided by the articles of association of the company as to whether it shall be resolved by the board of directors or by the shareholders' meeting to provide a guarantee for non-affiliates. In the absence of the provisions in the articles of association, it can be resolved either by the board of directors or by the shareholder's

meeting. Whether or not there is the provision in the articles of association, in accordance with the provision of Paragraph 3 of Article 61 of the *General Rules of Civil Law*[39], as long as the creditor can prove that it has reviewed the resolution of the board of directors or the shareholders' (general) meeting made the resolution when concluding the guarantee contract, and that the procedures of the resolution satisfy the provisions of the articles of association, the creditor shall be deemed to have acted in good faith, unless the company can prove that the creditor knows that the articles of association have made specific provisions on the authority making such a resolution.

5) Exceptions in respect of guarantees without company organ's resolutions

Article 19 of *Minutes of Meeting* 2019 provides that:

> *Under any of the following circumstances, even if the creditors know or ought to have known that there is no resolution made by the company's organ, the guarantee contract shall be deemed as consistent with the company's true intention and the contract is valid:*
>
> a) *The company is a guarantee company whose main business is to provide guarantee to others, or a bank or a non-bank financial institution that carries out the letter of guarantee;*
>
> b) *The company provides guarantee to the creditors for the business activities of the companies directly or indirectly controlled by it;*
>
> c) *the Company has business partnership with the principal debtor, such as mutual guarantee;*
>
> d) *The guarantee contract is signed by the shareholders holding more than two thirds of the voting right of the Company individually or jointly.*

In general, the above four exceptions

[39] Paragraph 3 of Article 61 of the *General Rules of Civil Law:* the articles of association of the legal person or the restrictions imposed by the body in charge of the legal person's power on the legal representative's right of representation shall not challenge any bona fide counterparty

can be characterized into: guarantees provided by professional guarantee company; parent company provides guarantees for subsidiary; mutual guarantees between company and principal debtor; and guarantees approved by sole shareholder or shareholders who hold absolute majority of stock equity. Under such scenarios, guarantees are valid even if no resolutions are made by company's organs.

For example, in the case (2017) Zuigaofaminzhong No.369, the court held that the aim of Article 16 of the *Company Law* was to ensure that the guarantee provided by company was company's real intention. In this case, Zhongxinfang South Company provided guarantee for its subsidiary which could not harm the interest of itself apparently, therefore, this conduct shall be regarded as Zhongxinfang South Company's real intention and the guarantee was valid though there is no resolution of board of directors.

6) Conclusion

The Minus of Meeting 2019 specifies the test of the guarantee's validity. First, it is to identify whether the legal representative acts beyond the authorization to provide a guarantee; if yes, the next step is to determine whether the creditor acts in good faith. To be noticed, the criteria of "bona fide" is different between providing a guarantee to affiliate and providing a guarantee for non-affiliates. If the creditor acts in good faith and it also proves that it has examined the resolution of the company's organs at the time of conclusion of the guarantee contract, the guarantee is valid. In addition, if the exceptions which are listed in Article 19 of the *Minutes of Meeting* 2019 exist, the guarantees are also valid. Generally, above regulations can prevent the legal representative's unauthorized act to cause harm to the company and they can also guide the creditor to estimate whether the guarantee is lawful and enforceable, thus securing the stability of transaction.

3. The validity of cross-border guarantee

Cross-border guarantee means that

among the parties to the guarantee contract relationship, at least one party is overseas entity or individual person. The performance of the cross-border guarantee is likely to trigger the cross-border foreign exchange payment. With the change of the foreign exchange control policy, the regulation of cross-border guarantee has gone through the process of approval, filing and registration.

1) **Before *Regulations of Cross-border Guarantee is issued*[40], cross-border guarantee contract is invalid without approval and registration**

Prior to the promulgation of the *Regulations of Cross-border Guarantee*, according to Article 13[41] and 15[42] of the *Guarantee Law*, a guarantee contract shall be concluded in written and the content of guarantee contract shall include the elements of the type, rang, term, etc. Besides, Article 6 of the *Judicial Interpretation of Guarantee Law* also specifically enumerates the circumstance of the invalid guarantee contract, for instance, a guarantee contract which is provided to an overseas entity or individual person is null if it is not approved or registered by relevant administration authorities, or a guarantee which is provided to a domestic creditor for an overseas entity or individual is null if it is not approved or registered by relevant administration authorities.

2) **After the *Regulations of Cross-border Guarantee* is issued, it is no more required that a cross-border shall be approved and the registration or filing is not the pre-**

[40] Attachment of Huifa [2014] 29, effective date: 1st June 2014

[41] Article 13 of *Guarantee Law: A guarantor and the creditor shall enter into a written guarantee contract.*\

[42] Article 15 of *Guarantee Law: The guarantee contract shall include the following information:*

1. The categories and sums of the principal creditor's rights guaranteed;

2. The deadline for the debtor to pay the debt;

3. The mode of guarantee;

4. The range covered by the guarantee;

5. The duration of the guarantee;

6. Other information deemed necessary by the signatories.

Guarantee contracts that do not fully comply with the requirements set in the previous paragraph may be revised.

condition of a guarantees becoming valid.

According to the *Regulations of Cross-border Guarantee*, the cross-border guarantees are divided into onshore guarantees for offshore loans, offshore guarantees for onshore loans, and other forms of cross-border guarantees. [43] To be noticed, Article 6 of the *Regulations* specifically provides that onshore guarantees for offshore loans and offshore guarantees for onshore loans shall be subject to the regulation of the registration of foreign exchange control authorities[44], while as for the other forms of cross-border guarantees, unless as otherwise expressly specified by the foreign exchange control authority, guarantors and debtors do not need to go through the procedure of the registration or putting on record with the foreign exchange control authority [45] . Different from the

[43] Article 3 of *Provisions for Cross-border Guarantee:*
Based on the place of registration of each party in a guarantee, cross-border guarantee shall comprise domestic guarantee for overseas loans, overseas guarantee for domestic loans, and cross-border guarantee in any other form.

Domestic guarantee for overseas loans shall mean a cross-border guarantee whereby the guarantor is registered in China, whereas the debtor and the creditor are both registered overseas.

Overseas guarantee for domestic loans shall mean a cross-border guarantee whereby the guarantor is registered overseas, whereas the debtor and the creditor are both registered in China.

Cross-border guarantee in any other form shall mean any other cross-border other than the aforesaid domestic guarantee for overseas loans and overseas guarantee for domestic loans.

[44] Article 6 of *Provisions for Cross-border Guarantee*:
The foreign exchange authorities shall implement registration and administration of domestic guarantee for overseas loans and overseas guarantee for domestic loans.

Domestic organisations engaging in domestic guarantee for overseas loans shall complete registration formalities for domestic guarantee for overseas loans pursuant to the requirements of these Provisions; in the event domestic guarantee for overseas loans registered with the foreign exchange bureau, where there is call on performance guarantee, the guarantor may perform the guarantee at its own discretion and thereafter complete registration formalities for overseas creditor's rights pursuant to the requirements of these Provisions.

Domestic organisations engaging in overseas guarantee for domestic loans shall satisfy the relevant criteria stipulated in these Provisions; in the event domestic guarantee for overseas loans registered with the foreign exchange bureau, the creditor may collect payment in relation to performance guarantee at its own discretion; the domestic debtor shall complete foreign debt registration formalities pursuant to the requirements of these Provisions upon settlement of performance guarantee.

[45] Article 25 *of Provisions for Cross-border Guarantee:*
Domestic organisations providing or accepting cross-border guarantees in any other form other than domestic guarantee for overseas loans and overseas

requirements of the *Judicial Interpretation of Guarantee Law*, the Article 29 of the *Regulations of Cross-border Guarantee* specifically stipulate that the validity of the cross-border guarantee is irrelevant to the registration or putting on record of the guarantee contract with the foreign exchange control authority.

As for the onshore guarantee for offshore loans, where the guarantor is a bank, the guarantor shall submit the relevant data of the guarantee to the foreign exchange control authority through data interface program or any other method; where the guarantor is financial institution or an enterprise other than a bank, the guarantor shall complete registration formalities with the foreign exchange control authority at the locality within 15 working days of the conclusion of the guarantee contract. Where there is any change in the main clause(s) of the guarantee contract, it shall complete the registration formalities of such changes.[46] Where there is call on performance of the guarantee under onshore guarantee for offshore loan, the domestic guarantor or the counter-guarantor shall complete registration formalities for becoming a creditor against an overseas debtor pursuant to the regulations.[47]

Where it is offshore guarantee for onshore loan, the domestic financial institution which provide the loan facility or credit shall submit the relevant data of the guarantee to the foreign exchange bureau on a centralised basis. [48] Where the performance of the guarantee takes place overseas, the domestic debtor shall complete registration of the conclusion of the loan contract for short-term foreign exchange debt and putting on record of the relevant information with the foreign exchange control authority at the locality.[49]

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guarantee for domestic loans shall, upon compliance with domestic and overseas laws and regulations and these Provisions, enter into a cross-border guarantee contract at their own discretion. Unless otherwise stipulated by the foreign exchange bureau, the guarantor and the debtor are not required complete registration or filing formalities with the foreign exchange bureau for a cross-border guarantee in any other form.

