邮件

致 交通运输部

2018 年 12 月 7 日

关于《海商法（修订征求意见稿）》第四章，第七章和第十四章的学术意见

应《海商法（修订征求意见稿）》公开征求意见的通知，英国南安普顿大学海商法研究中心以本报告形式提交关于第四章国际海上货物运输合同，第七章船舶租用合同和第十四章海上保险合同的学术意见。

在南安普顿大学孔子学院赞助下，南安普顿大学法学院分别在 2013、2014 和 2016 年举办了三次“英中海商法会议”，会议就中国《海商法》修改进行许多讨论。基于会议内容，出版了两本英文书籍：《中国保险法》和《中国海商法》。作为中国海商法研究专题的一部分，南安普顿大学海商法研究中心借此机会提交本学术意见，旨在促进国际海商法的发展和交流。

本报告有中文和英文两个版本。在研究中心主任 Andrew Serdy 教授的支持下， 本报告由 宋美娴博士、张婧博博士、Johanna Hjalmarsson 博士完成。Paul Todd 教授解答了报告中的个别问题。中文译文由宋美娴博士和张婧博博士完成。作者简介附在报告结尾处。如需联系，请发送邮件至 m.song@soton.ac.uk。

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航次租船合同:第四章还是第七章？

Paul Todd教授和宋美娴博士

本节回答是否要将航次合同调整到第七章租船合同，予以定性和规范。

单纯的从一个法律评论者的角度出发，Paul Todd教授认为，航次租船合同和提单的条款确实有很多相似之处。因此，比起期租合同，提单更适合并入航次租船合同中。但这个是将提单和航次租船合同放入同一个章节去规范的适当理由吗？这取决于这么做的初衷。租船合同在根本上与提单不同。光船租赁合同也本质上不同于其他两种租船合同。租船合同（光租除外）是关于船舶配备和提供船员服务的合同。租船合同由合同双方制定，正常情况下不转让于第三人。然而提单是关于货物，并非船舶，并且可以转让。

Paul Todd教授认为，海牙维斯比规则适用于提单和其他运输凭证，也就是说不适用于租船合同，除非合同双方自愿并入。这样的国际规范是因为提单影响到第三方，但第三方并不参与条款的协商。（以The Rafaela S[1]为例）同样的原因，英国法没有关于租船合同条款的成文立法，只有为保护第三方而制定的关于提单的立法，也就是《1971海上货物运输法》和《1992海上货物运输法》。英国法将租船合同依一般合同处理。所以，合同法的一般原则和规则适用于租船合同。

关于航次租船合同的属性，宋美娴博士认为，与货物运输相比，航次租船合同与船舶的使用更加相关。从租船合同制定后，同只船可能会被转租给下一个租家，例如 The San Nicholas[2] 和 The SLS Everest[3]两个案件的情形。航次租船合同只约束合同双方，合同双方关心船舶的使用和利益。宋美娴博士同意Paul Todd教授的观点：提单需要立法去保护第三方的利益。

第四章的内容明确的参考了海牙维斯比规则和鹿特丹规则，并且鉴于提单和租船合同定义和法律本质上的不同，宋美娴博士建议航次租船合同应移入第七章进行规范。

混合型租船合同

Johanna Hjalmarsson博士

本节建议第七章应该更近一步认可租船合同的合同自由，并承认混合型租船合同的存在。

《海商法》确认三种形式的租船合同：航次租船合同（第四章），定期租船合同和光船租赁合同（第七章）。《海商法》没有具体规定的时候适用一般合同法。

[1] [2003]2 Lloyd's Rep. 113
[2] [1976] 1 Lloyd's Rep 8
[3] [1981] 2 Lloyd's Rep 389

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《海商法》如此明确定义三种类型的租船合同存在潜在的问题，这样的划分过于严格。关于租船合同的国际规则一般是从商业实践发展而来，最终立法者以法律的形式确认下来。这种方法的缺点是合同双方创新出了新的实践操作，这种创新的做法可能会被现有的规范和概念所制约。

在实务中，租船合同的一些变化的形式可能不会合适地满足目前严格的区分的类型。例如航次期租，在指定的港口之间，以完成一次或多次航程为目的的租船合同，但该合同本身是一个期租合同。另一例子是连续航次合同，以航次租船合同的形式约定一段时间内完成一系列航程。

英国法主流的观点同中国《海商法》一样如此划分租船合同类型。但是他们也认可不同的变化形式的存在，并且在实务操作中，这种变化形式十分普遍。基于英国法的合同自由，租船合同有很大的空间和灵活度去制定混合型的条款，虽然其中的一些问题尚未解决。[4] 如此一来，目前的租船合同的分类已经制约了区间类型合同的法律的发展。[5] 实务中对租船合同的分类与法律上的分类有偏差。

虽然中国《海商法》的法条认可一定的灵活空间，但作者人认为，这比英国合同法的方法更加的拘束。第41条定义了航次租船合同，第129条定义了期租合同。每种租船合同必须包括一些法条列名的条款。法条中也制定了一些默示义务。如合同另有约定，则默示义务不适用。

当合同双方专注于制定一个混合型合同，因此忽略了一些典型的租船合同的条款，或者合同双方制定了没有严格遵照《海商法》规定的合同条款，这样就会产生一些问题。如果合同没有明确规定某一事项，并不代表合同双方想适用成本法的默示规则。当合同双方因交易的某种需要，特意的修改了合同的格式类型，《海商法》确认的默示合同条款是否仍约束合同双方？

举例说明：

1. 保留原文的第93条和第条130条的义务是描述性还是规范性条款？如果合同记录内容不全，会有什么法律后果？如果合同包含两条项下所有内容结果如何？
2. 第96条规定出租人应当提供约定的船舶；经承租人同意，可以更换船舶。这一规定是否适用于航次期租等混合型的租船合同？船东可否依据第96条更换新船？
3. 第47条规定的航次租船合同的适航义务，第131条规定的期租船舶适航，两条内容有所不同针对混合型租船合同应当适用哪一条？
4. 应当如何处理航次期租中的关于航程的条款？这些条款是否属于必要条款？承租人可否因其违约而终止合同？法院是否有法律指导性意见文件来做出判决？

总言之，当双方真心的想制定适用于他们自己的合同而非标准模板，达到预期目的会有诸多困难。作者建议修改后的《海商法》应当确保给予混合型租船合同留有足够的法律空间。

[4] Tania Siakantari, 'Time charter trips remain without across-the-board definition' (2016) 16(4) STL 3.
[5] Johanna Hjalmarsson, 'Trip charterparties and their binary endgames' [2018] L.M.C.L.Q. 376.

