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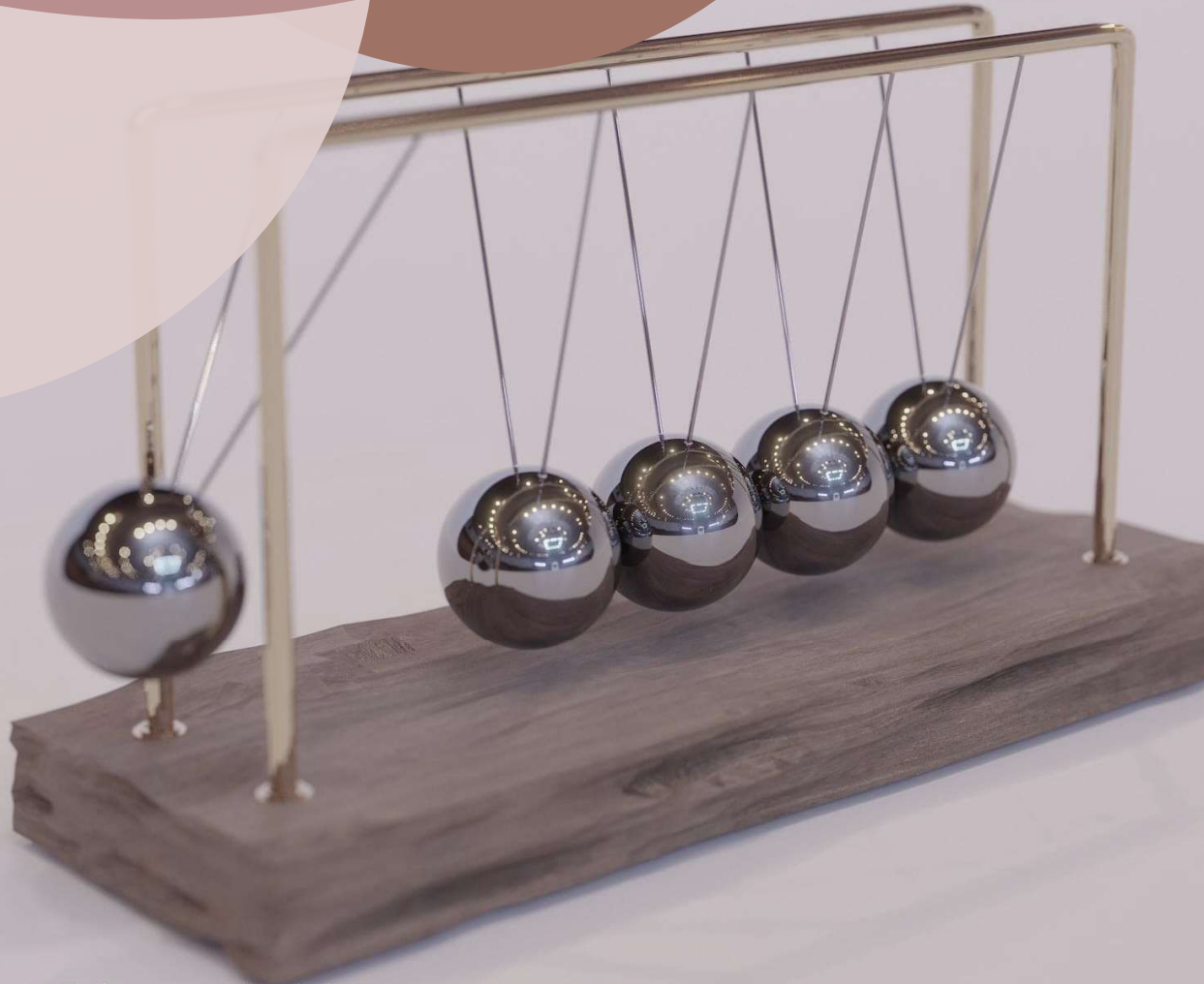
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Piracy Risk Off Guinea

CMH SPOTLIGHT

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Insurer's Liability Under Concurrent Causation: English Law And Chinese Law Regime +

Causation is a general principle of insurance law under which an insurer shall be liable for a loss proximately caused by a risk covered under an insurance policy.

However, there can be occasions where more than one causes concurrently leading to the loss. What if a loss is attributed to an insured risk and an uninsured risk, and what if an insured risk joins an excluded risk? English law and Chinese law gave different answers which are to be discussed in this article.

Concurrent Causation: Insured Risk And Excluded Risk

❖ English Law: Priority Of Exclusion

The Marine Insurance Act 1906 (MIA 1906) defines causation in both positive and negative ways in s55 (1) that “unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.”