[46] Article 9 of *Provisions for Cross-border Guarantee*

[47] Article 15 of *Provisions for Cross-border Guarantee*

[48] Article 18 of *Provisions for Cross-border Guarantee*

[49] Article 20 of *Provisions for Cross-border Guarantee*

As for the other forms of the cross-border guarantee, where the cross-border credit or debt under the guarantee is subject to prior examination and approval or verification, or in the event of any change in the cross-border credit or debt arising from the performance of guarantee, it shall complete the relevant examination and approval or registration formalities pursuant to the relevant regulations.[50]

After the issuing of the *Regulations of Cross-border Guarantee*, it seems that domestic courts have different opinions on the effect of the registration of the cross-border guarantee on its validity.

a) The cross-border guarantee is invalid without the registration

In the case (2016) Yue 03 Minzai No.36, based on the *Judicial Interpretation of Guarantee Law*, Guangdong High People's Court held that the cross-border guarantee was void due to the lack of the approval or the registration of the relevant authority. To be noticed, although the date of judgment (2017.01.08) is later than effective date of the *Regulations of Cross-border Guarantee*, the court did not quote the Article 29 of the Regulations to deal with the validity issue.

b) The cross-border guarantee is valid regardless of the registration or not

In the case (2017) Zhe Minzhong No.716, Zhejiang High People's Court had the view different from that of Guangdong High People's Court in above case. The court believed that, although China implement foreign exchange control and the *Judicial Interpretation of Guarantee Law* made it clear that without registration or approval, the cross-border guarantees were invalid, Chinese foreign exchange control policy is adjusted from time to time with the development of RMB's free conversion with the final aim to be completely free conversion of RMB of capital account. *Regulations of Cross-border Guarantee* also specify

[50] Article 25 of *Provisions for Cross-border Guarantee*

that registration or putting on record is not the pre-conditions of the validity of a cross-border guarantee. The cross-border guarantee without approval would not affect the foreign exchange control regulation indeed, and it would not harm the social public interest, therefore, such guarantees should not be determined to be invalid.[51]

3) Conclusion

In general, the *Judicial Interpretation of the Guarantee Law* and *Regulations of Cross-border Guarantee* are not consistent in dealing with the validity of the cross-border guarantee, and the judgments among the courts are not entirely the same. It seems that the above case (2016) Yue 03 Minzai No.36 might be the only one case in which the court made the conclusion that the cross-border guarantees are invalid without the registration after the *Regulations of Cross-border Guarantee* has already come into effect. At present, the dominate judicial opinion is that the validity of the cross-border guarantee should be based on the Article 29 of the *Regulations*, which means that the registration is not the condition. In order to protect the creditor's interest, we still believe that a prudent practice for the creditor is to require the guarantor to register or put on record of the guarantee and provide the relevant records of completing such registration or putting on record.

4. The validity of the independent guarantee

The independent guarantee, also called on-demand guarantee, is commonly adopted in international commercial transactions, e.g. in a shipbuilding contract, the refund guarantee provided by shipyard is a typical independent guarantee. According to the Article 1 of *Provisions of the Trial of Independent Guarantee Dispute Cases*, an "*independent guarantee*" means any undertaking given in writing by a bank or an institution other than a bank as the issuer to the beneficiary for the payment of a certain amount within

[51] See also, the case (2015) Heshangchuzi No.93, (2018) Yue 1972 Minchu No.10018, etc.

the maximum guaranteed amount at the request of the beneficiary when submitting documents in conformity with the guarantee. The "independence" characteristic embody that once the guarantee is issued, normally it is not affected by any dispute of the underlying contract. In addition, as long as the conditions stipulated in the guarantee are met, the guarantor should perform the obligations under the guarantee, such as paying the specified amount to the beneficiary.

Article 54 of the *Minutes of Meeting* 2019 re-affirm that where a letter of guarantee is issued by a bank or non-bank financial institution which falls into the circumstances stipulated in Article 1[52] and Article 3[53] of the *Provisions of the Trial of Independent Guarantee Dispute Case*, the validity of the guarantee shall not be affected regardless of whether it is used in international or domestic commercial transactions. But, an independent letter of guarantee issued by a person other than a bank or a non-bank

[52] Article 1 of *Provisions of Independent Guarantee Dispute Cases*:
For the purpose of these Provisions, an "independent guarantee" means any undertaking given in writing by a bank or a non-banking institution as the issuer to the beneficiary for the payment of a certain amount or an amount within the maximum guaranteed amount at the request of the beneficiary when submitting documents in conformity with the guarantee.

The "documents" as mentioned in the preceding paragraph means the written documents stated in an independent guarantee that the beneficiary should present to prove that payment is due, including written demands for payment, statements of default, documents issued by a third party, courts' judgments, arbitral awards, drafts, and invoices.

An independent guarantee may be issued at the request of the applicant of the guarantee or on the instruction of any other financial institution. Where an issuer gives an independent guarantee on the instruction, the issuer may request the instructing party to issue an independent guarantee to maintain the right of recourse.

[53] Article 3 of *Provisions of Independent Guarantee Dispute Cases*
Where a guarantee is under any of the following circumstances, a party's claim that the guarantee by its nature is an independent guarantee shall be supported by the people's court, except that the guarantee fails to specify the documents for the payment of money and the maximum amount payable under it:
(1) The guarantee specifies that it is a demand guarantee.
(2) The guarantee specifies that the International Chamber of Commerce (ICC) Uniform Rules for Demand Guarantees and other model rules for independent guarantee transactions should apply.
(3) According to the content of the guarantee, the payment obligation of the issuer is independent of the underlying transaction relation or the legal relation arising from the guarantee application, and the issuer only assumes the payment obligation for a complying presentation.

financial institution, as well as an agreement of excluding the subordinate characteristic of the guarantee, shall be deemed invalid. However, under the principle of "conversion of invalid legal acts", an invalid independent guarantee shall be deemed to be a subordinate guarantee despite denying its independent nature while its validity is determined by reference to the validity of the underlying contract. Therefore, if the guarantee is provided by a person other than a bank or a non-bank financial institution, which includes the provision that guarantor's obligation is independent of the underlying contract, on the premise of application of Chinese Law, such agreement of independence is invalid, however, the guarantor should still bear joint and several liability with the debtor.

5. The validity of guarantees provided by a listed company

1) Relevant provisions of the *Minutes of Meeting 2019* on creditors' reliance on disclosed information of listed companies to enter guarantee contract

The fact that a listed company, as a public company, provide a guarantee would likely affect the interest of its shareholders and potential shareholders. If it violates related regulations of guarantee, it would also have adverse effect on the healthy development of the securities market. Thus, the creditor should keep alert when receiving the guarantee provided by a listed company. Article 22 of the *Minutes of Meeting* 2019 stipulate that the people's court shall affirm the validity of a guarantee contract concluded by a creditor based on the information publicly disclosed by the listed company that has been resolved by the board of directors or the general meeting of shareholders. Before concluding the guarantee contract with a listed company, it is prudent for the creditor to examine the company's publicly disclosed information carefully and decide on the contract accordingly.

2) Rules of Stock Exchange on listed company's duty to disclose guarantee information (e.g. *Stock Listing Rules of the Shanghai Stock Exchange*)

Stock Listing Rules of the Shanghai Stock Exchange (effective date 30th April 2019, hereinafter *Stock Listing Rules*) stipulate that a listed company is obliged to disclose relative information about some guarantee transactions and the *Stock Listing Rules* also lists documents to be disclosed. Among others, Article 9.11 provides that a listed company shall submit guarantee-related transactions to the board of directors or meeting of shareholders for deliberation and disclose accordingly on time. In addition, Article 10.2.6 formulates that if a listed company provides guarantee for its affiliates or shareholders who hold less than 5% of stock equity, regardless of the amount of the guarantee, it shall submit such guarantee to the board of directors for resolution and disclose relevant details in time. Then, it shall also submit such guarantees to general meeting of the shareholders for deliberation, and to be noticed, shareholders who have conflicting interest in the guarantee shall not take part in the voting.

3) Conclusion

In summary, the listed company shall disclose relevant details of providing guarantees to others, meanwhile, in order to meet the requirements of "*bona fide*", creditors shall examine the listed companies' bylaws, resolution of board of directors and meeting of shareholders, attending members, contents of resolutions, etc. For instance, in the case (2019) Hu 02 Minzhong No.5939 and the case (2019) Hu Minzhong No.274, the court held that as the listed companies' bylaws were publicly disclosed, the creditors are presumed to be aware of it. What's more, in the case (2019) Yue 01 Minzhong No.17577, the court indicated that the creditors shall be able to review the bylaws of limited liability company since the bylaws can be searched in business registration records kept at the Administrative of Industry and

Commerce. To sum up, as for the guarantee provided by a listed company, the creditors shall exercise due diligence to search and examine the information disclosed by the listed company in order to ensure the validity of guarantees.

6. Conclusions and suggestions

1) Conclusions

The Minutes of Meeting 2019 answer and address the issues of the validity of guarantee. For a guarantee which is provided by a company without the resolution of its board of directors or (general) meeting of shareholder, the guarantee is valid and the creditor is bona fide provided that the creditor can prove by evidence that it has done the formality examination at the time of conclusion of the guarantee contract and it does not know or should not know that the legal representative of the guarantor company acts beyond the authorization. In addition, the criteria of "bona fide" of the creditor is distinguished in providing guarantee to affiliates and to non-affiliates. Besides, if any one of the exceptions listed in Article 19 of the *Minutes of Meeting* 2019 exist, the guarantee is valid even without resolution of company's organs.

As for the guarantees provided by a listed company, the *Minutes of Meeting 2019*, in conjunction with the corresponding stock listing rules formulated by the Stock Exchange, makes clear that if a creditor concludes a guarantee contract by relying on the contents disclosed by the listed company which are approved by the resolution of the board of directors and shareholder's meeting, such guarantees are valid.

What's more, as for the validity of the cross-border guarantee, *Regulations of Cross-border Guarantee* stipulates that the requirements of approval, registration or putting on record of a cross-border guarantee contract by the foreign exchange control authority and other regulatory requirements specified in the *Regulations* shall not constitute the pre-conditions of the cross-border guarantee contract to take effect.

The identity of the issuer of the independent guarantee concerns the validity of the guarantee. A letter of guarantee issued by a bank or non-bank financial institution shall not affect its validity, regardless of whether it is used in international or domestic commercial transactions. However, if the independent guarantee is issued by a person other than a bank or non-bank financial institution, such guarantee or independent agreement is invalid under Chinese Law but the guarantor shall still bear joint and several liability with the debtor.