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第四章国际海上货物运输合同

张婧博 博士

本文主要就“第四章国际海上货物运输合同”提出修改建议和参考：

1. 实际托运人概念的歧义性和矛盾点

第四章的修改要点中强调增加“实际托运人”概念，并规定当其与合同托运人都要求承运人向其签发运输单证时，承运人应将运输单证签发给实际托运人。笔者理解这则修改是基于我国进出口贸易中大量使用 FOB 合同的现状，对出口货方在一定程度上给予的保护，但是修改稿中所提出的“实际托运人”的概念存在歧义，而且其与承运人之间的法律关系需要进一步疏通。

修改稿 4.2 条（四）规定“实际托运人”，是指接受托运人委托将货物交给承运人或者实际承运人运输，并且在运输单证上记载为“托运人”的人。这则概念包含了两个并列的要素，也就是说，构成海商法中规定的“实际托运人”，不单单是将货物实际交付给承运人，而且此人要在运输单证上被记载为“托运人”。

修改稿 4.33 条最后一段规定“托运人和实际托运人都要求承运人签发运输单证的，承运人应当向实际托运人签发运输单证”。这句话和上述的“实际托运人”定义相矛盾，因为修改稿 4.2 条已经把运输单证上记载为“托运人”作为成为法定“实际托运人”的必要条件，那么何来 4.33 条所说的运输单证签发前的“实际托运人”？

在运输单证上所记载的托运人通常是与承运人订立海上货物运输合同的人，即 4.2 条（三）中所指的“托运人”。相较“托运人”而言，“实际托运人”的界定反而更加严格狭窄，因为其不仅需要在运输单证上被记载为托运人，而且需要实际履行货物的交付。

修改稿 4.2 条（四）“实际托运人”的概念中提到“接受托运人委托”，暗指实际托运人为托运人的委托代理人，而非海上运输合同的订立方。在多数情况下，“托运人”，也就是与承运人订立海上货物运输合同的人，都会选择签发以本人为托运人的运输单据。然而在一类 FOB 合同中，可能出现买方租船订舱，而卖方实际装船并得到以卖方为托运人的运输单据。

在租船运输中，当 FOB 买方租船，卖方实际装船并得到以其为托运人的运输单据时，FOB 买方是租船人受租船合同的约束，而卖方则是以运输单证为证明的海上运输合同的合约方。在班轮运输中，当 FOB 买方订舱，卖方实际装船并得到以其为托运人的运输单据时，FOB 买方应被视为初始海上运输合同的订立方，然而卖方仍然是运输单证中所包含或显示的海上运输合同的合约方。众所周知，运输单证是海上运输合同的证明，运输单据中记载的托运人可以利用运输单据作为海上运输合同的载体对抗承运人，同时也要承担其在运输单据中所体现出来的海上运输合同下的义务，在这一点上托运人和实际托运人的法律地位并无区分。至于实际托运人是托运人的代理人问题以及托

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运人作为委托人的的权利义务问题，应该留在货物买卖合同下解决，而非混淆在海上货物运输合同中。

2. 澄清承运人单位赔偿责任限额的适用范围和举证责任

4.17 和 4.18 两个条款就承运人单位赔偿责任限额进行了规定，但是并没有阐明适用的情况和范围。

结合其他条款来看，其中 4.14 条说明“承运人与托运人明确约定货物应当装载于舱内，对于因舱面装载而造成的货物灭失、损坏或者迟延交付，承运人无权援用本法第 4.17 条或者第 4.18 条限制赔偿责任的规定”；4.20 条补充到“经证明，货物的灭失、损坏或者迟延交付是由于承运人的故意或者明知可能造成此种损失而轻率地作为或者不作为造成的，承运人不得援用本法第 4.17 条或者第 4.18 条限制赔偿责任的规定”。

可以分析出 4.14 条所列举的情况可以归于 4.20 条“承运人的故意或者明知可能造成此损失”中，然而其他行为，比如 4.9 条中的绕航也可以归于这个情况。根据绕航固有的特殊争议和违背的严重法律后果，笔者建议对 4.17 和 4.18 两个条款的适用范围进行澄清。

此外，4.20 条所提及的“经证明”应该更确切的强调经请求人（货方）证明。

3. 进一步列举并增加运输单证的种类

修改稿在 4.2 条（七）规定的“运输单证”，是指包括提单、电子运输记录在内的证明海上货物运输合同和货物已经由承运人接收或者装船的单证。虽然在本款运输单证的种类中增加了“电子运输记录”，但并未列举常见的海运单，提货单和和多式联运单据。

修改稿 4.40 条（六）提及“签发提单和电子运输记录以外的其他运输单证或者未签发任何运输单证的，凭收货人的身份证明交付货物”。这个条款适用于海运单和提货单等不可转让单据，但是并不一定准确适用于多式联运单据，尤其在多式联运的海运部分签发的是可转让提单的时候。修改稿第四章第八节对多式联运合同进行了特别规定，但是并未提及多式联运提单。基于多式联运的增长和诸多法律的不确定性，笔者建议增加对多式联运单据的规定。

4. 法定运输单证持有人的权利和义务来源

修改稿 4.38 条第一段规定“托运人以外的运输单证持有人，未行使运输合同权利的，不承担运输合同的义务；行使运输合同权利的，应当承担运输单证载明的义务”。这一规定明晰了运输单证持有人所可能承担的在运输合同项下的义务，但是此条款并没有明确说明运输单证持有人在运输合同下的权利来源。因为单证持有人本身并非海上货物运输合同的当事方，根据合同法下合同相对性的原则，单证持有人在无法律规定的情况下是无法享受运输合同权利的。虽然实践中权利和义务的转移已经得到认可，但是仍需要在法律上予以体现，例如像英国《海上货物运输法 1992》的做法来突破合同相对性的限制。故此建议在现有修改稿基础上保留原有《海商法》第七十八条的元

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素，增加“承运人同收货人、提单持有人之间的权利、义务关系，依据运输单据的规定确定”。

此外修改稿 4.38 条第一段省略了“收货人”，只提及了“运输单证持有人”，而后第二段又同时列举了“收货人，运输单证持有人”。在使用不可转让单据时，用“收货人”的说法更为恰当，因此建议第一段加入“收货人”。

5.货物交付中的常见问题 – 无单放货与保函

修改稿中第四章第五节增加了货物交付的规则，但是并没有提及实践中常有的无单放货及使用保函的问题。无单放货的豁免例外情况以及保函的法律认可一直都处于模糊的状态。笔者建议考虑增加以下条款：无单放货的法律例外情况，保函本身是否合法，承运人或实际承运人该如何履行保函中的指示，各方在无单放货中的责任分配等。