MIA 1906 does not contain provisions regarding concurrent causation, and question of insurer’s liability under concurrent causation is left to common law. According to the commonly accepted case authorities, if both the insured risk and the excluded risk are proximate causes, the excluded risk prevails over the insured risk; therefore, an insurer is not liable for a loss under such circumstance.

❖ Chinese Law: The Apportionment Approach

The statutes governing marine insurance contracts in China are mainly the Insurance Law of the PRC and the Maritime Code of the PRC, which affirm the insurer’s liability arising from insured perils. Chinese scholars interpreted that the concept of causation in Chinese law allows insurers to be free from policy liability if a loss is caused by uninsured perils or excluded perils.

Other than the statutes, the superior courts, particularly the Supreme People’s Court (SPC), formulate judicial interpretations on the specific application of law which play a role as quasi-legislation binding their lower courts. In 2015, the SPC promulgated the *Interpretations of the Supreme People’s Court on Several Issues Concerning the Application of The Insurance Law of the People’s Republic of China III (Insurance Law Interpretation III)*, in which “a principle of proportional causation” was introduced to allow the court to uphold an insurance claim by apportioning the insured peril part and the uninsured / excluded peril part based on the corresponding potency. Today, it is believed the Chinese courts have accepted this approach for both life and non-life insurance.

❖ Chinese Law: The Apportionment Approach (Cont'd)

In a *Wenzhou Hongda Marine Shipping Co Ltd v Sunshine Property & Casualty Insurance Co Ltd Wenzhou Central Branch case* (“*The Hong Da 158*” case), the insured vessel was overloaded with goods before commencement of voyage, and later came into contact with a bridge. Due to the combined effect of contact and overloading, the vessel sank and became a total loss. The H&M insurance policy of the vessel had expressly excluded loss caused by unseaworthiness such as overloading.

The appellate court is of the view that, unless otherwise agreed by parties, the excluded peril does not inevitably prevail over the insured peril when they are concurrent causes to the same loss. Therefore, both causes should be considered for determining insurer’s liability. The court exercised discretion to decide the potency of insured and excluded cause at 70/30, and the insurer was held to be liable for the 70% of the total loss of the vessel. SPC upheld the decision of the appellate court.

Concurrent Causation: Insured Risk And Uninsured Risk

❖ English Law: Whole Policy Liability To Insurer

Where there are two concurrent proximate causes, one being covered risk and the other one being uncovered but also not excluded, the common law rule is that the insurer is liable. This principle was stated in *Halsbury's Laws of England* and later confirmed by *JJ Llyod Instruments Ltd v Northern Star Insurance Co Ltd* (“*The Miss Jay Jay*” case).

In *The Miss Jay Jay* case, evidence proved that the loss would not have been sustained but for a combination of unseaworthiness due to design defects and an adverse sea. The marine policy in dispute contained no relevant exclusion relating to loss caused by unseaworthiness. The Court of Appeal found it was not the intention of the parties to the policy that the loss caused by the uninsured peril should be covered by the insurer or excluded from the policy. Therefore, the uninsured peril was a proximate cause as a matter of fact; it was not an issue relating to the insurer's liability as a matter of law. Based on the construction of the policy, the Court applied the principle in *Halsbury's Laws of England* to decide the insurer should bear whole policy liability.

❖ Chinese Law: The Apportionment Approach

Same as the scenario of insured peril and excluded peril as concurrent causes, the Chinese courts have applied the apportionment approach in their judicial practice on insurer's liability where a loss is concurrently caused by an insured peril and an uninsured peril. This approach was adopted by SPC in the case *Qu Rongmo v China Continent Property & Casualty Insurance Co Ltd Weihai Branch & Shidao Branch* (“*The Lu Rong Yu 1813 & The Lu Rong Yu 1814*” case).

❖ Chinese Law: The Apportionment Approach (Cont'd)

In *The Lu Rong Yu 1813 & The Lu Rong Yu 1814* case, the two fishing vessels stranded and were lost due to three concurrent proximate causes: 1) heavy weather, 2) crew negligence, and 3) insufficient manning as a result of Owners' negligence.