2) Suggestions

To ensure the validity and enforceability of the guarantee, we suggest the following steps be taken by creditors:

a) Before entering into a guarantee contract, the creditor should examine following documents:

i. Articles of incorporation, in order to ascertain the competent organs to make the resolutions;

ii. List of shareholders as well as the ultimate controller of the company;

iii. Resolutions of the relevant guarantees by the company organ;

iv. If the guarantee is to be provided to affiliates, the creditor should carefully examine the company's seal and shareholder's director's signatures;

v. If the guarantee is to be provided by a listed company, the creditor should request the listed company to disclose the relevant details that the guarantees are approved by the resolution of the board of directors or meeting of shareholders. Besides, the creditors can also check the information registered/filed in the Administrative of Industry and Commerce in order to access the contents disclosed by the listed company.

b) Cross-border guarantee

i. Before entering into the guarantee contract, the creditor shall identify the types of guarantee;

ii. As for the cross-border guarantees which need to be registered or put on record under the requirements of the *Regulations of Cross-Border Guarantee*, the creditor shall require the guarantor to complete the registration or putting on record of the guarantee within the specified period after the issuance of the guarantee and provide the corresponding proof.

c) Guarantee without resolution of company's organs

i. The creditors can identify whether the guarantee falls into the exceptions listed in Article 19 of the *Minutes of Meeting 2019* exist, if yes, such guarantee is valid although no resolution of the company's organs;

ii. The creditor can also require the company to complement relevant resolutions of the company's organs.

d) Identifying risks

To be noticed, the *Minutes of Meeting 2019* has the retrospective effect on the cases which are undergoing the trial of the first instances or the second instances of court proceedings. To protect the creditor's interest, the creditor should identify risks according to the provisions of the *Minutes of Meetings* 2019 and remedy them if any, e.g. requiring the guarantor company to supply relevant resolutions.

中国法下有关担保合同效力的若干问题

一、 问题

担保合同在航运业务中并不鲜见，从船舶建造、船舶融资这些大项目中的还款保函、履约保函，到货运代理费的支付担保，都会涉及担保合同。一份有效、可执行的担保合同对于债权人来讲至关重要。公司未经董事会或股东会决议通过即对外提供担保的，此担保合同对公司是否有约束力？公司法定代表人签字、公司公章是否能代表公司的真实意思表示？债权人是否有相应的审查义务？ 这些问题在我国过往的司法实践中存在着争议。2019 年 11 月 8 日，最高人民法院发布了《最高人民法院关于印发<全国法院民商事审判工作会议纪要>的通知》(法〔2019〕254 号,以下简称《九民纪要》)，其中针对担保合同的效力问题做出明确的规定，特别是公司法定代表人越权代表问题、债权人善意的判断标准、债权人审查义务、上市公司为他人提供担保问题等。此外，国际航运业务中的合同因其通常具有涉外因素，所涉担保合同的当事人可能处于不同的地区/国家，因此，针对跨境担保合同的效力问题，债权人需注意《担保法司法解释》以及《跨境担保外汇管理规定》中有关担保登记备案的相关规定。另外，航运业务中可能涉及的独立保函，债权人应注意《最高人民法院关于审理独立保函纠纷案件若干问题的规定》中关于独立保函效力的规定。本文将分析并讨论这些问题。

二、 公司对外担保的效力问题

(一)《九民纪要》发布前关于认定担保合同效力的争议

我国《公司法》第十六条针对公司对外担保的效力问题作出了如下规定：

> *“公司向其他企业投资或者为他人提供担保，依照公司章程的规定，由董事会或者股东会、股东大会决议；公司章程对投资或者担保的总额及单项投资或者担保的数额有限额规定的，不得超过规定的限额。*
>
> *公司为公司股东或者实际控制人提供担保的，必须经股东会或者股东大会决议。*
>
> *前款规定的股东或者受前款规定的实际控制人支配的股东，不得参加前款规定事项的表决。该项表决由*

出席会议的其他股东所持表决权的过半数通过"

在司法实践中，上述条款的适用存在这些争议：公司为他人提供担保，是否必须由董事会或者股东会、股东大会决议通过？担保合同由法定代表人签字并由公司盖章，但未经董事会或股东会决议，此类担保合同是否无效？在有些案件中，法院认为公司章程对法定代表人的权限限制属于公司内部规定，对外不能约束交易相对人，因此，即使公司对外进行担保的行为未经董事会或股东会决议通过，只要担保合同由公司盖章或法定代表人签字，即代表公司的意思表示，则该担保合同对公司就有约束力。例如，在(2017)最高法民终 610 号案中，最高人民法院明确表示《公司法》第十六条所规定的公司对外担保须经股东会决议是公司对内的程序性规定，并不涉及公司以外第三人的审查义务。公司是否召开股东会以及是否形成决议，是公司内部控制程序，不能约束与公司进行交易的第三人。因此，尽管该担保合同未经股东会决议，但担保合同有效。[54]

但是，在（2016）最高法民申 607 号案中，尽管法院判定担保合同有效，然而判决理由和上述案件完全不同。最高人民院认为《公司法》第十六条并未明确规定公司违反该条规定对外提供担保即导致担保合同无效，该条规定应属于管理性强制性规定，公司股东会或股东大会是否据此形成决议作为内部决策程序并不当然约束第三人。该案中，法院考虑了《公司法》第十六条的性质，并结合《合同法》第五十二条[55]以及《合同法司法解释（二）》第十四条[56]，从而认为《公司法》第十六条属于管理性强制规范，因此违反该条款不会导致担保合同无效，且当时此类裁判思路的主流观点大多认同管理性强制规范的说法。[57]

还有的法院认为，针对《公司法》第十六条的适用问题，应从法定代表人的代表权限出发，即该法定代表人未经公司董事会、股东大会授权而对外签署担保合同的行为是否构成《合同法》第五十条[58]所规定的表见代表。若债权人的该行为是善意的，那么合同有效；反之，合同无效。例如（2014）民申字

54 类似案例可见：（2017）最高法民申 1696 号，（2016）最高法民再 194 号、(2016）最高法民申 1007 号等。

55 《合同法》第五十二条规定，"有下列情形之一的，合同无效：（五）违反法律、行政法规的强制性规定"。

56 《合同法司法解释（二）》第十四条规定，"《合同法》第五十二条第（五）项规定的"强制性规定"，是指效力性强制性规定"。

57 类似案例可见：（2017）最高法民申 370 号、（2016）最高法民申 607 号、(2016）最高法民申 809 号、(2016）最高法民再 194 号、(2016）最高法民再 24 号等。

58 《合同法》第五十条规定，"法人或者其他组织

第 1876 号案中，法院认为《公司法》第十六条明确规定，公司为公司股东或者实际控制人提供担保的，必须经股东会或者股东大会决议。因法律有明确规定，债权人应当知道公司为债务人的债务提供担保须经公司股东会决议，但并未要求公司出具股东会决议，债权人显然负有过错，因而其不能被认定为善意第三人，且该担保合同无效。[59]

(二)《九民纪要》发布后统一认定担保合同效力的标准

《九民纪要》发布后，其将《公司法》第十六条视为对法定代表人权限的法定限制，通过判断法定代表人是否属于越权担保以及合同相对方是否善意，即是否“知道或者应当知道”法定代表人超越权限来认定担保合同的效力。同时，债权人也应对公司机关决议内容尽到审查义务。

1. 法定代表人的行为是否构成越权代表公司提供担保？

《九民纪要》第 17 条明确规定担保行为不是法定代表人所能单独决定的事项，而必须以公司股东（大）会、董事会等公司机关的决议作为授权的基础和来源。法定代表人未经授权擅自为他人提供担保的，构成越权代表，在司法实践中，人民法院应当根据《合同法》第五十条关于法定代表人越权代表的规定，区分订立合同时债权人是否善意分别认定合同效力：债权人善意的，合同有效；反之，合同无效。

2. 债权人是否善意？

《九民纪要》第 18 条对“善意”作出了相应的解释。善意，是指债权人不知道或者不应当知道法定代表人超越权限订立担保合同，即在越权代表存在的情况下，若债权人主张相应的担保合同有效，则其需要证明在该担保合同成立时，其已根据《公司法》第十六条的规定，对公司机关的决议进行了形式审查，审查要求并不严苛，只要尽到必要的注意义务即可。因《公司法》第十六条对关联担保和非关联担保进行了区分，则债权人相应的审查义务也有所不同：

的法定代表人、负责人超越权限订立的合同，除相对人知道或者应当知道其超越权限的以外，该代表行为有效”。

59 类似案件可见：（2018）最高法民申 2114 号、（2018）最高法民终 298 号、（2017）最高法民申 4565 号案中、（2017）最高法民再 209 号、（2016）最高法民申 2633 号等

1) **关联担保：**是指公司为公司股东或实际控制人提供担保。根据《公司法》第十六条第二款的明确规定，若公司提供关联担保，则该担保必须由股东（大）会决议。因此，当公司法定代表人越权提供关联担保但的，若债权人主张担保合同有效，则其必须举证证明已对股东（大）会决议进行了审查，且决议的表决程序符合《公司法》第十六条[60]的规定，此时才可认定该债权人是善意的，担保合同有效。

2) **非关联担保：**指公司为公司股东或实际控制人以外的人提供担保。根据《公司法》第十六条第一款规定，若公司提供非关联担保，则由公司章程规定是由董事会决议还是股东（大）会决议。章程未规定的，则董事会或股东（大）会决议任一决议均可。但是，无论章程是否有相关规定，根据《民法总则》第六十一条第三款不得对抗善意第三人的规定[61]，只要债权人能够举证证明其在担保合同订立时对相关决议进行了审查，不论是董事会决议还是股东（大）会决议，且决议程序符合公司章程的规定，则应当认为该债权人是善意的，担保合同有效，但公司能够证明该债权人明知公司章程对决议机关有明确规定的除外。

3. 无须公司机关决议的例外情况

《九民纪要》第 19 条规定：

“存在下列情形的，即便债权人知道或者应当知道没有公司机关决议，也应当认定担保合同符合公司的真实意思表示，合同有效：

（1）公司是以为他人提供担保为主营业务的担保公司，或者是开展保函业务的银行或者非银行金融机构；

（2）公司为其直接或者间接控制的公司开展经营活动向债权人提供担保；

（3）公司与主债务人之间存在相互担保等商业合作关系；

[60] 《公司法》第十六条第三款规定，“前款规定的股东或者受前款规定的实际控制人支配的股东，不得参加前款规定事项的表决。该项表决由出席会议的其他股东所持表决权的过半数通过”。

[61] 《民法总则》第六十一条第三款规定，“法人章程或者法人权力机构对法定代表人代表权的限制，不得对抗善意相对人”。

（4）担保合同系由单独或者共同持有公司三分之二以上有表决权的股东签字同意。”