第十四章 海上保险合同

宋美娴博士和Johanna Hjalmarsson博士

自2006年，英国法律委员会开展保险合同法的审查，并得出结论保险法某些方面需要修改以维持一个有效率和有竞争力的保险市场，修改后的法律应该反映出现代的实务操作。大部分内容针对《1906海上保险法》的条文，包括消费者保险和商事保险的被保险人的最大诚信原则下的义务，保证条款，对保险人在欺诈保险金情形下的救济和保险人迟延支付赔偿款时应支付的赔偿金等事项。[6] 修改后的法律旨在确保保险合同双方之间利益更加平衡。

目前，《2012消费者保险（告知与陈述）法》于2013年4月6日生效。更重要的，适用于商事保险的《2015保险法》于2016年8月12日生效。绝大多数海上保险合同属于商事合同，因此适用《2015保险法》。《1906海上保险法》未经修改的部分仍有效。

《2015保险法》有三个显著的值得注意的特点：首先，《1906海上保险法》总结整理了1906年当时和以前的主要的判例和规则，并非大陆法系传统的立法。然而，《2015保险法》旨在调整当前和以后的保险合同法律问题，各法条仍需法院的解释。第二，《2015保险法》没有区分海上保险法和非海上保险法，所以海上保险合同适用新法。第三，本次保险法修改区分了消费者保险合同和商事保险合同。消费者被保险人和商事被保险人通常在协商能力和资源上有很大差距。大部分海上保险合同属于商事保险合同的范畴，但海上保险合同因制定的目的仍可为消费者保险。[7]

在中国成文法下，《海商法》第14章和《保险法》（2015年修订）无具体规定时，保险合同纠纷可适用《中华人民共和国民法通则》和《合同法》。[8] 根据胡正良教授的

[6] Law Com No 353 / Scot Law Com No 238
[7] Meixian Song, ‘Insurance Contract Law Reform in England’ in *Insurance Law in China*, edited by Johanna Hjalmarsson and Dingjing Huang (Routledge, 2015) pp 274-277.
[8] Meixian Song, ‘Introduction to Chinese Insurance Law’ in *Insurance Law in China*, edited by Johanna Hjalmarsson and Dingjing Huang (Routledge, 2015) p 10.

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观点，《海商法》原第12章海上保险合同内的部分条款与《保险法》的规定并不一致。例如，根据《保险法》第16条规定，被保险人仅有如实告知的义务，然而原《海商法》第222条规定被保险人的主动告知义务。[9] 期刊《海商法研究》和2018年第九届海商法国际研讨会为本节内容提供了很多学术材料和保险实务的反馈意见，让我们更好的了解草案第14章的修改重点。

就商事保险合同，即绝大多数的海上保险合同而言，参考和比较英国法和中国法是十分有价值的，参考介绍的修改要点有五点，本节就其中三点提出问题和观点：

1. 完善被保险人主动告知义务制度，体现诚信原则的“双向性”要求。
2. 调整海上保险保证制度，引入因果关系要求，体现对被保险人的公平性。
3. 根据海上保险商业实践要求，改变保险人对免责条款的主动说明义务。

（1）关于第14.8条的意见

第二百二十二条　合同订立前，被保险人应当将其知道的或者在通常业务中应当知道的有关影响保险人据以确定保险费率或者确定是否同意承保的重要情况，如实告知保险人。 ***保险人知道或者在通常业务中应当知道的情况，保险人没有询问的，被保险人无需告知。***	第14.8条　合同订立前，被保险人应当将其知道的或者在通常业务中应当知道的有关影响保险人据以确定保险费率或者确定是否同意承保的重要情况，如实告知保险人。 ***下列情形保险人没有询问的，被保险人无需告知：*** ***（一）被保险人已经告知的信息足以使得保险人意识到需要进一步询问相关情况的；*** （二）保险人知道或者在通常业务中应当知道的相关情况的。	*建议：* *第14.8条　合同订立前，被保险人应当将其知道的或者在通常业务中应当知道的有关影响保险人据以确定保险费率或者确定是否同意承保的重要情况，如实告知保险人。* ***被保险人应告知保险人充分的信息足以使谨慎的保险人能注意到其需要进一步询问被保险人以揭示重要情况；保险人没有询问的，被保险人无需进一步告知。*** ***保险人知道或者在通常业务中应当知道的情况，保险人没有询问的，被保险人无需告知。***

第 14.8 条第一款，宋美娴博士认为有明显的语言表述问题，并且法律逻辑不清晰。第 14.8 条第二款为原第 222 条第二段，第一款为新增内容。该新第 14.8 条的内容同英

[9] Zhengliang Hu, ‘A Study on the Revision of the Chinese Maritime Code’ in *Maritime Law in China*, edited by Johanna Hjalmarsson and Jingbo Zhang (Routledge, 2015), p 10.

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国《2015 保险法》第 3(4)条和 第 3(5)条类似。 可以说，新第 14.8 条合并了英国法两条的主要内容，但是表述上有所不同。

英国《2015保险法》第3(4)条和 第3(5)条内容如下：

（4）除本条第（5）款另有规定外，告知应满足以下要求：
（a）被保险人应当将其知道或者应当知道的重要情况如实告知保险人；或
（b）**如未尽到上述要求，被保险人应告知保险人充分的信息以使谨慎的保险人能注意到其需要进一步询问被保险人以揭示这些重要情况**。

（5）如未被询问，本条第（4）款不要求被保险人告知以下情况：
（a）使风险减小的情况；
（b）保险人知道的情况；
（c）保险人应当知道的情况；
（d）推定保险人知道的情况；
（e）保险人放弃获知的情况。

如果将第 14.8 条两款分开两句来读，第一句为被保险人已经告知的信息足以使得保险人意识到需要进一步询问相关情况的，保险人没有询问的，被保险人无需告知。第二款为保险人知道或者在通常业务中应当知道的相关情况的，保险人没有询问的，被保险人无需告知。

宋美娴博士的观点是第一句和英国法第 3(4)（b）条很接近， 但是，英国法规定了被保险人的明确的‘有限的’告知义务，如果没有完成‘有限的’告知，被保险人则违反法律规定，以保证被保险人仍然尽到‘最大’诚信。中国法第 14.8 条第一款并没有清楚的规定这是一个告知义务的方式之一，仅强调如果保险人没有询问，则被保险人没有告知义务。鉴于中国《保险法》第 16 条仅规定了如实告知义务，并没有主动告知的规定，《海商法》第 14.8 条必须清楚的界定该义务的界限，而非将其等同于其他可抗辩的事由。