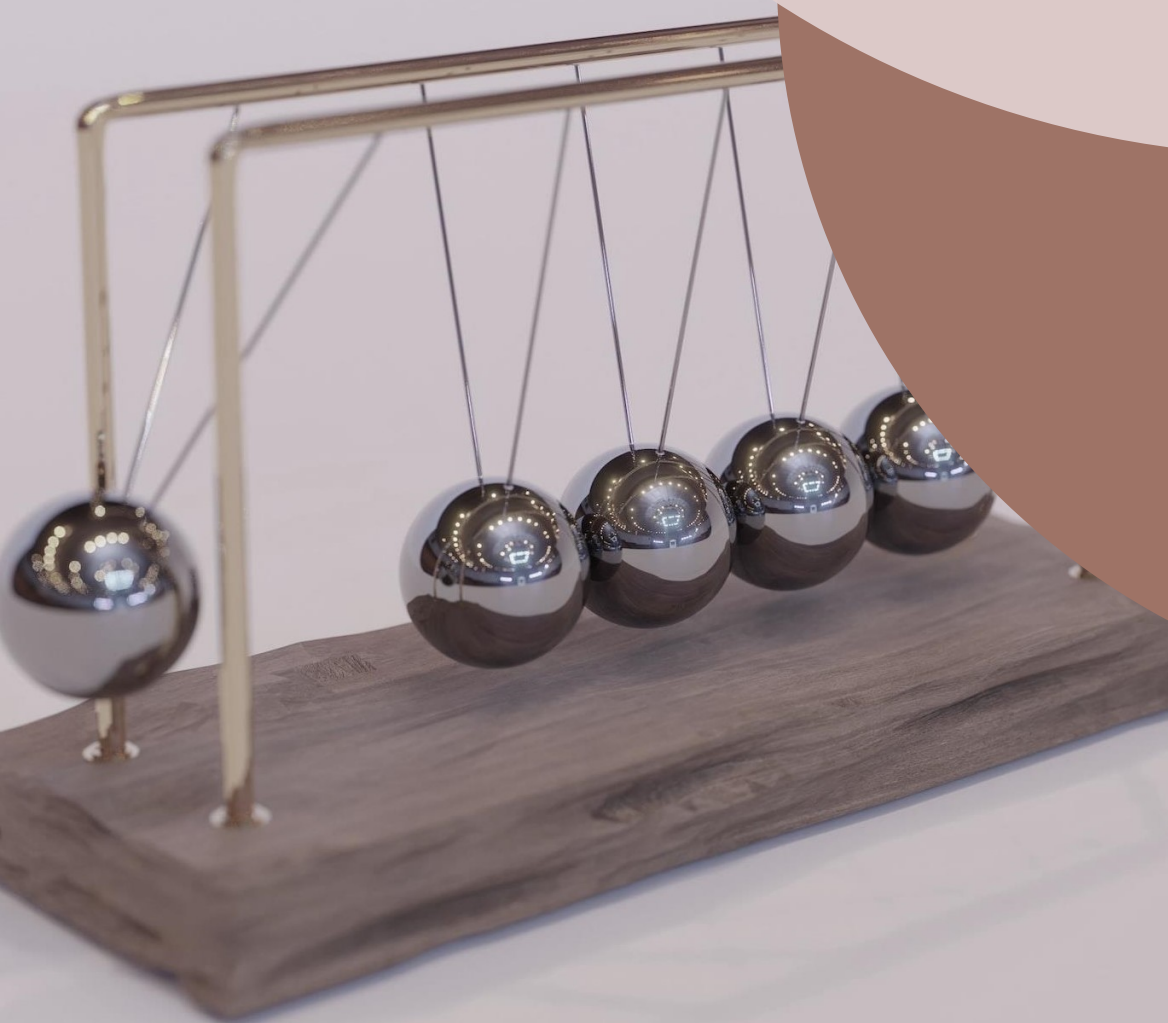
The marine policy covers the first two perils and excluded Owners' negligence. However, according to Insurance Law of the PRC, the insurer is obliged to point out all the exclusion clauses and explain expressly to the policy holder in writing or verbally, failing which the exclusion clauses will be void. It was found the insurer did not explain the exclusion of Owners' negligence to the assured, hence the relevant exclusion clause became null and Owners' negligence was deemed as an uninsured risk.

SPC took into account the uninsured peril when ascertaining the insurer's liability. It was believed that the heavy weather was the main proximate cause which had a direct and significant potency on the loss of the vessels, while the negligence of crew and Owners exerted limited potency. Ultimately the insurer was held to be liable for 75% of the loss.

Although without the statutory basis, the SPC pointed out the apportionment discretion is mainly in consideration of:-