上述四种例外情况可以归纳为专业担保公司提供担保、公司为其子公司提供担保、公司与主债务人之间相互担保、公司唯一股东或持有绝对多数股权的股东书面同意担保的，即使公司机关没有做出决议，担保合同并不因此无效。例如在（2017）最高法民终 369 号案中，法院认为《公司法》第 16 条规定的决议前置程序旨在确保公司为他人提供担保系公司的真实意思表示。本案中，中新房南方公司为其控股子公司履行合同项下的义务提供担保，其担保行为不损害中新房南方公司的自身利益，应认定为中新房南方公司的真实意思表示。据此，中新房南方公司虽未提供其公司董事会决议，但此担保合同有效。

(三) 总结

《九民纪要》明确了公司担保行为效力的认定标准，首先应判断公司对外提供担保是否存在法定代表人越权代表的情况，若有，则需判断债权人是否是善意，并注意在关联担保和非关联担保的情况下，善意的判断标准不同。若债权人是善意的，且其在订立担保合同时尽到了相应的审查公司机关决议的义务，那么该担保合同有效。另，若债权人能举证证明《九民纪要》中所列的四种无须公司机关决议的例外情况存在，则担保合同有效。上述规定在防止公司法定代表人越权代表公司提供担保从而损害公司利益的同时，也使得债权人能够判断债务人所提供的担保是否合法且可执行，从而保障了交易的稳定。

三、 跨境担保合同的效力问题

跨境担保是指担保合同法律关系的当事人中至少有一方是境外公司或个人。跨境担保在执行阶段可能涉及外汇跨境支付。随着我国外汇管制政策的变化，跨境担保的管理也经历了批准、备案、登记的发展过程。

(一)《跨境担保外汇管理规定》[62] 发布前未经批准、登记的跨境担保合同无效

[62] 汇发[2014]29 号附件一,2014.06.01 生效

在《管理规定》生效前，根据《担保法》第 13 条[63]、第 15 条[64]规定，担保合同必须以书面形式订立，且合同内容需要包含保证方式、范围、期限等要素。此外，《担保法司法解释》第 6 条对于对外担保合同无效的情形作出了明确的列举，其中之一是未经国家有关主管部门批准或者登记对外担保的或未经国家有关主管部门批准或者登记，为境外机构向境内债权人提供担保的无效。

(二)《跨境担保外汇管理规定》发布后，跨境担保无需办理审批，登记、备案也不再是担保有效的条件

《跨境担保外汇管理规定》将“跨境担保”区分为内保外贷、外保内贷及其他形式[65]。需要注意的是，《跨境担保外汇管理规定》第六条明确规定外汇局对内保外贷和外保内贷实行登记管理[66]，而对于内保外贷、外保内贷以外的其它形式的跨境担保，除外汇局另有明确规定外，没有登记或备案的要求[67]。与上述《担保法司法解释》的规定不同，《管理规定》第 29 条明确表明，跨境担保合同是否有效与备案登记与否无关。

其中，在内保外贷的情况下，若担保人为银行，则由担保人向外汇局报送担保业务的相关数据；若担保人为非银行金融机构或企业，则其应在签订担保合同后 15 个工作日内到所在地外汇局办理内保外贷签约登记手续。担保合同主要条款发生变更的，应当办理

63 《担保法》第十三条 保证人与债权人应当以书面形式订立保证合同。

64 《担保法》第十五条 保证合同应当包括以下内容：

（一）被保证的主债权种类、数额；

（二）债务人履行债务的期限；

（三）保证的方式；

（四）保证担保的范围；

（五）保证的期间；

（六）双方认为需要约定的其他事项。

保证合同不完全具备前款规定内容的，可以补正。

65 《管理规定》第三条规定，“按照担保当事各方的注册地，跨境担保分为内保外贷、外保内贷和其他形式跨境担保。内保外贷是指担保人注册地在境内、债务人和债权人注册地均在境外的跨境担保。外保内贷是指担保人注册地在境外、债务人和债权人注册地均在境内的跨境担保。

其他形式跨境担保是指除前述内保外贷和外保内贷以外的其他跨境担保情形。”

66 《管理规定》第六条规定，“外汇局对内保外贷和外保内贷实行登记管理。

境内机构办理内保外贷业务，应按本规定要求办理内保外贷登记；经外汇局登记的内保外贷，发生担保履约的，担保人可自行办理；担保履约后应按本规定要求办理对外债权登记。

境内机构办理外保内贷业务，应符合本规定明确的相关条件；经外汇局登记的外保内贷，债权人可自行办理与担保履约相关的收款；担保履约后境内债务人应按本规定要求办理外债登记手续”。

67 《管理规定》第二十五条规定，“境内机构提供或接受除内保外贷和外保内贷以外的其他形式跨境担保，在符合境内外法律法规和本规定的前提下，可自行签订跨境担保合同。除外汇局另有明确规定外，担保人、债务人不需要就其他形式跨境担保到外汇局办理登记或备案”。

内保外贷签约变更登记手续。[68]若该业务发生担保履约的，成为对外债权人的境内担保人或反担保人应当按规定办理对外债权登记手续。[69] 在外保内贷的情况下，由发放贷款或提供授信额度的境内金融机构向外汇局集中报送担保业务的相关数据。[70]外保内贷业务发生境外担保履约的，境内债务人应到所在地外汇局办理短期外债签约登记及相关信息备案手续。[71] 在其他形式跨境担保的情况下，若担保项下对外债权债务需要事前审批或核准，或因担保履约发生对外债权债务变动的，应按规定办理相关审批或登记手续。[72]

《管理规定》发布后，关于跨境担保未办理登记是否影响担保效力的问题，国内法院似乎仍有不同的看法。

1. 未经登记的担保合同无效

在(2016)粤 03 民再 36 号案中，广东省高级人民法院根据上述《担保法司法解释》的相关规定作出判决：未经国家有关主管部门批准或者登记对外担保的，担保合同无效。因涉案担保合同未经有关部门批准、登记，故应认定为无效。需要注意的是，尽管该案裁判日期（2017.01.08）晚于《管理规定》的生效日期，但是在确认跨境担保合同是否有效的问题上，法院并未援引《管理规定》第 29 条内容。

2. 未经登记的担保合同有效

在（2017）浙民终 716 号中，浙江省高级人民法院认为，虽然我国实行外汇管制且《担保法司法解释》明确了对外担保未经有关主管部门批准或登记无效，然而我国的外汇管理制度是沿着人民币走向自由兑换这一路径而开始演变历程的，实行人民币资本项目自由兑换是外汇体制改革的目标。《管理规定》亦明确了外汇管理部门对跨境担保合同的核准、登记或备案等外汇管理要求，不构成跨境担保合同生效要件。未经批准的跨境担保行为实质上不会涉及国家外汇管理秩序，并不构成对我国社会公共利益和社会经济秩序的违反，不宜再被认定为无效。[73]

(三) 总结

[68] 《管理规定》第九条
[69] 《管理规定》第十五条
[70] 《管理规定》第十八条
[71] 《管理规定》第二十条
[72] 《管理规定》第二十五条

[73] 类似案例可见，(2015)荷商初字第 93 号，(2018)粤 1972 民初 10018 号等。

由上文可见，《担保法司法解释》和《管理规定》中关于跨境担保合同的效力问题的条款存在冲突，且在司法实践中，有不同判决。(2016)粤03民再36号案似乎是唯一一例在《管理规定》生效后法院认定未经登记的担保合同无效的情况，目前针对此问题的主流审判思路以《管理规定》第29条作为判决基础，即备案登记并非跨境担保合同的生效要件。但是为帮助债权人更好地保障自身利益，我们建议债权人在接受跨境担保时要求担保人按照《管理规定》的要求对该担保合同进行备案登记并提供相应的备案登记证明，以避免可能的不利后果。

四、 独立保函的效力问题

独立保函，又称见索即付保函，在涉外商事交易中使用较为广泛，在船舶建造合同中船厂提供的由银行出具的还款保函就是典型的独立保函。根据我国《最高人民法院关于审理独立保函纠纷案件若干问题的规定》第1条规定，独立保函是指银行或非银行金融机构作为开立人，以书面形式向受益人出具的，同意在受益人请求付款并提交符合保函要求的单据时，向其支付特定款项或在保函最高金额内付款的承诺。独立保函的独立性体现在，一经开出即独立于基础合同交易关系，不受基础合同交易争议的影响，保证人只依据保函的规定对受益人承担担保责任，此外，只要受益人满足该保函所约定的条件，出具保函的担保人就应当履行担保责任和义务，如向受益人支付约定的特定款项等。

《九民纪要》第54条对独立担保的效力问题作出了进一步的明确：凡是由银行或者非银行金融机构开立的符合《最高人民法院关于审理独立保函纠纷案件若干问题的规定》第1条[74]和第3条[75]规定情形的保函无论是用于国际商事交易还是用于

[74] 《最高人民法院关于审理独立保函纠纷案件若干问题的规定》第1条规定，“本规定所称的独立保函，是指银行或非银行金融机构作为开立人，以书面形式向受益人出具的，同意在受益人请求付款并提交符合保函要求的单据时，向其支付特定款项或在保函最高 金额内付款的承诺。
独立保函可以依保函申请人的申请而开立，也可以依另一金融机构的指示而开立。开立人依指示开立独立保函的，可以要求指示人向其开立用以保障追偿权的独立保函”。

[75] 《最高人民法院关于审理独立保函纠纷案件若干问题的规定》第3条规定，“保函具有下列情形之一，当事人主张保函性质为独立保函的，人民法院应予支持，但保函未载明据以付款的单据和最高金额的除外：
（一）保函载明见索即付；
（二）保函载明适用国际商会《见索即付保函统一规则》等独立保函交易示范规则；
（三）根据保函文本内容，开立人的付款义务独立于基础交易关系及保函申请法律关系，其仅承担相符交单的付款责任。

国内商事交易，均不影响保函的效力。但是需要注意的是，银行或者非银行金融机构之外的当事人开立的独立保函，以及当事人有关排除担保从属性的约定，法院应当认定其无效，根据“无效法律行为的转换”原理，在否定其独立保函效力的同时，应当将其认定为从属性担保，并根据主合同是否有效来判断该担保的效力问题。因此，若银行或非银行金融机构以外的公司对外提供担保，担保函中约定了担保人的义务独立于基础合同或有类似约定的，若此担保合同适用中国法，那么该独立性约定无效，不过担保人仍应与债务人承担连带责任。