宋美娴博士建议参考《2015 保险法》第 3(4)条和 第 3(5)条的方法和措词。将两款分开说明：

第 14.8 条 合同订立前，被保险人应当将其知道的或者在通常业务中应当知道的有关影响保险人据以确定保险费率或者确定是否同意承保的重要情况，如实告知保险人。

被保险人应告知保险人充分的信息以使谨慎的保险人能注意到其需要进一步询问被保险人以揭示这些重要情况；保险人没有询问的，被保险人无需进一步告知。

保险人知道或者在通常业务中应当知道的情况，保险人没有询问的，被保险人无需告知。

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（2）关于第 14.9 条的意见

第14.9条新增了合同解除权，自保险人知道有解除事由之日起，超过三十日不行使而消灭，与《保险法》更加一致，但是，就违约的法律后果和新修改的英国《2015保险法》很不同，尤其比例原则的救济方式，如果需要更多介绍和解释，请联系。

（3）关于第 14.10 条的意见

	第 14.10 条 订立海上保险合同，采用保险人提供的格式条款的，保险人应当采取合理的方式提示被保险人注意免除保险责任的条款，并按照被保险人的要求，对该条款予以说明。 保险人未按前款规定履行提示或说明义务的，该条款不产生效力。	*建议：* *是否过于有利于被保险人？*

第 14.10 条 是新增条款，但宋美娴博士对该条款有疑问： 建议交通运输部再考虑一下中国海商市场的被保险人是否应当想个人消费者一样被《海商法》保护？该条款似乎对被保险人过度保护。英国法不同于第 14.10 条，商事合同的保险人一般没有通知被保险人免责条款的义务。这样的规范通常建于个人消费合同，例如在英国《2015 消费者权益保护法》。原《1906 海上保险法》因为违约后结果严苛，并不符合现代对个人消费者合同利益的平衡的要求。所以，在英国保险法修改过程中，立法在告知义务方面将两类区分开来。保险人的告知和解释义务仅在英国法新法中一处出现过，[10] 英国《2015 保险法》规定，如果合同约定不适用新法规定，并约定如果被保险人违约后，法律后果比起新法规定对被保险人更加不利，该约定必须清楚写明，并向被保险人告知和说明。英国法在平衡保险合同双方利益时更加小心，避免走向偏于被保险人利益的另一极端。

（3）关于第 14.22 条的意见

[10] Section 17 The transparency requirements
(1) In this section, “the disadvantageous term” means such a term as is mentioned in section 16(2).
(2) The insurer must take sufficient steps to draw the disadvantageous term to the insured’s attention before the contract is entered into or the variation agreed.
….

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第二百三十五条　被保险人违反合同约定的保证条款时，应当立即书面通知保险人。保险人收到通知后，可以解除合同，也可以要求修改承保条件、增加保险费。	第 14.22 条 被保险人违反合同约定的保证条款的，保险人有权解除合同或者要求修改承保条件、增加保险费。 保险人解除合同的，对被保险人违反保证条款前发生保险事故造成的损失，保险人应当承担赔偿责任；对被保险人违反保证条款至合同解除前发生保险事故造成的损失，保险人不承担保险责任，**但被保险人能够证明属于下列情形之一的除外：** **（一）被保险人违反保证条款对保险事故的发生没有影响的；** **（二）保险事故发生在被保险人已纠正违反保证条款行为之后的。** 本条所称保证条款是指海上保险合同中约定被保险人有义务作为或不作为，或者被保险人确保某种事实状态的存在或者不存在的条款，但不影响承保风险的约定不属于保证条款。	*建议：* ***（一）被保险人违反保证条款对保险事故的发生没有因果关系的；***

根据修改要点的第二点“调整海上保险保证制度，引入因果关系要求，体现对被保险人的公平性”。14.22 条两个除外情形：

（一）被保险人违反保证条款对保险事故的发生没有影响的；

（二）保险事故发生在被保险人已纠正违反保证条款行为之后的。

英国《2015 保险法》第三部分第 9-11 条调整保证条款。第 10 条废止所有法律条款中关于被保险人如果违反保险合同中的保证（明示或默示）将免除保险人合同责任的规定；在合同中的保证被违反后至被矫正前的期间内，由于或可归因于某事件的发生而造成保险标的之任何损失，保险人得免除其合同下的责任。第 11 条适用于除针对保险标的整体风险条款以外的用于减少以下一项或多项特定损失风险的条款：（a）特定种类的损失；（b）特定地点的损失；（c）特定时间的损失。如果在损失发生时被保险人已经违反该条款，如果被保险人能证明其违反该条款在当时情况下**不可能导致该已发生的损失的风险的增加**，则保险人不得以被保险人违反该条款为由免除、限制或解除其保险赔偿责任。

起初，法律修改委员会建议英国法引进“因果关系”[11]，但是在 2014 年被否定了，因为理赔调查过程中费用会增加，诉讼会复杂，不确定性增大，难于举证等反馈。因此第 10 条并无“因果关系”的要素。法案解释稿更加明确说明**“不可能导致该已发生的损失的风险的增加”不是 “因果关系”，**这个标准仅要求违约和实际损失的情况有某种影响即可，这种关联并不一定是因果关系。[12]

[11] See Meixian Song, Causation in Insurance Contract Law, (Routledge, 2014), Chapter 7
[12] The Explanatory Notes to the Insurance Act 2015, para [92]-[96].

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比较澳大利亚法，可以找到明确的“因果关系”。非海上保险合同的保证条款的违约适用澳大利亚《1984 保险合同法》第 54 条：保险人在能证明被保险人的违约和损失有因果关系的情况下才能拒绝赔偿责任。但是，海上保险合同仍遵循严苛的结果：合同解除。

宋美娴博士认为， 第 14.22 (1)条没有明确表达出因果关系，且英国法认为‘有某种影响’并不一定是因果关系，所以建议，14.22 (1) 将“没有影响的”该为“没有因果关系的”。

5）保险利益

以下列出了废除中国海上保险法可保利益要求，或者依经济损失定义可保利益。 《海商法》没有关于可保利益的规定。在《海商法》没有任何规定的情况下，《保险法》调整该事项。第二章第一节第12条第2款：“财产保险的被保险人在发生保险事故时应对保险标的具有保险利益。”保险利益的定义如下第6段：“被保险人或被保险人对标的物本身具有法律认可的利益。“该定义同样适用于人寿保险和财产保险。值得注意的是，责任保险（包括海上责任保险）不需要保险利益。对于人寿保险，第31条中有关于家庭关系和同意的进一步定义。[13]对于财产，没有进一步的定义。

解释

该定义的确切含义取决于“法律承认的利益”一词的含义。这可能意味着法律关系[14]或经济关系。[15] 这法院解释的问题，特别是最高法院。主流的观点似乎是“法律承认的关系”这个词应该被赋予“广泛和自由”的含义，并且经济关系足以满足要求。然而，最高法院在其关于适用保险法的解释II中没有明确说明，尽管该解释草案中讨论了该原则。[16]

