

Legal Aspects of Bills of Lading Exception Clauses and Their Impact Upon Marine Cargo Insurance

by Dr. Chen Liang



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提单免责条款及其对海运货物保险的影响

陈梁 著

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by Dr. Chen Liang,
Professor of Shipping Law,
Fudan University

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Preface

This book is based upon my Ph.D. thesis submitted to the Cardiff Law School, University of Wales in 1991.

At the time of submitting this to the publishers of the Wuhan University Press, I have already been with the Fudan Law School, Fudan University for more than a year, which also means that it is inconvenient for me to have a complete access to the materials about the new developments of the English law upon which this book is based. So, instead of making a piecemeal revision which may not be reliable, this author decided to publish this book in its original form in which it was submitted to the Cardiff Law School about 12 years ago on September 31, 1991. As a result, the new developments about the English law including the 1992 Bills of Lading Act and the 1999 Third Parties' Right Under the Contracts Act would not be considered in this book. However, so far as the above-mentioned two Acts are concerned, as this book has devoted detailed examinations to the judicial practice leading to the enactment of this two acts, this book is still very useful for understanding these two Acts. That aside, the new English cases decided upon during this twelve years' period have not changed greatly the law upon which this book is based. After all, this book reflects my then understanding and opinions about the areas covered by this book.

At the time when this book goes to press, I have lots of gratitude to make to various parties. Apart from my parents and other relatives who have helped me one way or another during the long course of writing this book, I should express my gratitude to the Ministry of Education of China who financed me, through the Chinese Embassy in London, for the tuition and major living expenses for my studying in the U.K. Thanks also go to the British Council for giving me a one year scholarship.

I am also very grateful to the late Professor Cadwallader, who was not only my Ph. D. supervisor but also my teacher of various maritime law subjects in my LL. M. course. So, it could be said that it is mainly he who introduced me to the English maritime law.

Finally, I would like to thank Wuhan University Press and her editors for assisting me in various aspects towards the publishing of this book. In the same vein, thanks also go to the Fudan Law School, Fudan University for providing partial financial support for the publishing of this book.

LC
31 August, 2003

前 言

此书基于我在英国威尔士大学卡的夫法学院的博士论文。

由于在递交此书予武汉大学出版社时，本人已就职于复旦大学法学院一年有余。所以在国内已不能方便地全面获取英国相关法律的新发展的资料。因此，笔者觉得，虽可以冒以偏盖全的风险加以修改，还不如依照原样，将其出版。

此论文是 1991 年 9 月 31 日递交给威尔士大学以申请博士学位的，所以此书所依据的法律也只能截止于此相同日期；而在此日期后颁布的英国 1992 年提单法和 1999 年合同下第三方权利法当然没有能在书中涉及。幸好，本书对导致上述两部法律产生的立法原因已进行了详细的分析，所以本书对相关判例的分析和解释对理解此两部法律是非常有用的。此外，在本书所涉及的其他领域，近十年来英国也有许多新的判例出现，但总的来说，它们对原有判例所建立的原则改变不大。总之，本书反映了笔者当时的学术观点，也是对本人学术经历的一个方面的记录。

在此书付印时，笔者有许多人要感谢。除了我的父母与其他亲属给予许多方面的帮助外，我还要感谢中国教育部给我留英学习时的资助，感谢英国文化委员会给了我一年的奖学金。此外我还要特别感谢我的博士导师——已故 Cadwallader 教授对我的教诲，可以说他是我学习英国海商法的主要启蒙老师。

最后我要感谢武汉大学出版社各位编辑特别是张琼老师在出版此书时给予的各种帮助，并感谢复旦大学法学院为出版此书提供的部分资助。

陈 梁

2003 年 8 月 31 日于复旦

Summary

Exception clauses are the major device of the risks allocation in any contracts. The bill of Lading contracts and the marine cargo policies are no exceptions.

This thesis is focused on the legal aspects of the exception clauses of three kinds in the bill of lading contract: the exclusion of liability clauses, the limitation of liability clauses and the limitation of action clauses. Then it will go on to see how these exception clauses affect the marine cargo policies especially through the insured perils clauses.

After discussing the basis of the bill of lading carrier's liability, many issues concerned with the exception clauses in bills of lading are discussed in detail. Among those issues, many are not only important for the shipping law but also important for the general law of contract. Such issues are: construction of the negligence clause, construction of the fundamental breach clauses and the right and burden of the third parties under the exception clauses. Otherwise, discussion is centred on the detailed examination of art. IV, r. 2, art. IV, r. 5 and art. III, r. 6 of the COGSA 1971 and the relationship between these clauses and the five incidents: negligence in care of goods, unseaworthiness, deviation, delay and wilful misconduct. Similar issues are discussed in the context of the Hamburg Rules.