五、 上市公司对外担保的效力问题

(一)《九民纪要》关于债权人依赖上市公司披露信息订立担保合同的规定

上市公司,作为公众公司,对外提供担保可能会影响到股东和潜在股东的利益，若其违规担保，还会影响到证券市场的健康发展，因此，在接受上市公司提供的担保时，债权人需要格外注意。《九民纪要》第 22 条规定债权人依赖上市公司披露的董事会和股东会决议通过的内容订立担保合同的，担保合同有效。债权人在与上市公司订立担保合同时，谨慎的做法是对上市公司公开披露的各项内容进行审查，以此为合同订立的基础。

(二) 各证交所制定的关于上市公司披露担保信息的规则（以《上海证券交易所股票上市规则》为例）

《上海证券交易所股票上市规则》（2019.04.30 起生效，以下简称《股票交易规则》）规定了上市公司提供部分担保交易事项时需要进行披露，且对披露的文件作出了列举。其中，第 9.11 条[76]规定了上市公司发生“提供

[76] 《上海证券交易所股票上市规则》第 9.11 条规定，“上市公司发生“提供担保”交易事项，应当提交董事会或者股东大会进行审议，并及时披露。”
下述担保事项应当在董事会审议通过后提交股东大会审议：
（一）单笔担保额超过公司最近一期经审计净资产 10%的担保；
（二）公司及其控股子公司的对外担保总额，超过公司最近一期经审计净资产 50%以后提供的任何担保；
（三）为资产负债率超过 70%的担保对象提供的担保；
（四）按照担保金额连续 12 个月内累计计算原则，超过公司最近一期经审计总资产 30%的担保；
（五）按照担保金额连续 12 个月内累计计算原则，超过公司最近一期经审计净资产的 50%，且绝对金额超过 5000 万元以上；

担保”交易事项，应当提交董事会或者股东大会进行审议，并及时披露。此外，第 10.2.6 条对关联担保作出了相关规定，即上市公司为关联人或持股 5%以下的股东提供担保的，不论数额大小，均应当在董事会审议通过后及时披露，并提交股东大会审议，有关股东应当在股东大会上回避表决。

(三)总结

综上所述，上市公司对外提供担保需要对相关事项进行公开披露，而债权人接受上市公司提供的担保时，应当对公司章程、两会决议、出席人员、决议内容等内容进行审查，以此达到“善意”的标准。例如在（2019）沪 02 民终 5939 号案以及（2019）沪民终 274 号案中，法院认为上市公司的章程是公开渠道公布的，因此应推定债权人知晓。另，在（2019）粤 01 民终 17577 号案中，法院明确表示，有限公司的章程可以在工商登记备案资料中查询，因此，债权人应当能够对章程进行审查。债权人在与上市公司订立担保合同时，应当尽合理谨慎之义务对该上市公司公开披露的内容进行审查，以此确保担保合同的有效性。

六、 结论及相关建议

(一)结论

《九民纪要》的发布对担保合同效力问题作出了更加明确的规定。其中，公司未经董事会或股东（大）会决议通过即对外提供担保的，如果债权人可举证证明其在订立担保合同时尽到了相应的形式审查义务，且对公司法定代表人越权代表的情况不知情，那么此时应认定该债权人是善意的，此担保合同有效。另，需要注意关联担保和非关联担保的情况下，判断债权人是否善意的标准不同。此外，若存在《九民纪要》第 19 条所列的无须机关决议的四种例外情况存在，即使没有机关决议，该担保合同有效。针对上市公司对外提供担保的情况，《九民纪要》结合证交所制定的相应的股票交易规则，作出了明确规定，即债权人依赖上市公司披露的董事会和股东会决议通过的内容，订立担保合同的，担保合同有效。对于跨境担保合同的效力问题，《管理规定》则明确了登记备案不是该类合同的生效要件。其次，独立保函的效力问题与保函的开立人相关，若该保函是由银行或非银行金融机构开

（六）本所或者公司章程规定的其他担保。
对于董事会权限范围内的担保事项，除应当经全体董事的过半数通过外，还应当经出席董事会会议的三分之二以上董事同意；前款第（四）项担保，应当经出席会议的股东所持表决权的三分之二以上通过”。

立的且符合法律规定，那么该保函用于国际和国内商事交易均有效。但是，非上述主体开立独立保函或该担保中存在独立性条款，那么中国法下，此类独立保函或独立性条款无效，担保人仍应与债务人承担连带责任。

(二)建议

为保证债权人能取得一份有效、可执行的担保，我们提出如下几点建议：

1. 债权人在接受公司提供的担保时，应当对以下文件的相关内容进行审查：

1) 公司章程，以此确定决议机关；
2) 公司股东名册及实际控制人等；
3) 公司机关对公司担保作出的决议；
4) 若公司为关联方提供担保，那么债权人应当更加谨慎审查相关公司签章、董事、股东签字等；
5) 若提供担保的公司为上市公司，谨慎起见，债权人可积极主动地要求该上市公司提供其公开披露关于担保事项已经由董事会或股东大会决议通过的信息，此外债权人也可通过查询工商登记备案资料等方式，获取该上市公司的章程等披露内容。

2. 跨境担保：

1) 债权人在订立担保合同时，首先需注意识别担保合同的种类，内保外贷、外保内贷，还是其它类型的担保；
2) 对于按照《管理规定》的要求需要登记、备案的跨境担保，债权人应要求担保人保证在出具担保之后指定期限内完成登记、备案并提供相应的证明。

3. 若债权人所接受的公司担保未经过公司机关决议

1) 债权人可以判断担保是否属于《九民纪要》中的四种例外情形，来确定担保合同的有效性；或
2) 债权人可以要求公司补交机关决议。

4. 风险排查

需要注意的是，《九民纪要》对于人民法院尚未审结的一审、二审案件具有

溯及力。为保障其权益，债权人应当积极根据《九民纪要》的要求做好风险排查，并做好相应的补救工作，如要求公司补交机关决议等。

Whether A Defective Passage Plan or Working Chart Will Make A Vessel Unseaworthy?

—The CMA CGM LIBRA[77]

The owners (hereinafter referred as "the Owner") of the vessel CMA CGM LIBRA （hereinafter referred as "the Vessel"） appealed against the Order of the Admiralty Judge Teare J (hereinafter referred as "the Judge") dated 8 March 2019 ([2019] EWHC 481(Admiralty)) (hereinafter referred as the "first instance") before England and Wales Court of Appeal. The case (hereinafter referred to as "the Case") is focused on issue of the scope of the Owner's obligation to make the Vessel seaworthy before and at the beginning of the voyage under the Hague/Hague Visby Rules, namely if the passage plan and working chart of the Vessel didn't contain a warning of a Notice to Mariners, whether the defect may render the vessel unseaworthy.

Recently, the Court of Appeal made a judgement on this case which dismissed the appeal of the Owner. Both the courts of the first and the second instance held that a defective passage plan or a defective chart may render a vessel unseaworthy, and restated that the obligation of seaworthiness of the Owner was non-delegable, so even if the preparation of the Vessel was accomplished by the master and crew, the liability of unseaworthiness of the Vessel should be borne by the Owner.

[77] 【2020】EWCA Civ 293

1. Factual Background

On 18 May 2011, while leaving the port of Xiamen in China, the Vessel parted from the passage plan and navigated outside the buoyed fairway and then grounded. During the judgement, it was known that the second paragraph of the Notice of Mariners 6274 (P) /10 (hereinafter referred to as "the Notice") contained a warning that "numerous sites exist within and in the approaches to Xiamen Port, the water depths of which is less than that charted (hereinafter referred to as "the Warning"). But the second officer of the Vessel who prepared the chart and passage plan didn't mark the Warning on the chart and in the passage plan. The judge of the first instance Mr. Justice Teare held that the master's decision to part from the passage plan and navigated outside the buoyed fairway was negligent, but there could only be actionable fault if the grounding was caused by a failure by the Owner to exercise due diligence to make the Vessel seaworthy. Teare J further held that the focus at trial is whether the passage plan had been defective and, if so, whether its defectives were causative of the grounding and, if they were, whether the Owner had failed to exercise due diligence to make the Vessel seaworthy.

2. The judgement of the first instance

Teare J held that, as stated in the *Guidelines for Voyage Planning* adopted by IMO in 1999, the passage plan should include "all areas of danger". Having considered the expert and other evidence, Teare J concluded that "whilst it would of course be prudent to note the Warning in the passage plan it would also be necessary to mark the Warning on the chart since that is the primary document to which the officer navigating the Vessel would refer when making navigational decisions in the course of the outward passage". Whilst the chart had been updated with a note placed on the fairway between buoys 15 and 18 advising the mariner to "see" the Notice, Teare J said that the note did not in terms remind the mariner of the Warning

that charted depths outside the buoyed fairway may be unreliable. Teare J further held that the chart should be noted with "depths less than charted exist outside the fairway" at least.

On the nature of the passage plan, Teare J accepted that, as the Owner submitted, passage planning was "the preparation" for safe navigation but said that it did not follow that it was not an aspect of seaworthiness. Seaworthiness extended to having the appropriate documentation on board including the appropriate chart.

Teare J didn't reject the Owner's submission that production of a defective passage plan was an error of navigation and that it did not matter that it occurred prior to the commencement of the voyage.

As to the point of view contained in in *The Apostolis* [1997] 2 Lloyd's Rep 241 that "for a ship to be unseaworthy, or more strictly uncargoworthy, there must be some attribute of the ship itself which threatens the safety of the cargo", Teare J held that the if the chart of a vessel is not up to date or the passage plan of the vessel is defective, these are attributes of the vessel which can render the vessel unseaworthy. If a vessel carries a chart which the second officer has failed to up to date or carries a passage plan which is defective because it lakes a required warning of "no go" areas, then those are two aspects of the vessel which are cable of rendering the vessel unseaworthy at the beginning of the voyage.

As to whether a defective pass plan may render the Vessel unseaworthy, Teare J rejected the Owner's argument that the defect of the passage plan was one-off which could not amount to unseaworthiness, saying that this confused the issue of seaworthiness with the issue of due diligence which is a non-delegable duty. Teare J also noted that the defect was probably not "one-off" as the same defect in the passage plan was probably present at the time of the previous voyage in March 2011.