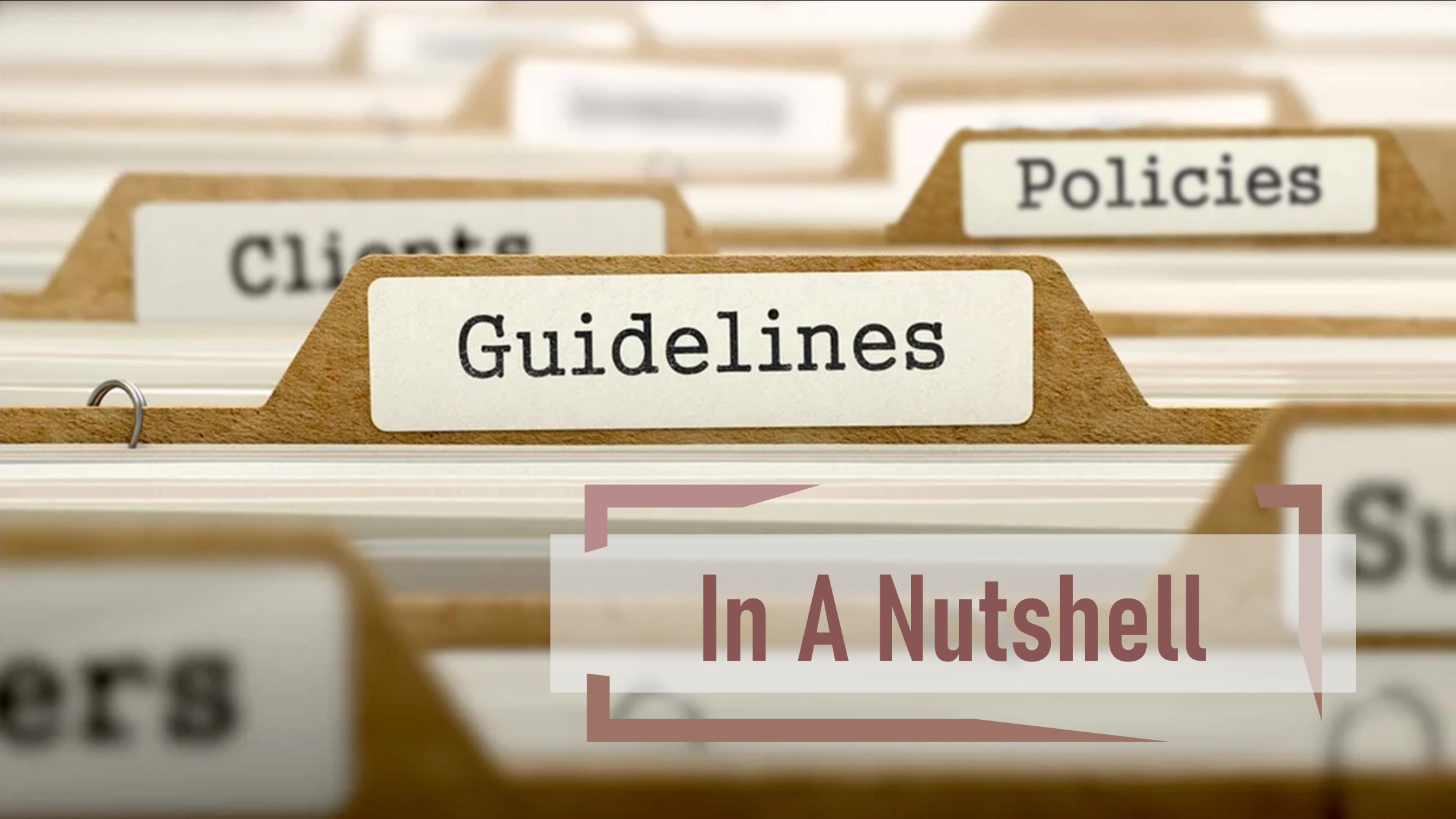
- Identification of the causes of the accident;
- The scope of insurance coverage;
- Exclusions of insurance liability and the degree of potency from insured risks.

Insurer's Liability Under Concurrent Causation: English Law And Chinese Law Regime



❖ Comments

- Unless specifically agreed in insurance contracts, where the concurrent causation includes both insured peril and excluded peril, Chinese law is more lenient than the “all or nothing” approach of English law.
- If the insurance contract (especially policies with listed perils instead of “all risk”) is governed by Chinese law and jurisdiction, it is important to draft the insurance contract carefully and agree on a solution of concurrent causation, if the insured does not want to apply the apportionment approach in cases caused by insured peril and uninsured peril.
- The same subject matter may be insured in the Chinese market governed by Chinese law, and in the meantime reinsured in the international market governed by English law. The different regime may cause different claim handling results although the reinsurance contract is based on back-to-back cover of the insurance contract.



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In A Nutshell

Case Reading - Performance Assessment Methods Re-evaluated

Case reading of (Eastern Pacific Chartering Inc -v- Pola Maritime Ltd [2022] EWHC 2095 (Comm))

Background And Main Disputing Issue

- The claimant, Owners of MV “Divinegate”, chartered the vessel to the defendant Charterers on amended NYPE1946 terms for the carriage of pig iron from Latvia to New Orleans in October/November 2019. Charterer ordered the vessel to proceed at eco-speed (about 12.5 knots).
- The charterparty contained a fairly standard Speed and Consumption Warranty (“S&C” Warranty), which set out relatively usual requirements for “good weather”.
- After completion of discharge, it was found that the hull of the “Divinegate” was considerably fouled by marine growth, and charterers alleged the vessel’s performance was significantly affected and refused to pay the outstanding hire.
- Among the various disputes arising thereof, one argument is regarding appropriate method to be employed in assessing the vessel’s performance. This article will concentrate on this aspect only.
- Conventional assessment method of the performance is by reference to the vessel’s speed during good weather. If a vessel underperforms in good weather, she will also underperform in bad weather.
- Owners contended to apply the conventional “good weather” assessment method, but Charterer argued the conventional method is imprecise and suggested to apply assessment method by referring to vessel’s measured RPM.



