

## Evaluating the Legal Risk of the Marine Cargo Claim Case

## 海事貨損求償案件之法律風險評估（下）

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## Analysis

## (分析)

One of the good ways to clarify the complex situation is to check the points one by one in proper order. It may go as below:

（一步步分析如下：）

**Is it reasonable that the alleged poor condition of this dry container to cause this wet cargo damage?**

（據稱存在於系爭乾櫃上的瑕疵是否是造成據稱貨損的合理原因？）

**Was Container Condition Poor?**

It is noted that the submitted survey report indicates the nine(9) defects of this dry container while the POD EIR laden out shows the seven(7) ones. From the numbers of defects, it looks like that the condition of this dry container was poor. But before jumping to this conclusion, it should be checked that what are the meanings of the nine(9) defects and seven(7) defects?

Do they logically match to each other? In this case, it is noted that both of them include the defects of dent, bulge, swelling or handle pin missing. Besides the meanings, the defects could be also checked by the photos of the survey report. From the photos, it is noted that all the visible damages of this dry container are small or even tiny; it could not be found a hole, breakage or gap. The defects to be checked on the photos reflect that the POD EIR laden out shows no sign regarding how the water got into this dry container. Furthermore, the POD EIR empty in shows the sound condition of this container, as well as no repair record of this dry container before it was launched to the next shipment.

We could therefore suppose that the container condition should be fine, which is that the defects should be just

existence than nothing. This poor condition could be only in wording rather in fact.

（海事保險公證報告指出系爭乾櫃有九個瑕疵，且目的港提貨時由目的港碼頭發出的貨櫃交接單上亦指出七個瑕疵，乍看之下，該乾櫃的確狀況不良，然而，是這樣嗎？此七個瑕疵與九個瑕疵是否相同或相呼應？此等瑕疵是否與濕損有關？本案中，此等瑕疵從文字上看來皆與濕損無直接關聯。另外，參酌海事保險公證報告上的相關圖片，進一步發現該等文字上的瑕疵於照片上皆屬輕微，甚至輕微到與本件貨損就一般情況而言不可能有相當因果關係時，船公司甚可據此反證系爭乾櫃之良好狀態

### **Cargo Nature and Alleged Cargo damage**

The alleged cargo is the dry beef meal. It was dried on the ground by the natural sunshine. It was put into the common nylon bags, and then was installed into this dry container, bags by bags, without further lashing. It is alleged by the survey report that the cargo was wet by the rain water or the humid air during the transportation, therefore it can not be used for the original purpose which is to be the

human food.

Since this meal was dried by the sunshine instead of the advanced machine; did it dry enough without containing the meaningful mist? Was it sterilized? Why it was not packaged with vacuum? What was the condition of the beef when it was stuffed into this dry container, anything related to the insects? When the latitude changes, the humid air inside the dry container may become mist and water drop, anything related to this water?

（假設據爭濕損的貨物是牛肉乾。該牛肉放在太陽底下曬乾後，直接放入尼龍袋中，託運人將一袋一袋的尼龍袋堆入乾櫃後即封櫃。海事保險公證報告指出，該等濕損肉乾的水源來自於雨水或運送中之水氣，由此或可斟酌此等肉乾之製程與包裝是否有不妥之處？蟲與肉乾之製程及裝櫃有關係嗎？緯度之變化與水氣有關嗎？）

Without concerning the above, the surveyor issued this survey report with the conclusion that the wet damage to the cargo happened during the transportation of this

shipment. The recovery agent accordingly uses this report to be the prima facie evidence to claim to the Carrier.

(然而代位求償的律師事務所提出的海事保險公證報告指出該肉乾之濕損是發生在運送過程中，因此該律師事務所據此向船公司求償。)

### Which is the Better Choice for the Carrier? To settle or To reject?

In this case, the carrier stands on the fair position to believe that they should not be responsible; therefore the carrier has the need to evaluate the situation and to make a comparatively beneficial decision. To reject this claim with accepting a possible law suit in the foreign country, or To settle this claim with saving the legal cost of the possible law suit? After all, if to settle saves money, to settle; if to suit saves money, to suit. But which one should be chosen?