In relation to the Owner's point that there was no previous case where it

had been held that a defective passage plan rendered the vessel unseaworthy, Teare J held that the standard of seaworthiness may rise with improved knowledge of shipbuilding so may the standard of seaworthiness rise with improved knowledge of the documents required to be prepared prior to a voyage to ensure, so far as reasonably possible, that the vessel is safely navigated. Before the need for passage planning to be adopted by "all ships engaged on international voyages" was recognized, it may have been the case that a prudent owner would not have insisted upon the preparation of an adequate passage plan from berth to berth. But Teare J was confident that by 2011 the prudent owner would have insisted on such a passage plan before the voyage was commenced. The Vessel was, in Teare J's judgement, unseaworthy at the beginning of the voyage.

On the issue of causation, Teare J concluded that the defect in the passage plan was causative of the master's decision to navigate outside the buoyed channel and thus the grounding. Citing Article III rule 1 and IV rule 1 of Hague Rules, Teare J held that the carrier's duty of due diligence was a non-delegable personal duty. He then referred a number of cases where the carrier had been held to have failed to exercise due diligence because failures by the master or chief engineer before the commencement of the voyage. In this case, the Cargo Interests contended that the negligence of the master and second officer in preparing the passage plan before the commencement of the voyage amounted to a failure by the Owner to exercise due diligence to make the Vessel seaworthy.

In the part of conclusion of Teare J's judgement, he concluded that the Vessel was unseaworthy before and at the beginning of the voyage from Xiamen because it carried a defective passage plan. That defective passage plan was causative of the grounding of the Vessel. Due diligence to make the Vessel seaworthy was not exercised by the Owner because the master and second officer failed to exercise

reasonable skill and care when preparing the passage plan. It follows that the grounding of the Vessel was caused by the actionable fault of the Owner.

3. The grounds of appeal

The Owner advanced grounds of appeal as follows:

1) The judge wrongly held that a one-off defective passage plan rendered the Vessel unseaworthy for the purpose of Article III rule 1 of the Hague Rules and, in particular, failed properly to distinguish between matters of navigation and aspects of unseaworthiness.
2) The judge wrongly held that the actions of the Vessel's master and crew which were carried out in the capacity of navigator could be treated as attempted performance by the carrier of its duty in the capacity of carrier to exercise due diligence to make the Vessel seaworthy under Article III rule 1 of the Hague Rules.

4. Both parties' submissions

1) The Owner's submissions

The Owner submitted that passage planning constituted a navigational decision, notwithstanding that it took place whist the vessel was at the berth or before the voyage begin, relying in that context on what Lord Hobhouse said in *The Hill Harmony* at 537:"The character of the decision cannot be determined by where the decision is made. A master, whilst his vessel is still at the berth, may, on the one hand, decide whether he needs the assistance of a tug to execute a manoeuvre while leaving or whether the vessel's draft will permit safe departure on a certain state of the tide and, on the other hand, what ocean route is consistent with the utmost dispatch. The former come within the exception [of "act, neglect or default of the master…in the navigation or the management of the ship"]; the latter does not. Where the decision is made does not alter either conclusion.

In addition, the Owner submitted that placing the Warning on the chart or in the passage plan was an act of

navigation and that an error in navigation of this kind did not render the Vessel unseaworthy. The Owner submitted, on the basis of the decisions in *The Aquacharm* [1982] 1 WLR 119 and *The Aposolis* [1997] 2 Lloyd's Rep 241, that seaworthiness was concerned with the attributes or inherent or intrinsic qualities of the vessel, which comprised the vessel herself, her crew and equipment. The passage plan and working chart were not attributes of the vessel but the recording of navigational decisions. It was incumbent on the owner to have on board everything necessary for the crew to carry out proper passage planning, such as competent crew, up to date charts and proper systems and instructions. However, the use which the crew then made of it went to navigation or seamanship. There was a fundamental distinction between having everything necessary on board, which was part of the Owner's responsibility to make the vessel seaworthy and the actual navigation by the crew where any failure would be excepted by Article IV rule 2(a) of Hague Rules.

The Owner also alleged that updating a chart was a mechanical exercise of writing on the chart updates in notices to mariners or tracing updates onto the chart. In contract, any decision as to whether or not to write a warning on the chart or place a hatched area involved an exercise of judgment and seamanship, which was part of passage planning and thus an act of navigation. Whilst it was inherently likely that an error in management before or at the beginning of the voyage would affect an attribute of the vessel, it was inherently unlikely that an error in navigation would do so. There was no English case before the present decision where an error in navigation had been held to render the vessel unseaworthy.

Besides, the Owner also submitted that the judge had only found that the defect in the working chart but had not found that this was a failure to update or correct it. Had he intended to make such a finding, it would have been a much easier and straightforward route to finding unseaworthiness.

2) The Cargo Interests' submissions

The Cargo Interests emphasized the findings of facts on unseaworthiness in the first instance and submitted that the effect of those findings is that the working chart was defective because it did not contain any warning about the charted depths outside the fairway. Even if, which the Cargo Interests did not accept, the conventional test of unseaworthiness required the defect alleged to be an attribute of the vessel, a defective chart was clearly an attribute of the vessel.

He submitted that the same negligent act or omission which, during the voyage, would fall within one of the exceptions in Article IV rule 2 of Hague Rules; before the voyage, would render the vessel unseaworthy. It was an overriding obligation of the Owner to make the vessel seaworthy which could subject to the exceptions in Article IV rule 2 of Hague Rules.

Besides, the Cargo Interests insisted that there are no conceptual limits to the types of defect which can constitute unseaworthiness. He also submitted that an error of navigation could not make the vessel unseaworthy was simply wrong as a matter of law. Meanwhile, there were many cases where errors in the exercise of skill and judgment, not just "mechanical" tasks could cause unseaworthiness. All those cases also demonstrated that it was not just systemic failing but one-off instances of negligence which could constitute unseaworthiness.

What's more, the Cargo Interests submitted that it was well established that failure to have necessary documents on board for the safe physical or legal prosecution of the voyage could constitute unseaworthiness. This included navigational documents such as charts. In that context, he relied upon the *obiter* statement by Kerr LJ in *The Derby* [1985] 2 Lloyd's Rep 325 at 331.

In relation to the second ground of appeal, the Cargo Interests submitted that it was misconceived. The law

was clear that, if there is a defect which renders the vessel unseaworthy, the owners are liable for a failure to exercise due diligence on the part of anyone to whom they have delegated or entrusted the task of making the vessel seaworthy. The duty under Article III rule 1 is a non-delegable duty.

5. Judgments of Court of Appeal

1) Lord Justice Flaux:

Flaux LJ held that there are a number of fallacies in the case advanced on behalf of the Owners on the appeal, the principal of which is the contention that, because the preparation of a passage plan can be said to be an act of navigation involving an exercise of judgment and seamanship, it falls within the exception in Article IV rule 2(a) and a defect in the plan cannot constitute unseaworthiness. It has been established, at least since *Dobell v Passmore* [1895] 2 QB 408, that a vessel may be rendered unseaworthy by negligence in the navigation or management of the vessel and, as *Maxine Footwear* established, the obligation to exercise due diligence to make the vessel seaworthy is an overriding obligation, to which none of the exceptions in Article IV rule 2 is a defence.

Furthermore, whilst negligent management of the vessel before the commencement of the voyage can render the vessel unseaworthy, negligent navigation cannot, is wrong both in principle and on authority. There is no principled basis for concluding that a defect caused by navigational error by the master or crew before or at the commencement of the voyage cannot render the vessel unseaworthy.

A further fallacy in the case advanced on behalf of the Owners is the distinction between mechanical acts of the master and crews which render the vessel unseaworthy and acts of master and crew which require judgment and seamanship which would not render the vessel unseaworthy. As the Cargo Interests submitted, there are any number of cases where it has been decided that

the acts of those for whom the owners are responsible, which have rendered the vessel unseaworthy, have involved the exercise of judgment and seamanship.

Ultimately, however, it is not necessary to resolve this particular dispute as to whether the alleged defect must affect or relate to an attribute of the vessel. This is because that an uncorrected chart which is not up-to-date and a passage plan which is defective because it does not contain a warning of no-go areas are both aspects of the vessel's documentation which are capable of rendering the vessel unseaworthy. Although the Owners relied upon a number of authorities in support of their submission that negligent passage planning cannot constitute unseaworthiness, none of those cases is of any assistance to them.

The Owner argued that because the defect in the passage plan was "one off", it could not amount to unseaworthiness. As the Cargo Interests pointed out, it is well-established that both one-off instances of negligence and systematic failing can cause unseaworthiness. Furthermore, as the judge of the first instance, the defect in the passage was probably not one-off because it was present at the time of the earlier March 2011 voyage.

In conclusion on the first ground of appeal, the judge was right to find that the defect in the passage plan (which included the working chart), that it did not contain the warning about the unreliability of charted depths outside the fairway rendered the vessel unseaworthy. it is necessarily implicit in the judge's reasoning that he considered that working chart had not been appropriately corrected or updated to contain that warning and that this constituted a defect in the chart, which was an attribute of the vessel. Even if that analysis were wrong, according to the Cargo Interests' submissions, the working chart was defective because it did not contain the warning and that defect, which was an attribute of the vessel, rendered her unseaworthy.

The second ground of appeal, which seeks to draw a distinction between acts of the master and crew *qua* carrier (for which the Owners are responsible) and their acts *qua* navigator (for which the Owners are not responsible) is misconceived. Once the Owners assumed responsibility for the cargo as carriers, all that acts of the master and crew in preparing the vessel for the voyage are performed *qua* carrier, even if they are acts of navigation before and at the commencement of the voyage. The Owners are responsible for all such acts as a consequence of the non-delegable duty.

To sum up, Falux LJ did not upheld the Owner's submissions and stated that the appeal must be dismissed.

2) Lord Justice Males:

Males LJ agreed with Flaux LJ's statements and added a supplementary judgment.