On the part of the marine cargo insurance, apart from surveying some general issues concerned with the liability of the cargo insurer and with the insured perils clauses and excepted perils clause in general, examination is mainly focused on the insured perils clauses in the new marine cargo insurance clauses Clauses A or B or C to see how they co-ordinate with the exclusion of liability clauses under the bills of lading statutes. The relationship between the insured perils clause and the five incidents: negligence in care of goods, unseaworthiness, deviation, delay and wilful misconduct are also discussed. Such discussion is carried out with the view to seeing whether there exists some difference between the impact of those five incidents on the exception clauses in the bills of lading and the impact of those incidents on the insured perils clause in the marine cargo policy thus affecting the risks allocation among the cargo owner, carrier and the marine cargo insurer. The impact of the limitation of liability clause and the limitation of action clause on the marine cargo policy is also discussed.

The main statutes, codes and international conventions under discussion are the COGSA 1971, the Hamburg Rules and M. I. A. 1906. Yet, the M. S. A. 1979, the Limitation Act 1980 and the Arbitration Act 1950 are also discussed to some extent in relation to the limitation

of liability clause and the limitation of action clause. That aside, the standard form contract of marine cargo insurance Clauses A or B or C are the main subject of discussion on the part of the marine cargo insurance.

Above all, in the following aspects this thesis is intended to contribute to the knowledge. First, a detailed, comprehensive and updated examination of almost all aspects of exception clauses in bills of lading has been made especially in relation to the bills of lading statutes. Second, the confusion caused by the usage of many similar terms in both bills of lading and in marine cargo insurance is attempted to be clarified. Third, if we regard the cargo insurer's liability as one stool and the carrier's liability as another stool, this thesis is attempted to survey whether under certain legal regimes the cargo owner falls on either of or both of or between these two stools.

概 要

合同中的免责条款是合同双方风险划分的主要工具。提单所证明的海上货物运输合同（下称提单合同）中的免责条款也不例外。通常，提单合同中的免责条款的受益方是承运人，货物利益方（通常是货主和提单持有人）是这些免责风险的直接承受方，但是货物利益方可以为了转移此种免责风险向海上货物风险保险人购买有关保险。然而，海上货物保险合同像其他保险合同一样，所保风险的多少主要取决于合同双方的合意，或更明白地说就是取决于支付的保险费的多少。当然，被保险人的恶意行为所导致的被保标的损失是不可保的，否则保险无异于赠送。

另一方面，有些海上风险，承运人并没有在提单合同中加以免责，但是货物利益方却为这些海上风险购买了货物保险。这种没有必要的保险购买行为通常是由于投保方对提单合同与海上货物保险合同之间风险分配的衔接不清楚所致。为了搞清楚海上货物承运人，货物利益方和海上货物保险人之间在提单合同和海上货物保险合同下的风险划分和衔接，有必要对提单合同法和海上货物保险合同法这两种不同的法律条文进行交叉研究，特别是对这两种合同中的风险划分起主导作用的免责条款进行研究。这里所指的免责条款，包括提单合同中的全部免责条款，责任限制条款，诉讼时效条款和海上货物保险合同中全部免责条款和保险风险条款。

本书主要聚焦于英国提单合同法中的免责条款，并研究在英国通用的海上货物保险格式合同如何在海上货物人和货物被保险人之间分配那些在提单合同中所规定的免责风险。此书基于作者在英国威尔士大学卡的夫法学院所完成的博士论文。

在英国海商法学界，存在大量分别讨论提单合同和海上保险合同（包括海上货物保险合同）的学术著作，但是就是缺乏对提单合同和海上货物运输合同的风险划分的交叉研究。而本书就是旨在填补这一空白。这也是本书的创新所在。

英国伦敦是世界上主要的海运保险中心。大约 70% 以上的海上保险都在伦敦保险或再保险。同时伦敦也是世界上主要的海事诉讼中心。此外，中国的海商法特别是海上保险法的制定都特别参照了英国法。所以本书不但对我国的海商法的发展和研究具有促进作用，同时对我国航运和海商保险界更好地利用英国法来保护自己的利益也能提供参考。另外，由于香港法与英国法差别很小，本书对了解香港海商法（严格地说，香港法是中国法的一部分）也有帮助。

由于英国提单合同法采用海牙威士比规则，而伦敦保险市场通常采用 1982 年制定的海上货物保险格式合同（后者具有准法律的地位），本书将以此两部法律文件为主，结合英国相关判例法进行讨论。虽然英国并没有参加汉堡规则，但由于汉堡规则已经生效，作

为国际海事诉讼中心，伦敦法院很可能在将来遇到汉堡规则适用的案子。所以汉堡规则也会在本书中相关地方进行讨论。

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