Court's Finding and Decision:

- The “good weather” methodology is not the only available one to assess compliance to S&C warranty; however, it should still be the primary one as being agreed in the charterparty.
- If an alternative methodology is to replace the “good weather” one, it should be proved to be as reliable and consistent as the latter.
- Court found the Charterers’ suggested RPM method is “very theoretical” and unreliable.
- In applying the “good weather” method, the Court held that the Vessel had failed to meet the warranted speed of 12.5 knots in good weather and so there was underperformance giving rise to a loss of time of 16 hours.

Comments:

- Although the “good weather” methodology is given the primacy according to the charterparty, court does not rule out the application of other methodologies, especially when there is insufficient evidence of “good weather” periods or weather conditions in general.
- If parties wish to exclude all other ways of assessing underperformance, they shall make it clear in the charterparty.
- Alternative performance assessments may face a high hurdle in order to replace “good weather” method. Therefore, methodologies that are too theoretical are likely to be viewed with skepticism.



IG Clubs Underwriting Overview Across 2021/22 and 2022/23

1. Underwriting Results

- Among the 13 IG P&I Clubs, 11 Clubs present a natural decline in free reserves while Gard and Shipowners Club saw free reserves increase during 2021/22. Free reserves at London Club increased at the cost of an excess call against three policy years in the autumn of 2021.
- The natural trading deficit of the International Group for 2021/22 was in the region of USD375 million.
- The underwriting achievement served as the main drive for the overall result. Income from investments and other sources, taken as a whole, had no bearing on the result.
- 2021/22 saw total free reserves declined 6.5%, but it seems not too bad as the year is beset with Covid-19 related claims, record levels of pool losses in the first half of the year and negative investment income across the second half of the year.
- The investment income is usually a buffer to increase free reserve. However, 2021/22 investment return is in deficit of USD12.6 million, i.e. it is practically the underwriting result alone to cut the underwriting deficit by approximately 40% (compared to 2020/21 underwriting deficit is USD579.9 million).
- Standard & Poor's downgraded Japan Club in July 2022 from BBB+ positive to BBB stable. No other rating changes have yet emerged among all other IG Clubs.

2. Claims

- 2021/22 ended with 15 pool level claims, down from 21 the year before.
- The Clubs continued to experience significant levels of Covid-19 related losses. It was anticipated that Covid-19's impact on combined ratios would last and eventually decline with a long tail.

3. Investment Performance

- The investing result display an extreme volatility due to geopolitical instability, pandemic's impact and the market bounce-back.
- The rising interest rates and inflation would continue to put pressure on real investment yields.

4. General Increase Expectation

- 2021/22 policy year's general increases averaged roughly 8%, and the 2022/23 averaged around 12%. However, there still remained some way to go to reach breakeven underwriting.
- Market observers expect another difficult renewal at 2023/24 with Clubs still imposing general/target increases.

Loss Prevention Advice – Be Careful with Lines Under Tension

- Mooring decks is a place where people need to work in proximity with heavy lines under tension. Parting of tensioned mooring lines has been associated with some of the worst human injuries.
- Use of worn mooring lines, overtightening of the brakes or sudden movements of the ship is among the main reasons for ropes straining beyond their breaking limits and parting.
- It is important that the safety guidance is followed, and the following three key components should be stressed for safer mooring operations:-

Equipment

- To be safe on mooring decks, it is crucial to utilize the appropriate equipment and to keep it in excellent working order.
- Mooring lines need to be meticulously and routinely inspected to ensure 1) normal wear and tear has not degraded the line; 2) synthetic lines don't have any hard spots; 3) there are no indications that the line has been contaminated with grease or oil.
- To prevent additional stress or chafe points on the lines, the lead of each mooring line must be carefully considered.