Males LJ found that it was necessary as a matter of prudent passage planning that this warning should be marked on the chart, as this would be the primary document to which the officer navigating the vessel would refer when making navigational decisions in the course of the outward passage. However, this was not done. Applying the traditional test, the judge held that, as a result of this failure, the vessel was unseaworthy at the commencement of the voyage. Equally, the presence on board of the appropriate chart, with corrections notified in Notices to Mariners properly marked, was also an aspect of seaworthiness. As the judge of the first instance held:

> *"…A proper passage plan is now, like an up to date and properly corrected chart, a document which is required at the beginning of the voyage. If a vessel carriers a chart which the second officer has failed to correct to ensure that it is up to date or carriers a passage plan which is defective because it lacks a required warning of no-go areas then those are two aspects of the vessel's documentation which are capable of rendering the vessel unseaworthy at the beginning of the voyage."*

Moreover, the judge found that the failure to mark the warning on the chart was the cause of the grounding. If it had been marked, the master would not have attempted the manoeuvre that he did and would have remained on the fairway.

As for the seaworthiness, Males LJ does not think it matters whether this is viewed as a case of a defective chart or a defective passage plan. Either way, at the commencement of the voyage, the failure to mark the warning on the chart meant that it was not safe for the vessel to proceed to sea. The Owner accepted, inevitably, that charts which are not up to date will render a vessel unseaworthy, but submitted that updating a chart is a purely mechanical exercise which consists of nothing more than following precise instructions contained in a Notice to Mariners which leave no room for any exercise of judgment as to precisely how the chart should be marked. Thus, on the facts of the present case, even if prudence required that the warning about unreliable depths outside the fairway should be marked on the chart, the Notice to Mariners did not contain an instruction that this should be done, let alone specify exactly how it should be done. Accordingly, as a prudent Owner, he would not accept the chart in the form in which it was at the beginning of the voyage was up to date, and anything remaining was merely a matter of navigation.

As for the passage plan, Males LJ stated that the Guidelines for Voyage Planning adopted by IMO Resolution provided that passage planning was "of essential importance for safety of life at sea, safety and efficiency of navigation and protection of the marine environment". It is clear, therefore, that a properly prepared passage plan is an essential document which the vessel must carry at the beginning of any voyage. There is no reason why the absence of such a document should not render a vessel unseaworthy.

As for the due diligence, in Males LJ's views, it is well established that the duty to exercise due diligence under Article III rule 1 of the Hague and

Hague-Visby Rules is non-delegable. This means that the shipowner will be liable for a failure of due diligence by whomever the relevant work of making the vessel seaworthy may be done. However, in accordance with the Owner's submission, the principle of non-delegability only applied to work performed by the master and officer's "*qua carrier*" and not "*qua navigators*" and that a failure of navigation by the master or officer was "outside the orbit" of the shipowner's responsibility.

3) Lord Justice Hoddon-Cave:

Lord Justice Haddon-Cave agreed that the appeal must be dismissed for the reasons given by Flaux LJ and Males LJ and held that Article III rule 1 of the Hague Rules divided the allocation of risk for maritime cargo adventures into two separate regimes. The first regime imposes a non-delegable duty on carriers to exercise due diligence to make the ship seaworthy "*before and at the beginning of the voyage*". The second regime excuses carriers from liability for loss or damage caused by errors of crew or servants "in the navigation or in the management of the ship. Clearly, the Owner's submissions seek to elide these two separate regimes and are heterodox.

6. Conclusions and Suggestions:

1) A defective passage plan or working chart caused by the shipowner's failure of exercising due diligence may make the vessel unseaworthy before and at the beginning of the voyage;
2) It is an overriding obligation of shipowners to make the vessel seaworthy. Meanwhile, such a duty is non-delegable, which means even if the acts of preparing the vessel for the voyage are performed by others (e.g. the master and crew), the Owners are responsible for all such acts as a consequence of the non-delegable duty. In addition, the Owner cannot escape the liability according to relative exception clauses;
3) There is no settled scope of seaworthy, in other words, any defect which is caused by the

shipowner will render the vessel unseaworthy, therefore, the shipowner shall be more prudent while making the vessel seaworthy.

有缺陷的航次计划或海图能否导致船舶不适航？

——以 *the CMA CGM LIBRA* 案为例[78]

“CMA CGM LIBRA”轮（以下简称“船舶”）船东（以下简称“船东”）就 Teare J 法官（以下简称“一审法官”）做出的[2019]EWHC 481（Admlty）（以下简称“一审判决”）在英国上诉法院对货方提起上诉。本案的争议焦点为《海牙规则》/《海牙-维斯比规则》中规定的开航前和开航当时船东适航义务的范围，即若航次计划和常用海图均未记载航海通告中的警示，这种缺陷是否导致船舶不适航。

近期英国上诉法院对该案做出判决，驳回了船东的上诉请求。两审法院在判决中均认为，有缺陷的航次计划或海图可能导致船舶不适航，并且重申适航义务是船东不可转委托的首要义务，即使准备船舶的工作由船长、船员完成，船舶不适航的责任仍由船东承担。

一、 案件背景

2011 年 5 月 18 日，在离开厦门港时，船舶在航行中偏离航次计划驶出了航道并发生搁浅。经查明，2010 年 12 月签发的 NM6274（P）/10 航海公告第 2 段通知船员，在通往厦门港的航线上多处位置的实际水深浅于海图标记水深，但船舶船员并未将航海通告警示的内容标记在海图和航次计划中。一审法官认为船长偏离航次计划、驶出航道的行为存在过失，但仅在搁浅是由于船东未履行其谨慎处理使船舶适航的义务导致的情况下，船东才应当承担责任。一审法官认为，案件焦点为航次计划是否存在缺陷；如果是的话，船舶搁浅是否由航次计划的缺陷导致；如果是的话，船东是否做到了谨慎处理使船舶适航。

二、 一审判决

一审法官认为，根据国际海事组织 1999 年发布的《航次计划指南》的规定，航次计划中应当包含“所有的危险区域”（“all areas of danger”）。结合专家证据以及其它证据，谨慎起见，应当在航次计划中标注航海通告的内容，并且有必要将内容标注在海图上，因为海图是高级船员在航行中做出航行

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决定首要参考的文件。虽然船舶二副已经在常用海图的 15 号和 18 号浮标之间标注了“请见 NM6274 (P) /10 号航海通告”，但这种标注并没有起到提醒船员航海通告中关于海图中标记的航道之外的水深不可信的警示作用。一审法官认为，在海图中至少应当标注“航道外水深浅于海图标注水深”(“depths less than chartered existed outside the fairway”)。

关于航次计划的性质，一审法官接受了船东主张的航次计划是安全航行的准备工作的观点，但一审法官认为这不代表航次计划不是船舶适航的一部分。船舶适航包括船舶上有适当的文件，包括适当的海图。适当的海图也是船舶适航的一部分。

一审法官未支持船东主张的，航次计划的缺陷属于航海过失，即使航次计划的缺陷出现在开航前的观点。

关于 *The Apostolis* [1997] 2 Lloyd's Rep 241 案中提到的“对于一艘不适航的船舶，或者更确切来说是不适货的船舶，必定有某个或者某些船舶自身属性威胁了货物安全”的观点，一审法官认为，未更新的海图和有缺陷的航次计划都是能够导致船舶不适航的船舶属性。船舶配备二副未更新的海图或者配备有缺陷、未标记不可航行区域的航次计划，这是可能导致船舶在开航时不适航的两个原因。

关于航次计划的缺陷能否导致船舶不适航，船东在一审中主张，航次计划的缺陷是“偶然”的，这种缺陷不能算作不适航。一审法官驳回了船东的该主张，认为这种主张混淆了不适航问题和谨慎处理问题。一审法官还认为，这种缺陷并不是偶然的，航次计划的缺陷可能在 2011 年 3 月的航次中已经出现过了。

就船东在一审中提出的没有先例证明有缺陷的航次计划会导致船舶不适航的问题，一审法官认为，船舶的适航标准可能会随着人们对造船的认知的提升而提升，同样的，船舶的适航标准也可能随着人们对开航前为尽可能保证船舶适航所需准备的文件的认知的提升而提升。在所有国际航行的船舶必须使用航次计划的需求被承认之前，可能会出现即使是谨慎的船东也不准备航次计划的情况，但一审法官确信，至 2011 年，谨慎船东都会在开航前准备航次计划，因此一审法官认为涉案船舶是不适航的。

关于因果关系问题，一审法官认为，航次计划的缺陷导致了船长决定偏离浮

标并进而造成船舶搁浅。法官引用了《海牙规则》第三条第一款和第四条第一款的规定，认为船东谨慎处理使船舶适航的义务是不可转委托的，许多案例中，即使是船长或者轮机长在开航前的一些过错也会导致船东被判定为未谨慎处理。本案中，货方主张，船长和二副的开航前准备航次计划的过失应被认定为船东未尽到谨慎处理使船舶适航的义务。

一审法官在一审判决结论部分认为，因配备有缺陷的航次计划，船舶在开航前和开航当时不适航，并且有缺陷的航次计划是导致船舶发生搁浅的原因；船长和二副在准备航次计划时未行使合理的技能和注意，导致船东未尽到谨慎处理使船舶适航的义务，并最终造成船舶搁浅，货方有权拒绝承担共同海损分摊的责任。

三、 上诉理由

船东提出两条上诉理由：

(一)一审法官错误地认为航次计划偶然的缺陷导致了《海牙规则》第三条第一款中的船舶不适航，特别是，一审法官没有正确区分航海过失和不适航问题。

(二)一审法官错误地认为船长和船员以海员身份实施的行为可被视为《海牙规则》要求的船东以承运人身份实施的谨慎处理以使船舶适航的行为。

四、 双方抗辩意见

(一)船东抗辩意见

船东认为，准备航次计划是一种航海行为，尽管该行为发生在船舶停靠在港口之时或者开航前。船东以 Lord Hobhouse 在 *The Hill Harmony* 的观点支持自己的主张：一个决定的性质不能以该行为在何处做出而判断。当船舶仍停留在泊位之时，一方面，船长可能决定是否需要拖船为船舶离开泊位的操作提供协助，或者决定船舶吃水是否允许船舶在特定潮汐状态下离港；另一方面，决定何种航行路线与船东履行其合理速遣义务相符合。前面提到的行为是可以以航海过失为由免责的行为，后面的行为不可以以航海过失为由免责。

船东主张将航海通告中的警示内容添加在海图上或者航次计划中是一种航海行为，航海过失不会导致船舶不适航。船东主张，根据 *The Aquacharm* [1982] 1 WLR 119 和 *The Apostolis* [1997] 2 Lloyd's Rep 241 两个案件，适航与船舶的属性或者内在特性有关，