(在此假設的案件中，船公司有理由相信其無須對於本件貨物之濕損負擔法律上的損害賠償責任，但若船公司拒絕賠償將可能導致該律師事務所於其所在地(即國外，例如香港)

提出民事告訴，船公司將因此滋生不低的法律費用，則船公司該如何決定呢?)

### Prima Facie Evidence

(表面證據原則)

In this case, with the expertise in the fields of marine and law, after estimating the position of Prima Facie Evidence, the answer should be clear.

(表面證據原則可能是判斷的關鍵。)

Prima Facie Evidence in legal is that, on the first examination a matter appears to be self-evident from the facts. In the legal proceeding, one party has the burden of proof which requires presenting the prima facie evidence for the essential facts of the case. A prima facie case might not stand or fall on its own; therefore if an opposing party wants to introduce the other evidences or asserts an affirmative defense, he can only do it in the trial. This is the key for the recovery agent to make their butter and bread.

In this case, the carrier is

reasonable to defend to the recovery agent base on that (A) There are nine(9) defects on survey report while there are seven(7) defects on POD EIR laden out, so the reliability of the survey report is doubtable; (B) The defects on the survey report are not matching to the ones on POD EIR laden out, so the two document may talk about the different containers; (C) on the POD EIR laden out, there is none of the defects indicating the hole, breakage or gap, to allow the possibility to lead to the alleged wet cargo damage; (D) from the photos in the submitted survey report, it is not easy to be aware of the mentioned defects while the POD EIR empty in shows the sound condition of this container. As above, therefore the condition of this dry container should be fine in fact.

(表面證據原則是法院判斷受理案件與否的原則。承前所述，在此假設案例中，船公司有眾多合理的理由反駁該律師事務所的指控，如此，為何該律師事務所的態度卻能強硬呢?)

Here comes the interesting part of the principle of prima facie evidence. Assume that the recovery agent would submit this case to the court in Hong Kong with this survey report indicating that this cargo damage happened during the transit and the plaintiff was the carrier who was also the issuer of the B/L, to be the prima facie evidence of this case to ask the court to accept this law suit. Trust the recovery agent also understands that the legal cost would be the concern of the carrier since the headquarter of the carrier is not in Hong Kong. The carrier may need to bear in mind that what they use to argue in negotiating is not the same that what they can successful defend in the court! The causes could be used for bargaining the settlement amount during negotiation are not absolutely could be used to defend/win the case in the court! This is the key of the position of the prima facie evidence from the recovery agent side, and also the position of the defending

excuses from the carrier side. The good recovery agent with marine practice and legal background should know their position of each case regarding how to use the power of prima facie evidence; and the good legal consultant standing for the carrier should know the position of the recovery agent of each case, as well as know the position of the carrier with their expertise, and therefore driving the case facing to the beneficial end from the first place. It is a sign showing whether the carrier knows the difference between the workable causes in negotiating or in the court.

(表面證據原則之於本案之意義可能是，因為該律師事務所據以告訴之證據符合表面證據原則，因此香港法院應該會受理此案件，若香港法院受理此案件，船公司在應付法院的訴訟程序中，將支出為數不低的律師費用；另一方面，船公司也應該知道，在談判過程中可以使用的理由與在訴訟中可以使用的理由不完全相同，或者說同樣的理由在談判過程中與訴訟過程中之價值不同。因此，船公司的法務人員應具備分析案件的能力，亦即具備蒐集資料的能力、閱讀資料的

能力、分析對方及我方法律上的請求權基礎的能力、分析對方及我方法律上的舉證責任的能力、分析對方及我方談判策略上的能力、分析對方及我方訴訟上策略的能力，藉以提出有信賴基礎的法律意見。)

### **Law Suit or not?**

(是否該讓案件進入訴訟程序?)