初北平[17]和汪鹏南[18]都注意到这条规定的不确定性。

汪鹏南观点为，中国法院已将经济利益和商业权宜作为合法利益。他指出了一个悬而未决的问题：“货物装载在运输船上后卖方的合法权益”和“货物保险的合法利益，即海运货物政策中货物利润的一定百分比没有明确的增值条款”。[19]

[13] Zhen Jing, ‘Insurable interest in life insurance: a Chinese perspective’ [2014] JBL 337.
[14] As in the case *M/V Rong Sheng*; see Beiping Chu at page 97, ‘Current issues and developments in Chinese insurance law’ in *Insurance Law in China*, edited by Johanna Hjalmarsson and Dingjing Huang (Routledge, 2015)
[15]As in the case *M/V Yu Hang*; *ibid*
[16] Beiping Chu at page 97, ‘Current issues and developments in Chinese insurance law’ in *Insurance Law in China*, edited by Johanna Hjalmarsson and Dingjing Huang (Routledge, 2015).
[17] Beiping Chu, ‘Current issues and developments in Chinese insurance law’ in *Insurance Law in China*, edited by Johanna Hjalmarsson and Dingjing Huang (Routledge, 2015).
[18] Pengnan Wang, ‘An introduction to the law and practice of marine insurance in China’ in Insurance Law in China, edited by Johanna Hjalmarsson and Dingjing Huang (Routledge, 2015).
[19] Wang, Insurance Law in China, page 213.

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初北平说，“在司法实践中，法院在确定可保利益的存在时也采取了不同的检验标准”。[20]

似乎有机会推进海上保险法认定一个相对广泛的在被保险人在损失时所需的利益。下面将证明，这种趋势通常仅仅依赖于财产保险赔偿原则 - 即必须证明由保险事件引起的经济损失。

救济结果

如果在财产保险损失时没有可保利益，中国 2015 年《保险法》规定了以下法律后果：

第四十八条“被保险人在被保险事故发生时保险标的不具有保险利益的，被保险人不得向保险人索赔。”[21]

本条不影响合同的有效性，但涉及能否成功索赔的条件。从逻辑上讲，该条款必须暗含某种条件，不仅仅是证明经济损失。如果只提供损失证据就足够了，那么这条就没有必要了。尽管最高法院似乎倾向于对法律承认的可保利益定义的利益进行“广泛和书面”的解释，但第 48 条的逻辑阻碍了对被保险人经济损失的重视。

其他司法区域的近期发展

在英国海上保险法中，《1906 海上保险法》要求在损失发生时保险标的的法律或衡平法的关系。[22]本条基于 Lord Eldon 在 Lucena v Craufurd[23]的观点。在同一案件中，Lawrence J 主张要求证明经济损失即可。

虽然严格来说《1906 海上保险法》要求合法或衡平法的利益（“法律承认的”利益），但海上保险案件显示出实用主义的压倒性趋势。在 O'Kane v Jones（The Martin P）[24]中，如果船舶沉没，船舶经理只是因为遭受业务损失而被认为拥有可保利益。在 Sharp v Sphere Drake（The Moonacre）[25]中，由于税收原因，保险游艇归信托所有。被保险人是信托的董事，信托的受益人有权决定使用游艇。这被认为是一个充分的利益。

对于非海上财产保险，《1845博彩法》第18条禁止根据被保险人在订立保险单时缺乏可保利益或期望获得此类权益的保险合同。但是，《2005赌博法》废除了该部分，并且无意中也废除了对非海上财产法可保利益的要求。这意味着不再需要非海上财产保险的可保利益。[26] 2016年，法律委员会发布的一项法案草案建议，在非海上财产保险

[20] Chu, Insurance Law in China, page 97.
[21] This contrasts with life insurance, where the policy is made void by article 31. Article 58 of the Contracts Act provides for the further consequences of the avoidance.
[22] Marine Insurance Act 1906, section 5.
[23] (1806) 2 Bos & Pul MR 269.
[24] [2005] Lloyd's Rep IR 174.
[25] [1992] 2 Lloyd's Rep. 501
[26] *Colinvaux*, para 20-001.

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中，必须在损失时显示经济损失。[27] 2018年颁布的修订草案已经省略了关于非海上财产保险的规定，现在只涉及人寿保险。[28]因此，看起来似乎不会继续要求英国非海上财产保险的可保利益。相反，赔偿原则将具有相同的效果，即要求被保险人显示经济损失。

在澳大利亚保险合同法中，通过1984年《保险合同法》废除了对可保利益的要求。[29]该法第16条规定，在订立合同时不需要利益。根据中国法律，财产保险已经是这种情况。第17节进一步指出，在损失发生时缺乏合法或衡平法的利益（“法律承认的利益”）并不能免除保险人的责任。该规定自1986年1月1日起生效，在实践中没有出现值得注意的问题。

澳大利亚海上保险法依据1909年《海上保险法》，非常类似于《1906英国海上保险法》的法规，仅略有修改。第11-21条与英国法类似。第11条要求在损失发生时保险标的的“合法或衡平法的关系”。这类似于中国的财产保险的规定。澳大利亚法律委员会（ALRC）在2001年的一份报告中建议废除对可保利益的要求，经济损失的证据就足够了。[30]在此过程中，ARLC指出了现有定义存在的一些困难。[31]

在加拿大法律中，同样基于《1906年海上保险法》，最高法院驳回了在非海上保险案中要求被保险人有“法律或衡平法的关系”的利益。[32]在海上保险法中，安大略省高级法院最近的一个案例在实践中拒绝适用严格的定义，重点关注与航程的法律或衡平法的关系，而不是具体的财产。[33]

总结

受《1906年海上保险法》影响的司法管辖区，目前趋势是仅依赖赔偿原则或将可保利益定义为经济损失。 1984年《澳大利亚保险法》实施了这项改革。 2015年《中国保险法》，1909年《澳大利亚海上保险法》和《1906英国海上保险法》尚未实施这项改革。现有立法似乎阻碍了现代方法的发展。然而，在英国法律中，现代判例法对可保利益的经济损失概念有一个令人信服的趋势。在《2006年赌博法》生效后，英国法目前没有要求一般财产保险具有保险利益。废除“法律认可的利益”标准并未在已经这样做的司法管辖区内造成任何问题，并且符合财产保险的逻辑。

根据这些标准修改中国《海商法》将使其领先于较慢的司法管辖区，因为它将为海上保险法的当前和未来趋势提供法定形式。

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[27] Namely that the insured “will suffer economic loss if the insured event relating to it occurs”. The Draft Bill 2016 is available at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2016/04/draft_Insurable_Interest_Bill_April_2016.pdf (accessed 29 November 2018).
[28] The Draft Bill 2018 is available at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/June-2018-Draft-Insurable-Interest-bill.pdf (accessed on 29 November 2018).
[29] Available at https://www.legislation.gov.au/Details/C2016C00820 (accessed on 23 November 2018).
[30] See report http://www.austlii.edu.au/au/other/lawreform/ALRC/2001/91.html (accessed on 23 November 2018), Summary of recommendations paragraph 28.
[31] Ibid.
[32] *Kosmopoulos v Constitution Insurance* [1987] 1 SCR 2.
[33] *Broadgrain Commodities Inc v Continental Casualty Co* [2017] ONSC 4721.