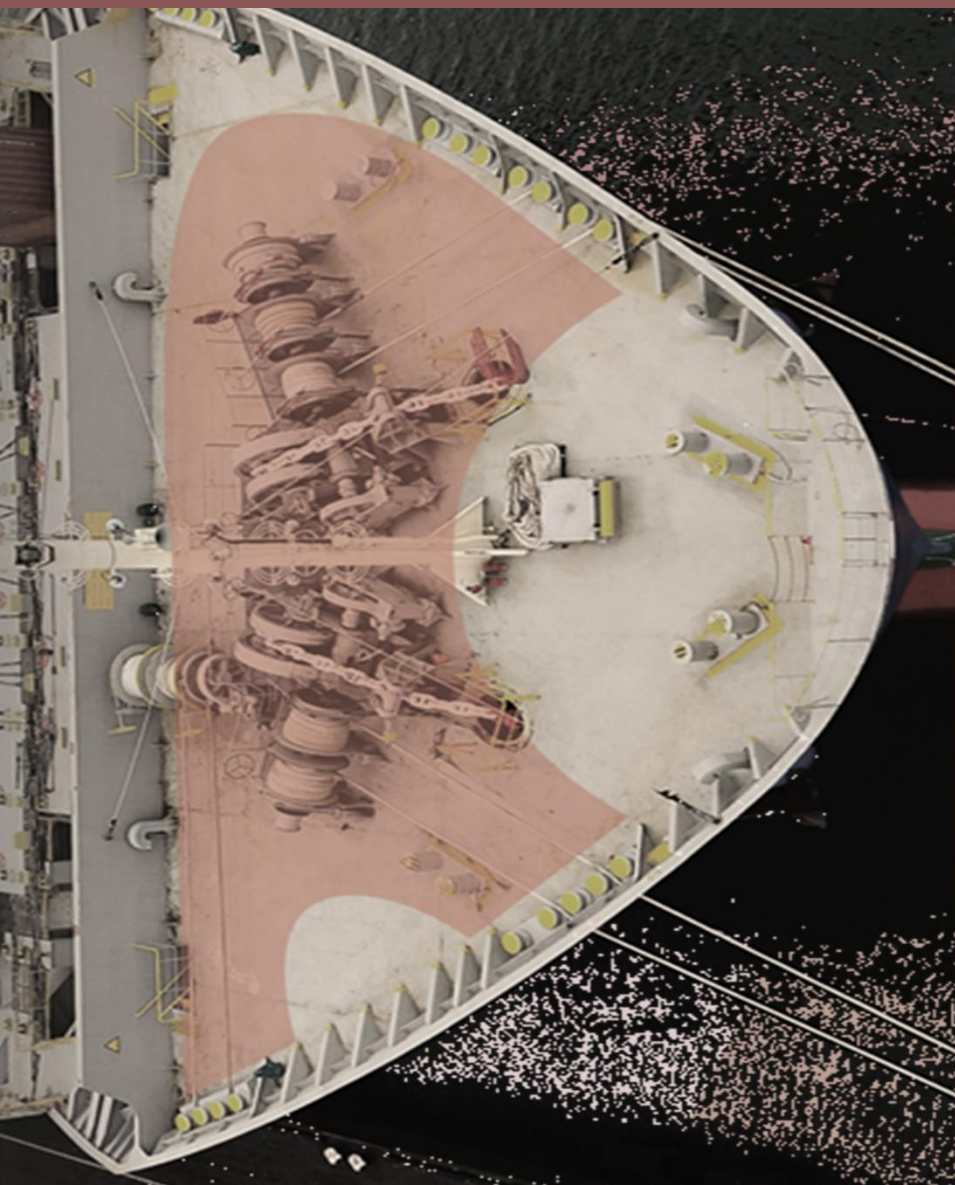
Planning and Briefing

- The risk assessment and control measures should be reviewed for each new operation.
- Planning should take account of the expected mooring configuration, paying particular attention to the potential risk of snapback.
- Areas where mooring deck operations take place need to be kept tidy and mooring lines should be closely monitored on all berths, particularly there is a large range of tide.
- Make sure that all seafarers are adequately briefed on the mooring configurations, that they know what to do, and that they are positioned on safe parts of the deck.
- Avoid too many crewmembers on deck as it can unnecessarily place others at risk.

Communication

- Crew communication is of the utmost importance when working on mooring decks, because it has the potential to be extremely hazardous if people are not able to interact clearly.
- Consider the number of circuits in use - too many voices on the same circuit can cause confusion and risk over-talking; however, using separate circuits can leave some crew in the dark.

Loss Prevention Advice – Be Careful with Lines Under Tension (Cont'd)



Further Recommendation

- The safety of mooring operations is also addressed in SOLAS Reg.II-1/3-8. New amendments will enter into force on 1st January 2024 with requirements provided in following:-
 - ❑ MSC.1/Circ.1175/Rev.1 and MSC.1/Circ.1619 on the design of mooring arrangements and the selection of appropriate mooring equipment, lines and fittings;
 - ❑ MSC.1/Circ.1620 for inspection and maintenance of mooring equipment including lines.
- Ship managers should review mooring procedures to ensure that unsafe working conditions are avoided during mooring operations.
- It is crucial to ensure that procedures are fully understood and followed, with seafarers receiving the appropriate onboard training in order to help them identify, assess, and control hazards associated with mooring operations.