It could be a good aspect for the carrier to decide if the carrier should put this case into the court, "if the carrier can win the result (or case), to do." To win the case means to get the favorable judgment. To win the result may involve the business or financial consideration. It depends on the needs. How to decide or know the carrier could win? That is the reason why the carrier hires the legal consultants who should know that what could happen during the law suit, as well as the possible result. This is also the reason why you could take the legal advices from them.

(是否讓某案件進入訴訟程序的關鍵是能夠掌握該案件對於公司有利的走向。唯有事先知道可能的過程甚或可能的結果，才能於事前做出對船公司有利的建議。)

### **The difference between the local law suit and foreign country law suit**

(國內訴訟與國外訴訟的差異)

The legal cost in foreign country could be much higher than it is in local, because (A) the lawyer fee will be hourly charged with the high price, and may be ended even higher than the settlement amount to the recovery agent; (B) The legal consult can attend to the court in the most cases without hiring a lawyer.

Another key point is that the legal consult of carrier should know the tricks of negotiation including how the recovery agent uses the prima facie evidence of each case. If one case is suggested to settle by the legal consult only because of the high amount of the foreign legal cost, then the smart recovery agent will use this reason to claim the rest of cases with the amount far more than they could claim legally!

(在國外進行訴訟之法律費用較高，原因大致上是因為跨國律師的律師費用較高。在國內進行訴訟多半不必支付律師費，原因是公司法務有能力處理。)

### **To Evaluate the Risk to Have a Law Suit in Hong Kong**

(若案件可能在香港被起訴，船公司該如何處理?)

ASSUME that the recovery agent locates in Hong Kong, who claims to the carrier for the wet damage of the dry beef meal. What much money it could be settled with the recovery agent? What many percentages it could be given the favorable judgment from the court with how much money of the legal cost? Viewing the situation as a whole, including the deductible regarding P&I Club, related document on hand, the recovery agent reputation, the practice of the foreign court, as well as the related regulations, it could bear in mind that the recovery agent will not give up this case if being rejected; in case the carrier chooses to reject to settle this case with the recovery agent, it should be possible equal to choose the law suit in Hong Kong.

(香港是熱門的轉運港，因此專營海事損害賠償案件之代位求償的律師事務所將其辦公室安置在香港有其國際私法上的道理。至於台灣的船公

司該如何面對可能在香港起訴的海事索賠案件，原則就是要盡可能掌握事實上、法律上、談判策略與訴訟策略之資訊，再由法務依其專業判斷。因此好的法務人員是船公司有價值的資產。)

### **Going to the court**

(讓案件被起訴在香港法院?)

Factually, there are reasonable causes to stand on the carrier's position to reject this cargo claim in the court. But to the carrier, to have a qualified Hong Kong lawyer to speak for you in the court costs a lot; whether the final judgment is favor or not, you already spend the lawyer fee. Therefore when the carrier evaluates to put a case into the court or not, the carrier should already know that (A)if he could win the case or result; (B) the possible totality of the legal cost, (C) the possible totality if the carrier loses this case.

(在香港起訴的風險是，如果沒有取得有利的結果，不但付出律師費用，還得依判決賠償索賠者，真是賠了夫人又折兵。)

### **To settle with the claimant**

(和解本案?)

Assume that the deductible of insurance is higher than the claim amount, which means that all the cost would be just on the carrier's shoulder. In the court, the carrier has the reasonable causes, and the recovery agent also have some. The recovery agent is usually a law firm, but the carrier needs to spend the lawyer fee by hourly charges.

(是否爲了避免訴訟而和解本案，除了前述因素外，還要考量到船公司對於本票貨損的保險自負額。事實上，有品質的代位求償的律師事務所都已經全面考慮到了，因此才會如此進行他的談判策略。)

### **To Ask the POD Terminal to Take the Responsibility?**

(要求目的港的碼頭負責?)

