一堂共同海損擔保的課程

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一、前言

西元 2007 年 7 月 20 日貨櫃船“Maersk Neuchatel”載有 1,139 只貨櫃，在西非迦納（Ghana）的特馬港（Tema port）外海擱淺。船東（St Maximus Shipping Co Ltd，實際上為光船租船人（Demise charterer））與救助人 Svitzer Salvage BV 簽訂勞式救助契約（Lloyd's Open Form – LOF 2000），在幾次浮揚（re-floating)行動中造成俥葉及船體進一步受損，船東於同月 25 日宣佈共同海損。就此，船東要求論時傭船人（Maersk Line）提供一只暫時性的貨物擔保，使得貨櫃可以進一步轉運至目的地。然而 Maersk 卻基於商業考量為貨方提供一只永久性的擔保。

初步理算報告顯示，貨方共同海損分攤金額高達美金 6,304,663.92 元。幾經協商，2012 年 1 月 10 日最終共同海損理算報告出爐，依理算報告結果，貨方尚須支付美金 4,254,985.53 元共同海損分攤金額。由於 Maersk 對理算結果提出質疑，主張貨方合理的共同海損分攤金額僅有美金 3,517,580.31 元，此案交付英國法院(High court）審理，2014 年 5 月 22 日做出判決（St Maximus Shipping Co Ltd v. AP Moller-Maersk A/S（The “Maersk Neuchatel”）- 〔2014〕 EWHC 1643（Comm））。此案涉及對共同海損擔保內容的不同解讀，值得各利益方研究學習。

二、A lesson to learn - 共同海損擔保的問題

(一) 誰有義務提供擔保

在論時傭船下，基本的原則就是，「誰有利益，誰提供擔保」。貨主擁有貨物利益，應提供貨物擔保。相同道理，傭船人擁有貨櫃及燃油利益，應提供貨櫃及燃油擔保。

船舶獲救後，貨物仍要繼續運送或是儘速轉運，船東為了自身利益而要求貨物擔保。在貨櫃運送下，尤其是現在一萬 TEU 以上的貨櫃船已成為市場主力戰艦，有“成千上萬”的貨主需要聯絡及收取擔保，若船舶是屬於論時傭船下，實務上傭船人會提供一只臨時性的貨物擔保，以避免因擔保問題造成貨物遲延。類似規範也會出現在傭船契約上:

「General average shall be adjusted at the place as indicated in Box 33 according to the York-Antwerp Rules 1994 or any amendment thereto by an adjuster appointed by Owners. In the event of general average or salvage, the Charterers shall provide an acceptable

temporary security covering all goods and containers to avoid delay and secure their release so that transit/delivery may continue. The Owners agree that Charterers' temporary guarantee may be exchanged in due course for a full set of securities from the appropriate interested parties covering all goods and containers. The Charterers agree to co-operate with the Owners and the Owners' appointed average adjusters, to assist by supplying manifests and other information and, where required, to endeavour to secure the assistance of the Charterers' local agents in the collection of security, at the Owners' expense.」

(二)合適的擔保內容

一般來說，船東當然希望擔保可以一步到位，傭船人若能提供一只永久性擔保，對船東而言，可以省去收取個別擔保所花費的時間及成本。

以此案為例，Maersk 基於商業考量，提供下述擔保給船東:

「In consideration of the delivery to Cargo Interests or to their order on payment of freight due of the cargo carried on board the MV MAERSK NEUCHATEL at the time of the above mentioned casualty, we hereby undertake and agree as follows:

1. To pay the proper proportion of any General Average and/or Special Charges which may hereafter be ascertained to be due from the Cargo or Shippers or Owners thereof under an Adjustment prepared by the appointed Average Adjuster in accordance with the Charterparty, dated 16 August 2004, and/or the Bills of Lading issued by us or SCL.……」

然而在正常的狀況下，傭船人並沒有義務幫貨主提供擔保，所以其最多只能做到在未獲得共同海損理算師同意前，保證不會讓貨主提領貨物。若不慎將貨物釋放，願意承擔貨方的共同海損分攤費用。因此，擔保內容應該會被傭船人修正為:

「In consideration of the delivery to us or to our order of the Cargo, we hereby undertake and agree, as follows:

1. To detain the Cargo at its final ports of destination as stated in the Bill of Lading and to not release the Cargo or part thereof to the relevant Cargo Interests until we have received confirmation from Average Adjusters that they have received sufficient/satisfactory General Average securities from the particular Cargo Interests for that part of the Cargo.
2. In the event of the Cargo or part thereof being released to the

relevant Cargo Interests without the collection of sufficient/satisfactory General Average securities as provided at 1. above, we agree to pay on first demand the proper proportion of any General Average and/or Salvage Expenses and/or Special Charges which is legally due from and payable by Cargo Interests and which may hereafter be ascertained to be due from the Parties/Cargo Interests concerned in the Cargo or the shippers or owners thereof, under an Adjustment prepared by the appointed Average Adjuster.……」

(三)擔保內容的實質義涵

Maersk 對理算報告提出質疑，其認為理算報告必須要確定合理及合法後，才有履行擔保的義務，因此僅願意支付其認為合理的金額（the undertaking is only to pay a "proper proportion" of the sum ascertained to be due, and that means a sum which is properly and legally due.）。船東則認為，Maersk 應該先依理算結果支付全部費用（this is clearly and unequivocally an undertaking to "pay" such amount as may be "ascertained to be due" under the Adjustment.），對於理算報告中的質疑可以在事後確認後，採取多退少補的方式解決。

法院在審理此案時，首先把問題放在，到底擔保中"proper proportion"的實質義涵為何？法官顯然較為認同船東的解讀，並舉出 The Jute Express〔1991〕2 Lloyd's Rep. 55 一案來支持他的論點。

除此之外，法官又引用 Tharsis Sulphur & Copper Co. Ltd v. Loftus（1872-73）LR8 CP1 及 Attaleia Marine Co Ltd v. Bimeh Iran（Iran Insurance Co）這 2 個判決來說明該擔保函的屬性類似於一種"見索即付"的擔保（on-demand guarantee）。

該擔保的文法結構就是，一經要求，就要履行付款義務，不論該理算報告是否合法或合理（It contained a clear undertaking to pay, and said nothing about the sum being either legally or properly due）。而不是 Maersk 解讀的，只應該支付合理的費用（Only to pay a "proper proportion" of the sum ascertained to be due）。

(四)一字之差－A magic word？

接續上述所討論的"proper proportion"，如果文字改成"proper amount"或是"proper sum"結果又會是如何？法官承認這樣會讓 Maersk 的論點更有說服力。

因此，雙方在草擬任何法律文字時，不僅要字字珠磯，更要字字斟酌，所謂差之毫釐，失之千里。即使雙方關係是如此的良好，一旦關係生變，往日種種只能追憶啊！

三、共同海損的流程- Pay first and argue later.

平心而論，共同海損的理算報告或多或少都會優惠船東，所以擔保內容亦會保留傭船人對理算報告內容爭執的權利，例如:

「This LOU is provided on behalf of the Cargo Interests on the basis that by so doing, the Owners accept that we are hereby put in the same position as these Cargo Interests as regards any defence to the contributions available to the Cargo Interests and preserved by Rule D of the relevant York-Antwerp Rules.」

依 1994 年約克安特衛普規則（York-Antwerp Rules 1994 - YAR1994）Rule D 原則，共同海損成立與否，端視是否合於其要件，而不論共同海損發生之原因是否為冒險一方之過失所致，全部利害關係人均須參與分攤，但是不侵害到利害關係人向肇責方求償的權利。若船舶事故之肇因為船東之疏失且並無免責條款之適用時，傭船人/貨方仍可向船東追償其相關損失（包括共同海損分攤）。

共同海損所牽涉到的層面非常的廣泛，諸如其法律性質、構成要件、海難救助、擔保收取、損失金額認定、理算程序、海損分攤及所對應的保險，所謂牽一髮而動全身，每一個過程都環環相扣。即使如此，整個共同海損的流程仍應依循所謂的「先理算，後分攤；先分攤，後追償」的原則進行。否則，船東與傭船人、貨主間的爭議將使得共同海損理算進度停滯不前，甚至落入永無止境的對抗循環當中。

四、結語

這堂所費不貲的課程，讓我們學到什麼？Maersk 願意提供這樣永遠性的擔保，是太過於自信還是另有隱情，外人不得而知。或許百萬美金，對這家丹麥航商而言，僅是九牛一毛。這件案子的結果，表面上讓一向自豪的輪船巨人，不僅輸了裡子，也輸了面子。

然而事實真的是如此嗎 ？ 在這個擱淺事故中，最大的獲利者應該是救助人（Svitzer Salvage BV），LOF 2000 救助契約的簽訂讓救助人可以說是”荷包滿滿”，而 Svitzer 卻是 Maersk 集團中的一份子，誰才是真正的贏家，答案應該呼之欲出了！

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