包括船舶本身、船舶配员和船舶设备。航次计划和常用海图不是船舶特性，仅是航行决策的记录。船东有义务在船上为船员准备实施航次计划所需的一切必备物资，比如适格的船员、已更新的海图和适当的系统以及指示等。但是船员对这些物资的使用是航海问题或者船艺问题。船东在船上准备一切必要物资（这是船东适航责任的一部分）和船员的实际航海行为之间是有区别的，船东对船员的航海过失免责。

船东主张，更新海图是一种为海员在海图上填写航海通告中的更新信息的机械性行为。与此对照，任何关于是否在海图上填写航行警示或者增加阴影区域的决定都涉及到做出判断或者行使船艺，这些行为是航次计划的一部分，因此也是一种航海行为。尽管存在开航前或者开航当时的管理缺陷影响船舶属性的潜在可能，但航海过失不会影响船舶属性。没有英国判例认为航海过失会导致船舶不适航。

船东还认为，一审法官仅判定常用海图存在缺陷，但未判定船东未做到谨慎处理。如果可以判定船东未谨慎处理，则可以直接判定船舶不适航。

(二)货方抗辩意见

货方在抗辩中强调了一审判决中关于不适航的一些事实。货方认为，这些事实表明常用海图存在缺陷，因为海图中未包含关于航道外标记深度的警示。即使不适航的条件之一是船舶属性存在缺陷（货方不赞同该观点），有缺陷的海图也是一种船舶属性。

货方认为，同样的疏忽行为或者疏漏，如果发生在航程中，即可适用《海牙规则》第四条第 2 款的规定免责；如果发生在开航前，则会导致船舶不适航。适航义务是船东的首要义务，船舶不适航不可以依据《海牙规则》第四条第 2 款的规定免责。

货方认为，可以构成不适航的缺陷的类型并没有概念上的限制。船东主张的航海过失不会导致船舶不适航在法律上是错误的，并且行使技能和判断的过错（这些行为并不是机械性的）也能导致船舶不适航，货方针对这些主张举出了相关的案例，这些案例也能表明不仅系统性的过错，偶然的过错也能导致船舶不适航。

货方主张，已证明未能在船上配备航行必要的文件也会构成船舶不适航，这些文件包括海图。货方以 Kerr LJ 在 *The Derby* [1985] 2 Lloyd's Rep 325 at 331 中的主张支持其观点。

货方认为船东的第二个上诉理由是错误的。法律很明确，如果存在导致船舶不适航的缺陷，不论船东将使船舶适航的责任转委托给谁，船东都要承担船舶不适航的责任。《海牙规则》第三条第一款规定的适航责任是不可转委托的责任。

五、 二审法官意见

(一)Flaux 大法官的观点

Flaux LJ 认为，船东的主张存在很多谬误，其中最主要的是船东主张的，因准备航次计划的行为可以被视为涉及行使判断和船艺的航海行为，因此该行为可以根据《海牙规则》第四条第 2（a）款的规定免责，并且航次计划的缺陷不构成船舶不适航。已经证实（至少自 *Dobell v Passmore* [1895] 2 QB 408 案之后）航海过失或者管船过失能够导致船舶不适航，并且正如 *Maxine Footwear* 所证实的，船东谨慎处理使船舶适航的义务是船东的首要义务，违反适航义务的船东不能根据《海牙规则》第四条第二款的规定免责。

船东主张的尽管开航前的管船过失能够导致船舶不适航，航海过失不能导致船舶不适航的观点，不论根据法律原则还是判例进行判断，都是错误的。开航前或开航当时船长或船员的航海过失导致的缺陷不能导致船舶不适航的观点没有任何法理基础。

船东主张中的另一个谬误是将船长、船员可能导致船舶不适航的机械行为和船长、船员需要做出判断和行使船艺的不会导致船舶不适航的行为区别开来。正如货方所主张的，许多案例可以证明，船东应负责的人做出的导致船舶不适航的行为也会涉及行使判断和船艺。

法官认为没有必要确定缺陷是否会影响船舶属性或者是否与船舶属性有关。因为，未更新的错误的海图和未添加航海通告中的警示的航次计划都是可以被视为船舶属性并能够导致船舶不适航的缺陷。船东为证明航次计划的过失不会构成船舶不适航举出了很多的案例，但这些案例均不能支持其主张。

船东主张因航次计划的缺陷是偶然的，这种缺陷不能算作不适航。正如货方所指出，已证实不论偶然的过失还是系统性的过失，都能导致船舶不适航。并且，正如一审法官在一审判决中提及的，该航次计划的过失可能不是偶然性的过失，因为这种过失在 2011 年 3 月可能已经出现过。

关于第一个上诉意见的结论，一审法官认为航次计划（其中包括常用海图）的缺陷，即航次计划中未包含航海通告的警示内容，导致了船舶不适航。一审法官认为常用海图没有恰当地改正或更新，没有将航海通告的警示内容加入其中，这构成海图的缺陷，并且也是船舶的一个属性。即使这种分析错误，按照货方主张的内容，因未在常用海图中加入航海通告的警示内容，常用海图是有缺陷的，这种缺陷也是船舶属性之一，并且导致了船舶不适航。

关于船东的第二条上诉理由，船东试图将船长、船员以承运人身份实施的行为（船东应当对此行为负责）以及船长、船员以海员身份实施的行为（船东不对此行为负责）区分开来的的主张是错误的。一旦船东以承运人身份承担了货物责任，船长、船员开航前和开航当时准备船舶的所有行为都是以承运人身份实施的，即使这是一种开航前和开航当时的航海行为。船东对所有的这些行为承担责任，因为适航义务是船东不可转委托的义务。

综上所述，Flaux LJ 不支持船东提出的两条上诉理由，认为应当驳回船东的上诉。

(二)Males 大法官的的观点

Males LJ 同意 Flaux LJ 的意见，并进行了补充。

Males LJ 认为，谨慎的航次计划中加入航海通告的警示内容是必要的，因为航次计划是船员航海或者作出与航海相关的决定时参考的主要文件。但是船东未在航次计划中加入警示内容。根据传统的判断是否适航的方式，该船舶在开航时是不适航的。在船舶配备的海图中恰当标记航海通告通知的内容是船舶适航的一个方面。正如一审法官在一审判决中判定的内容：“正确的航次计划，正如更新并妥善修改后的海图，是船舶开航时所需的文件。如果二副未对船舶配备的海图进行修改以保证该海图是最新的，或者携带未标记不可航行区域的存在缺陷的航次计划，这是船舶文件可能导致船舶在开航时不适航的两个方面。”

并且，一审法官发现，未在海图上进行标记是导致船舶搁浅的原因。如果在海图上进行了标记，船长可能不会进行其已经进行的操作，并会停留在航道之内。

关于适航，Males LJ 认为，将缺陷视作海图的缺陷还是航次计划的缺陷无关紧要。不论是海图还是航次计划的缺陷，在开航时，未在海图上进行标记

的行为都意味着船舶在海上航行是不安全的。船东接受了未更新的海图导致了船舶不适航的主张，但是船东认为更新海图是一种纯机械性的行为，这种行为仅包括遵从航海通告中包含的指示，不存在任何就海图如何标记行使判断的空间。因此，在本案中，即使谨慎起见航海通告中的警示应当被标记在海图之上，但航海通告中不包含任何关于在海图上进行标记的指示，更不用说明确说明如何在海图上进行标记。相应的，船东认为开航时的海图已经是最新的了，剩余的所有事项都是航海事项。Males LJ 不赞同船东的该主张。Males LJ 认为对海图进行修改或者更新的目的是保证船舶在获取最新的信息的前提下可以安全航行。如果谨慎船艺要求航海通告包含的信息应当被标记在海图上，则不能以航海通告未准确说明如何在海图上进行标记为由不进行标记。如果作为谨慎船东不会允许船舶在未对海图进行标记的情况下开航，那么配备未标记的海图的船舶就是不适航的。

关于航次计划，Males LJ 认为，IMO《航次计划指南》中写明航次计划“对于海上人命安全、航行安全和航行效率以及保护海洋环境至关重要”，恰当准备的航次计划是船舶在开航时必须配备的重要文件。没有任何理由可以将不配备妥善准备的航次计划的船舶视为是适航的船舶。

关于谨慎处理，Males LJ 认为，已证实《海牙规则》和《海牙-维斯比规则》中第三条第一款的谨慎处理的责任是不可转委托的。也就是说船东要对任何人所做的与船舶适航有关的工作承担责任。船东认为，不可转委托的原则仅适用于船长和船员以承运人身份所做的工作，而不适用于以海员身份所做的工作，并且船长、船员的航海过失不在船东应承担责任的范围之内。Males LJ 不支持船东的该主张。Males LJ 认为，在案例 *The Evje (No 2)*中，过错由船长造成，并且超出了船东的控制范围，但船东仍需要对船长未做到谨慎处理的过失承担责任。任何情况下，将保证船舶适航的工作内容区分为以承运人身份所做的工作和以海员身份从事的工作都是错误的。如果船舶不适航，不论是何人所为，都会产生威胁货物被安全运至目的地的风险。

(三)Hoddon-Cave 大法官的观点

Hoddon-Cave 大法官赞同 Flaux 和 Males 两位大法官驳回船东上诉的理由，并认为，《海牙规则》第三条第一款的内容表明，海上货物运输的风险分摊可以划分为两个独立的方面：第

一个方面是承运人在开航前和开航当时有谨慎处理使船舶适航的不可转委托的责任；第二个方面是航程中船员或者船东雇员的航海过失或者管理船舶的过失造成的损失或者损坏，承运人可以免责。船东试图混淆这两个方面是错误的。

六、 结论和建议

(一)开航前和开航当时，船东未谨慎处理导致船舶配备的航次计划或者海图存在缺陷的，会构成船舶不适航；

(二)船舶的适航义务是船东的首要义务，该义务不可转委托，即使谨慎处理使船舶适航的工作是由他人（如船长和船员）完成，船舶不适航的责任仍由船东承担，并且船东不可以根据免责条款免除其责任；

(三)船舶适航的内容没有固定的范围，任何因船东未谨慎处理导致未消除的船舶缺陷都可能会导致船舶不适航，因此船东在保障船舶适航方面应格外谨慎。