It is said that under this assumed situation, the legal consultant of the shipping company should push the POD terminal to settle this case with the recovery agent, since the POD terminal issued the POD EIR laden out with the seven(7) defects and also issued the POD EIR empty in with sound condition. Since this POD EIR laden out is used by the



recovery agent to claim to the carrier.

(據說，有法務認為，在本案這種假設的情況，可以強烈要求目的港的碼頭負責本件貨損的責任，因為系爭貨櫃之櫃況似乎良好，但是目的港碼頭卻發出記載七個瑕疵的貨櫃交接單，使得代位求償的律師事務所有此藉口，因此目的港的碼頭應該負擔全責。)

Trust this is not the real solution of the legal consultant of the carrier, since the POD terminal could easily clarify their alleged liability even in the court if they hire a good legal consultant. Furthermore, to insist to request POD terminal to take this responsibility with such weak position should damage the business relationship between the carrier and the POD terminal. Of course, in the marine field, the carrier knows that it is very important to keep the good friendship of the kinds of the important terminals.

(船公司與碼頭間存在商業上合作的利益，是否需要因為相對的微小利益而破壞良好的合作關係呢？值得思慮。另外，在本案件的情況，要求碼頭負責的證據薄弱，即使告上法

院，碼頭若有良好的法務也能輕易擺脫此控訴。)

## CONCLUSION

(結論)

Cargo claim cases are the routines to the carrier. Not only relating to the indemnity totality but also relating to the reputation to the customers and the friendships to the business partners, therefore when dealing with these routines, the carrier should evaluate them with the skills of business, marine, law, negotiation... and so forth, because it is a part of this society, rather than simply a case needs to be end on the pending list.

處理海事貨損求償案件就像處理其他事情一樣，只是社會的一個縮影，因此需要通用商業、海事、法律、談判等技巧，而非單純「結案」，才能為公司創造價值。





## 憶『唐山號』道具帆船及我中華海員（上）

文：田文國

民國75年2月，台灣電影製片廠爲了籌拍『唐山過台灣』影片，至香港購置舊80噸的機帆船，因高雄港設備不適停泊，公司方面決定將機帆船開往台中港，以備拍片使用。

由高雄開往台中途中，因船舶失事，造成船舶沉沒及四名船員死亡，船長一人獲救，雖然事隔至今已27年，但對我來說死亡四人其中黃邦齊爲鄰居同學，齊高雄、狄鯤生二人爲同班同學，齊自立爲齊高雄胞弟，只有船長顧靜祥不熟，往事歷歷在目沒齒難忘，現特以當時報紙報導及事後同窗們協助處理片斷，提醒我後進船員及政府有關當局，船舶航行安全底線是沒有任何折扣可打的。

### 1、船舶失事當時報章報導

(1)75.2.26中時5版『道具帆船翻了船！唐山過海多艱難』

唐山號駛往台中港途中沉沒，船長獲救兩船員罹難兩失蹤。船底何以在全無徵兆情形下破裂進水、亟待調查。老戲新開拍、保了意外險仍出意外；古船再下水、添加真實感果然真實。



圖1 唐山號帆船(網上尋找同年代相似帆船)

台灣電影製片廠所有的『唐山號』如圖1所示，道具帆船航向台中港途中沉沒；25日南縣漁民尋獲齊高雄、狄鯤生兩人之屍體，並救起生還的顧靜祥如圖2所示，另兩名船員齊自立、黃邦齊失蹤，全案由南縣警方及海防港檢單位調查處理中。

據了解台灣電影製片廠爲了籌拍『唐山過台灣』影片，特以一千兩百萬元代價委請香港船商打造這艘80噸的機帆船，旋因高雄港設備不適停泊，公司方面決定將機帆船開往台中港，以備拍片使用。

本月24日這艘機帆船自高雄港啓航，由顧靜祥(36歲，設籍高雄市三民區孝順街107號)擔任船長，船員則有齊高雄(39歲，高雄市人)、齊自立兩兄弟，及狄鯤生(38歲，高雄市人)、黃邦齊(36歲，高雄市人)等。