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Johanna Hjalmarsson博士的建议

由于缺乏最高法院的解释，不确定性仍然存在。海上财产保险的一个重要目的是保证运输货物将在整个航程中买卖。卖家和买家在装货前后的利益状况是一个真正令人担忧的问题。任何不确定性对商业都没有帮助。

根据1984年《澳大利亚保险法》和澳大利亚法律委员会的建议修订中国《海商法》，即可保利益定义为经济损失。

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BY EMAIL
Ministry of Transport of the PRC

7 December 2018

Dear Sir/Madam,

Academic Opinions: Draft Chinese Maritime Code Chapter 4, Chapter 7 and Chapter 14

This is an academic response from the Institute of Maritime Law of the University of Southampton (UK) to the consultation on the draft Chinese Maritime Code which is limited to some issues under Chapter 4 Contract of Carriage of Goods by Sea, Chapter 7 Charterparties and Chapter 14 Marine Insurance Contract.

The Anglo-Chinese Maritime Law Conferences held by the Southampton Law School with the support of the Confucius Institute in Southampton and London in 2013, 2014 and 2016 raised many discussions with regard to the study on the revision of the Chinese Maritime Code. Based upon the conferences, 'Insurance Law in China' and 'Maritime Law in China' were published by Routledge in 2016 and 2017. As part of this on-going project, the Institute of Maritime Law would like to deliver our academic opinion, with an eye to the development and harmonisation of maritime law at an international level.

The response is submitted in both Chinese and English languages. Key authors are Dr Meixian Song, Dr Jingbo Zhang, Dr Johanna Hjalmarsson under the direction of the Director of the Institute, Prof Andrew Serdy. Prof Paul Todd also contributes to the response. Chinese translations are delivered by Dr Meixian Song and Dr Jingbo Zhang. The biographies of the authors are attached at the end of this letter. Please Dr Meixian Song (m.song@soton.ac.uk) with any questions.

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Voyage Charterparty: Chapter 4 or Chapter 7?

Prof Paul Todd and Dr Meixian Song

The following questions whether the Draft Chinese Maritime Code should deal with voyage charterparties and bills of lading together under Chapter 4 International Contracts of Carriage of Goods by Sea, whereas time and demise charterparties are addressed in Chapter 7 Charterparties.

Speaking purely as a legal commentator, Professor Paul Todd maintains that it is true that the terms of a voyage charter party and a bill of lading are similar. For this reason, voyage charterparty terms are more suitable than time charterparties for incorporation into bills of lading. But is that a good reason for grouping them together? It depends on what purpose the grouping serves. Charterparties are fundamentally different from bills of lading. Demise charters are also fundamentally different from other types of charter. Charterparties are about the provision of a ship and, if other than by demise, the services of master and crew. They are contracts made between two parties and not normally transferred to third parties. Bills of lading are about goods, not ships, and are transferable.

Moreover, Professor Todd observes that the Hague Visby Rules apply to bills of lading and other documents of title - in other words not to charterparties, otherwise than by voluntary incorporation. The rationale of making such an international convention (as can be seen from the discussion in *The Rafaela S*[1]) is because bills of lading affect third parties, who had no opportunity to negotiate their terms. By the same token, English law has no legislation on the terms of charterparties. There is only legislation on bills of lading in order to protect third parties, namely, the Carriage of Goods by Sea Act 1971 and the Carriage of Goods by Sea Act 1992. English law treats charterparties as contracts. Therefore, principles and rules in contract law apply to a charterparty.

With regard to the nature of a voyage charterparty, Dr Meixian Song holds the view that a voyage charterparty is more relating to the use of the vessel and crew than to the carriage of cargo. Once a charterparty has been concluded between the shipowner and the charterer, the same vessel may be sub-chartered back to back by the charterer to a sub-charterer, as can be seen in *The San Nicholas*[2] and *The SLS Everest*.[3] A voyage charterparty is a contract which is only binding between the two specified parties who concentrate on the usage of and interest in the vessel. Dr Song concurs with Professor Todd that, the bill of lading requires a legislative framework to protect a third party in a carriage contract.

Chapter four categorically makes reference to both the Hague Visby Rules and the Rotterdam Rules. In light of the distinctions between a charterparty and bill of lading by definition and in legal nature, it is suggested by Dr Song that the provisions concerned with voyage charterparties should be moved to Chapter 7 Charterparties.

[1] [2003]2 Lloyd's Rep. 113
[2] [1976] 1 Lloyd's Rep 8
[3] [1981] 2 Lloyd's Rep 389

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Hybrid Forms of Charterparties

Dr Johanna Hjalmarsson

The following advocates greater freedom of contract in relation to charterparties, and recognition of the existence of hybrid forms of contract.

The Chinese Maritime Code identifies three types of charterparties: voyage charterparties (Chapter IV especially Section 7), time charterparties (Chapter VI especially Section 2) and bareboat charterparties (Chapter VI especially Section 3). It is clear that where there is no specific stipulation in CMC, general principles and stipulations of contract law apply instead.

There is a potential problem with the clear cut division into types of contracts espoused by the CMC, namely that the categorisation of contracts is too rigid for some types of contracts. The international law on charterparties has developed largely through commercial practice, to which contracting parties, legal authors and finally the legislator have given statutory form. The disadvantage with this approach is that where commercial parties innovate further, they may be held back by existing categories and concepts.

In practice, commerce uses further variants of charterparty which may or may not be a comfortable fit to the strict categories. One such category is the trip time charterparty. This is a contract for one or more specified voyages with specified cargo to and from specified ports (and therefore in substance similar to a voyage charterparty) but the contract in question is a time charterparty. Another hybrid form is the consecutive voyage charterparty. These are in the form of voyage charters, but are agreements for more than one voyage to be performed within a certain period of time and therefore in substance similar to a time charterparty.

The main authored works on English law are divided into typical forms of contract in the same manner as the CMC. However they also recognise that further variants are possible, and that in practice such further variants are very frequently employed by commercial parties. Given the principle of freedom of contract of English law, there should be sufficient flexibility to tailor the contract and its clauses into a hybrid form of contracts if the parties so wish, although the question remains essentially unanswered. [4] That said, the existence of the set categories of contract has held back development of the law in relation to additional, or intermediate forms of contract.[5] There is therefore a mis-match between the contracts used in practice and the categories developed by the law.