Market Snapshot

The U.N. Grain Deal - Ukraine Resumed Grain Exports, Russia Says West Is Breaking The Deal

- Ukraine has dispatched its biggest convoy of grain vessels under the U.N. grain deal. Till 18th September 2022, a total of 165 ships with 3.7 million tonnes of agricultural products have left Ukraine from the 3 re-opened ports – Odesa, Chornomorsk and Pivdennyi.
- Before the breakout of Russia-Ukraine war, Ukraine can ship up to 6 million tonnes of grain per month.
- Ukraine hopes to export 60 million tonnes of grain in 8 or 9 months, but if the ports do not function properly, the exports could take up to 24 months.
- On the other side, Russia said the West was not honoring its promise in the U.N. grain deal to help Russian food and fertilizer exports reach global markets, raising potential questions about its commitment to the grain deal.
- The Western sanctions do not directly target Russian food and fertilizer, but such makes it harder to arrange shipping and insurance for exporting these products.

Oil Tanker Rates Bubbling Up As Russia-Ukraine War Disrupts Trade

- Benchmark rates for supertanker that can haul 2 million barrels of oil topped to USD50,000/ day for the first time since June 2020, as the Russia-Ukraine war upends global crude flows.
- Market estimated the rates for eco vessels and eco vessels fitted with scrubbers could reach USD54,100/day and USD62,800/day respectively.
- European oil refiners are pulling more crude from Middle East and US which cause ships to sail longer distances than before the Russia-Ukraine war. This effectively reduces the number of available vessels and boosts demand for large oil tankers.
- Europe's demand of crude cargoes has increased significantly, and tanker shipowners are optimistic that earnings will continue to rise.

Shippers Unlikely To See Lower Insurance Premiums Despite Lower Indian Ocean Piracy Risk

- Improvement in piracy threats in Indian Ocean has prompted some key international shipping associations to reduce the geographic boundaries of the “High Risk Area” (HRA) from 1st Jan 2023, and likely this submission will be taken up by IMO in the coming October.
- Such will build pressure for war insurers to cease charging or reduce any additional war risk premium.
- Market observers pointed out that notable risks still remain on several key maritime routes of Indian Ocean. The Middle East is still an area of concern, as in the past 3 years there have been violent terrorism-related incidents due to US sanctions against Iran.
- Another concern is that it will not be wise to instantly remove armed guards, lest it results in a reversal in the security situation.
- In light of above, it is unlikely for war insurers to reduce the additional war insurance premium in short run.

Lloyd's Of London Sets Cyber Policy Exclusions For State-backed Attacks

- Lloyd's of London will require its underwriters to include exclusion clauses for state-backed cyber attacks, in addition to the war exclusion clauses (if any), within standalone cyber policies from 31st March 2023, at the inception or renewal of each policy.
- Such exclusion clauses shall at the minimum to fulfill the following:
 1. Exclude losses arising from a war, declared or not, where the policy does not have a separate war exclusion.
 2. Exclude losses arising from state-backed cyber attacks that either significantly impair the ability of a state to function or the security capabilities of a state.
 3. Be clear whether cover excludes computer systems that are located outside any state which is affected in the manner outlined in point 2.
 4. Set out a robust basis by which the parties agree on how any state-backed cyber attack will be attributed to one or more states.
 5. Ensure all key terms are clearly defined.

LNG Carrier Continue To Lead Newbuilds With High-Value Orders

- Market researchers reported the LNG orders increased by at least a quarter in 2022 with the global orderbook standing at 255 gas carriers, which represents a 40% increase in capacity. Orders by mid-year of 2022 alone had already surpassed 100 LNG carriers, compared to 86 orders in whole year of 2021.
- South Korea's main three shipbuilders in 2022 so far have received orders for more than 80 LNG, accounting for 75% of the global orders.
- In August, an order of 7 large LNG carriers was placed to Hyundai Heavy Industries at a total value of USD1.5 billion, from a consortium of MISC Berhad, Nippon Yusen Kaisha (NYK), Kawasaki Kisen Kaisha (K Line), and China LNG Shipping. The new order is scheduled for delivery in 2025 and 2026, which is relating to QatarEnergy's long-term time chartering program with these shipping companies.
- In early September, Daewoo Shipbuilding & Marine Engineering signed another contract for 7 LNG vessels due for delivery by February 2026 at value of USD1.5 billion, which is also believed to be tied to QatarEnergy's expansion program.
- Around the same time, Samsung Heavy Industries Co. reported four additional LNG carriers with a combined value of USD850 million, among which there are two linked to Qatar and the other two from Africa's emerging LNG facilities.

- Overall, Chinese shipbuilders come second to their Korean competitors regarding market share. However, starting from August, the total number of orders placed with Chinese shipbuilders have surpassed the Korean peers. On 24th September, China Merchants Energy Shipping signed a new construction project of 2+2 large LNG carriers with Dalian Shipbuilding Industry, which is a second order after their initial newbuilding contract of 2+2 LNG vessels in March 2022.