當天晚上七點十分左右，這艘機帆船航抵嘉義縣布袋港外海時，因爲船底部發生破裂進水，以致沉沒。

昨天中午11點鐘，齊高雄、狄鯤生的屍體，被南縣青山港『鯤天勝號』漁船船員尋獲，據漁民周勝治指出，尋獲這兩具屍體的地點在北門鄉與將軍鄉鄉界的外海海面上。

機帆船船長顧靜祥則爲南縣另一艘『進豐祥』號漁船船員在北門鄉與嘉義縣界外海救起；這時的顧靜祥穿



圖2 獲救船長顧靜祥(中時)

救生衣，配戴救生圈，眼睛浮腫，奄奄一息，即刻被送到佳里鎮黃外科急救。及至傍晚時分，顧靜祥的病情已經穩定下來，但身體仍然十分虛弱。

據顧靜祥表示，他們是受雇於台灣電影製片廠將這艘船開往台中港，到海難地點船底突告破裂，大量進水當機帆船沉沒後，船上五人均著救生衣落水，不多時即已沖散。

昨天下午，南縣警方及海防港檢單位據報之後，即時派員展開調查，生還的顧靜祥身體雖沒有明顯的外傷，但需要時間休息，辦案人員調查本海難事件進度受挫，稍嫌緩慢一點。

據查，沉沒的機帆船屬新打造者，船底何以會在毫無徵兆的情況下破裂，辦案人員表示要作進一步了解。

截至昨晚發稿為止，『唐山號』另兩位船員齊自立、黃邦齊仍無蹤影，辦案警方及南縣漁民還在進行搜救當中。

【台北訊】台灣電影製片廠籌拍中政策大戲『唐山過台灣』所需要的這條道具船，是由該片導演李行以七、八萬港幣自港購入，為30年代漁民捕魚用的老船，包括運費共花費一百五十萬元，於目前自港運到高雄港。

台製廠表示已透過順平公司為船與水手投保三百五十萬元意外險，其中船險一百萬元，於日前自港運到高雄港。

台製廠表示已透過順平公司為船與水手投保三百五十萬元意外險，其中船險一百萬元，五位水手兩百五十萬元。

這艘已沉下海底的船，船長76公尺，寬28公尺、重75公噸，原本昨天由美術指導鄒志良改裝為片中所需嘉

靖年間主角吳沙渡海來台用的大船。

照台製廠的計畫，預定於三月初在台中外港拍船遭風浪的主戲，現在發生此變故，台製廠表示將先跳拍其他戲。

『唐山過台灣』由李行導演主要演員有柯俊雄、邱淑宜及馬如風等人，描寫嘉靖年間吳沙歷經風浪渡海來台開墾蘭陽平原的過程，為執政黨中央文工會支援一千萬元拍攝的年度政策大戲。

為了船戲問題，台製廠傷透腦筋，前前後後折騰了半年，原先是想日本設計師以內搭景加上特技的效果拍攝費用約在三百五十萬元之譜，但台製廠考慮成本過高，並未增加真實感，『決定以突破性』的做法，在台中港外該區特有的風浪實地拍攝，但國內遍尋不到30年代的老船，於是由李行親往香港購船。

好不容易船自香港購進運到高雄港但船如何由高雄港運到台中港又費了一番功夫，據稱，台灣製估計若將船運到台中港運費太高，而決定請五位水手開到台中港。

然而由於船太老舊，某保險公司認為危險太高而拒保，最後由順平公司託保，但因高雄港風浪太大不敢開，耽擱數日，沒想到還是出事了。

由台中港的風浪據估計於三月五日左右及減弱，不適合『唐』片劇裡所需要的效果，經此沉船事件，使『唐』片的拍攝『出師不利』，但台製表示，決定克服萬難，不放棄拍攝『唐』片。

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