While the CMC has some inbuilt flexibility, it is arguably even less open-textured and more prescriptive than English contract law. Voyage charterparties are defined in article 41. Time charterparties are defined in article 129. For each type of charterparty, there is listed a number of terms that must be included in the charterparty (voyage charters, article 93; time charters, article 130). There are also created a number of implied obligations (voyage

[4] Tania Siakantari, 'Time charter trips remain without across-the-board definition' (2016) 16(4) STL 3.
[5] Johanna Hjalmarsson, 'Trip charterparties and their binary endgames' [2018] L.M.C.L.Q. 376.

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charters, article 95 onwards; time charters, article 131 onwards). These are said to be subject to the stipulations of the contract itself (voyage charters, article 94; time charters, article 127).

Issues may arise where the parties have sought to create a hybrid, and have therefore intentionally omitted some of the stipulations normally found in typical charterparties, or replaced them by other stipulations which nevertheless do not correspond precisely to the CMC's provisions. If a contract is silent on a matter, it does not necessarily mean that the parties wish for it to be imported from the statute. Are the obligations in CMC still to be implied into the contract, where the parties have purposely sought to modify the standard contract category for their particular purposes?

Some examples are necessary.

1. Are the lists of obligations in Article 93 and article 130 descriptive or prescriptive? What if a contract contains some, but not all of these obligations? What happens if they contain obligations from both lists?

2. Under a voyage charterparty, the shipowner is under the obligation to deliver the ship or an acceptable substitute, failing which the charterer may cancel the charter (article 96). Is this obligation to be implied into a trip time charterparty or a consecutive voyage charterparty, or a bespoke hybrid? Does the shipowner have the right to deliver an alternative vessel (per article 96)?

3. Article 47 provides that under a voyage charter, the shipowner must exercise due diligence to make the ship seaworthy before and at the beginning of the voyage. There is a list of obligations which pertain generally to cargoworthiness. Article 131 provides that under a time charterparty, the shipowner shall exercise due diligence to make the ship seaworthy, which here is defined as fit for the intended service. Which of these is to be implied into a hybrid charterparty, concluded for the carriage of goods on consecutive voyages over a period of time? The parties' obligations may be quite different under each clause.

4. What role is to be given to the voyage provisions in a trip time charterparty? Do they define the contract performance, and are they essential terms? Can the charterer terminate the contract if they are not complied with? If two parties present opposite arguments before the court on the issue whether a contract is to fall under the time charterparty provisions and the voyage charterparty provisions, what guidance should the court follow in order to determine the issue?

In sum, where the parties genuinely are seeking to contract on terms that do not fully conform to the standard matrix, difficulties may arise in accommodating their contractual intentions. It is recommended that the reformed CMC should ensure that there is adequate freedom to enter into contracts on terms that do not correspond exactly to a voyage charterparty or a time charterparty.

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Chapter 4 International Carriage of Goods by Sea Contracts

Dr Jingbo Zhang

This paper mainly discusses “Chapter Four International Carriage of Goods by Sea Contracts”, and provides suggestions and references for revision.

1. Ambiguity and conflict regarding the concept of “actual shipper”

One of the key points in the Chapter Four draft revision lies in adding the concept of “actual shipper”. Chapter Four further states that when both the contractual shipper and the actual shipper request the carrier issuing a transport document, the carrier should issue it to the actual shipper. The author appreciates that the background of this revision is based on the large volume of using FOB contracts for international trade in China, and the revision aims to protect the interest of Chinese export traders to some extent. However, the current draft revision contains a self-conflict point regarding the definition of “actual shipper”, and the legal relationship between the actual shipper and the carrier is not very clear.

The draft provision 4.2 (Four) stipulates that “actual shipper” means a person under the delegation of shipper delivers the cargo to a carrier or actual carrier for carriage and is recorded as “shipper” on the transport document. The definition of “actual shipper” here covers two co-existing elements, i.e. actually delivery of the cargo to a carrier, and being recorded as “shipper” on the transport document.

The last paragraph of the draft provision 4.33 stipulates that when both the contractual shipper and the actual shipper request the carrier issuing a transport document, the carrier should issue it to the actual shipper. This sentence is in conflict with the definition of “actual shipper” stated above, because the draft provision 4.2 has already made “being recorded as shipper on the transport document” as a necessary condition to become an “actual shipper”. How can the situation described in the draft provision 4.33 occur, as before the issuance of a transport document, a person cannot be qualified as an “actual shipper” at all?

Generally, the shipper recorded on a transport document is the party who makes a contract of carriage with the carrier, that is, “shipper” defined in the draft provision 4.2 (Three). Comparing with that “shipper”, the range of “actual shipper” is much narrower, since an actual shipper not only needs to be recorded as shipper on a transport document, but also actually delivers the cargo to the carrier.

The definition of “actual shipper” in the draft provision 4.2 (Four) refers to “under the delegation of the shipper”, which indicates that the actual shipper as an agent of the shipper, instead of making a contract of carriage by himself. In most cases, “shipper”, who makes a contract of carriage with the carrier, would choose the transport document to be issued in his own name as shipper. Nevertheless, under one type of FOB contracts, the buyer may find shipping space or charter the vessel, while the seller actually ships the cargo and obtains the transport document recorded himself as the shipper.

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In the case of charterparty, when the FOB buyer charters the vessel but the seller ships the cargo and obtains the transport document as shipper, the contract of carriage for the FOB buyer is charterparty, while the seller is a party under the contract of carriage evidenced by the transport document. In the case of liner shipping, when the FOB buyer books shipping space but the seller ships the cargo and obtains the transport document as shipper, FOB buyer should be regarded as an original party in the contract of carriage, while the seller is still a party under the contract of carriage contained or evidence by the transport document. It is well-known that the transport document evidences the contract of carriage, and the shipper in the transport document can avail himself to defend against the carrier under the contract of carriage as well as expose to obligations under the contract of carriage. From this perspective, there is no difference in legal status between shipper and actual shipper. The issue of agency and the potential conflict of interests between a principal and an agent, should be solved in the context of international sale of goods contract, rather than mixing into the contract of carriage of goods by sea.

2. Clarify the scope of application in terms of carrier's limitation of liability and the issue of burden of proof

Both draft provisions 4.17 and 4.18 express how to calculate the carrier's minimum limitation of liability, but without illustrating the circumstances and scope of application.

Referring to other relevant provisions, 4.14 provides "when the carrier and the shipper has clearly agreed that the cargo should be loaded in the hold, the carrier shall not be entitled to claim the limitation of liability stated in 4.17 and 4.18 if the loss, damage or delay of the cargo was caused by loaded on deck". 4.20 supplements "upon proof, if the loss, damage or delay of the cargo was resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result, the carrier shall not be entitled to claim the limitation of liability stated in 4.17 and 4.18".