LNG: Seismic Shifts As Russia/Ukraine Conflict Makes Waves

- The conflict between Russia and Ukraine has caused a seismic change in the world's gas and LNG markets. Spot prices are at all-time highs in Asia and Europe, and LNG contractual activity has increased as gas consumers look for alternatives to Russian gas.
- In reaction to record LNG prices, buyers have started signing up for long term deals. Annual volume signed under new long-term contracts in 2022 is already at its highest since 2018 – with the majority to be supplied from US LNG projects.
- The majority of contracts since the Russia-Ukraine war have been signed by trading houses and portfolio players, in spite of the desire of European buyers to purchase additional LNG.
- EU and US governments signed an accord calling for the supply of 50 billion cubic metres of new US LNG supply into Europe by 2027.
- However, European deals have been slower than anticipated. Western European buyers are looking for shorter-term deals that suit energy transition schedules, whilst US sellers are looking for long-term deals as they need 15 to 20-year contracts starting from 2026 for financing purposes.

Suez Canal Rises Transit Tolls In 2023

- Suez Canal Authority announced the transit toll increases from January 2023, which is mainly based on average freight rates for various types of vessels.
- Other factors influencing the toll increase includes the canal's increasing operational costs, global inflation, and the increased savings made on higher fuel costs by using the shorter route through the canal.
- Tolls for all vessel types using the Suez Canal will increase by 15%. The only exceptions are dry bulk ships and cruise ships which will increase by 10%, since dry bulk vessel charter rates are currently extremely low and cruise industry still recovering from an almost total shutdown during the pandemic.
- Suez Canal Authority said this new pricing policy can still ensure that the canal remains the most efficient and least costly route compared to alternative routes; however, in case if the market conditions result in the canal becoming less competitive, there will be rebates up to 75% of the tolls for specific sectors of shipping for defined periods.

Dry Bulk Carrier Attacked Off Guinea

- An Antigua & Barbuda-flagged bulker “Martina”, with freeboard of 5.3 meters, was robbed by armed criminals on 14th September 2022 whilst in the Conakry anchorage, Guinea. At the time of attack, the vessel was not under the protection of any naval guards.
- It was reported that 3 robbers armed with AK style rifles and blades boarded the 8,564 dwt bulker and the other 2 accomplices remained onboard a boat. The crew mustered in the citadel and no injury or kidnapping was reported.
- The pirates looted the ship and then apparently fled. Shortly after the attack the “Martina” heaved anchor and moved further out to sea.
- Despite that the piracy incidents around the world were at a lowest level in nearly 30 years, the Gulf of Guinea was nevertheless the area condemned as the world's piracy hotspot with threat levels remaining high.

IG Clubs Swerve Gibraltar Shipwreck Loss And Continue Clear Run For Pool Claims

- A Tuvalu-flagged bulker “OS 35” sustained a break in her hull after collision with a ballast LNG carrier “Adam LNG” on 29th August 2022, and leaked heavy fuel oil off the east coast of Gibraltar while the vessel partially submerged in the sea.
- With concerns on heavy weather in mid-September, the salvage team recommended a controlled sinking of the stern in order to minimize environmental impacts, which was approved by the Port Authority of Gibraltar.
- Upon surveying the incident, P&I market sources estimated that wreck removal and clean-up costs may reach tens of millions of US dollars, a quantum that would fall into pooling arrangement of International Group of P&I clubs (IG) were it entered with a group club.
- It was found that “OS 35”’s P&I insurer is British Marine – a QBE’s subsidiary, therefore, this claim will not impact IG Clubs’ pooling arrangement.
- Touch wood, there has yet to be a pool claim this policy year since 20th February 2022. By a continued spell of a pool-claim-free policy year, market is hoping for less wrestling IG reinsurance renewal weighing against wider concerns amongst specialty reinsurers around claims arising from the war in Ukraine.

Maersk Hit With \$180 Million Contract Claim From New York Shipper

- A New York shipper association, U Shippers Group (“U Shipper”), is legally pursuing Maersk for monetary damages in excess of USD180 million, by alleging the carrier failed to meet contractual obligations during the pandemic.
- U Shipper argued that Maersk failed to provide contractually allocated space but selling its services to spot cargo customers instead. Consequently U Shipper’s members had to meet their shipping requirements through the spot market, which raised their costs substantially in an inflated market.
- The insufficient provision of container space also reduced U Shipper members’ chance of earning incentive bonus which is calculated based on the number of containers shipped.
- The US Federal Maritime Commission advised the initial decision would be given by 30th Aug 2023, and the final decision will follow in another 6 months.

Happy reading, take care and see you in October!

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