It is not difficult to see that the illustrated situation in 4.14 is covered by the scope of 4.20, as a result of carrier's intent or knowledge. Other acts or omissions, for example, deviation, can also be potentially covered by the scope of 4.20. Due to the existing debates and uncertainties on the serious legal consequences triggered by deviation, the author suggests clarifying the applicable circumstances of 4.17 and 4.18, in other words, whether the carrier's limitation of liability would apply to all the circumstances except the one described in 4.20.

In addition, "upon proof" referred in 4.20 should be more precisely stated as "upon proof of the claimant (cargo interest)".

3. Illustrate and increase the type of transport documents

"Transport documents" stated in the draft provision 4.2 (Seven) means any document which can evidence the contract of carriage and prove that the cargo has been received or shipped by the carrier, including bill of lading and electronic transport records. Although the article has been extended to expressly include electronic transport records, it does not list other

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common type of transport documents, such as sea waybill, ship's delivery order and multimodal transport document.

The draft provision 4.40 (Six) provides that "when transport documents except bills of lading and electronic transport records were issued or when no transport documents were issued, delivery is upon the consignee's proof of identity". This provision fits with non-transferable documents, such as sea waybills and ship's delivery orders; however, it does not necessarily fit with multimodal transport documents, especially when a transferable bill of lading was issued for the part of sea carriage. Chapter Four Section Eight of the draft revision has specifically addressed the issues of multimodal carriage contracts, but there is no mention about multimodal transport documents. Based on the increase needs of multimodal transport and the uncertainties in this area of law, the author suggests adding provisions for multimodal transport documents.

4. Ascertain the legal source of transport document holder's rights and obligations

In the first paragraph of the draft provision 4.38, it stipulates "the holder of a transport document, except from the shipper, is not subject to liabilities under the contract of carriage if he has not claimed the rights under the contract of carriage; if he has claimed the rights under the contract of carriage, he is subject to liabilities under the contract of carriage". This provision nicely clarifies the rights and obligations vested on the holder of a transport document; however, it does not provide how the rights under the contract of carriage is originally come to the holder of a transport document. Since the holder of a transport document in this provision is not an original party in the contract of carriage, based on the restriction of privity under contract law, the holder of a transport document is unable to claim any rights under the contract of carriage without the aid of legal intervention. Although transfer of rights to the holder of a transport documents has been commonly recognised in practice, it still needs to be ascertained and reflected in law. For example, the restriction of privity has been successfully broken out by the English Carriage of Goods by Sea Act 1992. It is therefore submitted that a similar provision to the existing Maritime Code Art.78 should be kept and added in the current revision. A draft example can be "rights and obligations between the carrier and the consignee or the holder of a transport document should be referred to those under the transport document".

In addition, the first paragraph of the draft provision 4.38 only refers to "holder of a transport document" without mentioning "consignee", and later on the second paragraph lists both "consignee" and "holder of a transport document". In case of non-transferable documents, it makes better sense to use "consignee", so this word should be added in the first paragraph as well.

5. Common problems in delivery – delivery without a bill of lading and letter of indemnity

Chapter Four Section Five of the draft provision has added new rules on delivery of goods, but there is no reference on delivery without a bill of lading and the use of letter of indemnity.

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The exceptions of delivery without a bill of lading and the legal status of letters of indemnity have been long-lasting questions. The author therefore tentatively suggests considering adding the following provisions: the legal exceptions of delivery without a bill of lading, legal status of letters of indemnity, how a carrier or an actual carrier should perform the order in a letter of indemnity, how to allocate liabilities arisen from delivery without a bill of lading in different circumstances.

Chapter 14 Marine Insurance Contract

Dr Meixian Song and Dr Johanna Hjalmarsson

Introduction

Since 2006 the Law Commission of England and Wales and the Scottish Law Commission have been engaged in a joint project examining UK insurance contract law, and have concluded that there is a need to reform aspects of insurance law to help maintain an effective and competitive insurance market, as well as to reflect modern practice. Four main target areas are disclosure and misrepresentation in business and other non-consumer insurance contracts; insurance warranties; the insurer's remedies for fraudulent claims; and damages for late payment of claims.[6] These reforms are aimed at ensuring a better balance of interests between policyholders and insurers.

So far, the Consumer Insurance (Disclosure and Representation) Act 2012 which applies to all "consumer insurance contracts" entered into force on 6 April 2013. More importantly, the Insurance Act 2015 ("the 2015 Act") came into force on 12 August 2016 for business insurance contracts. The vast majority of marine insurance contracts will fall within the scope of application of the 2015 Act. The unchanged part of the Marine Insurance Act 1906 ("the 1906 Act") remains effective. The 2015 Act has three salient features that are noteworthy: first of all, while the original 1906 Act was not a civil law code designed to provide answers to future problems, but rather a summary of the existing rules and practice in 1906, the 2015 Act aims to resolve some current and future legal issues arising from insurance contracts which require judicial interpretations in future. Secondly, the 2015 Act does not particularly distinguish marine insurance from other forms of insurance so that any fundamental amendment on the principles of insurance contract law will affect the propositions in the law of marine insurance as well. Thirdly, a distinction between consumer insurance and business contracts is drawn. Consumer and business insureds normally hold different positions in negotiation and knowledge. Marine insurance is largely within the scope of business insurance, but a marine policy may fall under the Consumer Insurance Act due to the purpose of cover.[7]

[6] Law Com No 353 / Scot Law Com No 238
[7] Meixian Song, 'Insurance Contract Law Reform in England' in *Insurance Law in China*, edited by Johanna Hjalmarsson and Dingjing Huang (Routledge, 2015) pp 274-277.

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Among the promulgated legislative instruments in China, the 'Civil Law Code' and the Chinese Contracts Act contain several provisions regulating general issues of insurance contract law in the absence of specific rules. The latest Chinese Insurance Act 2015 is the third amendment to the Insurance Act 1995 and provides laws relating to insurance contracts. Chapter 12 of the Chinese Maritime Code 1992 ("the CMC 92") provides rules applicable particularly to marine insurance contracts.[8] As observed by Prof Zhengliang Hu, some provisions in Chapter 12 are not in line with the provisions of the Insurance Act. For example, insureds are only subject to a duty of fair presentation when replying to insurers' questions in accordance with Art. 16 of the Insurance Act, whereas Art. 222 of the CMC 92 sets out a more onerous duty of disclosure on insureds.[9] Chinese Journal of Maritime Law and The Ninth International Conference on Maritime Law in Shanghai on 29-31 October 2018 also provide many scholarly writings and market responses for us to get to know the focus and need of reforms.

So far as business marine insurance contracts are concerned, it is of significant value comparing the UK legislations and experience with Chapter 14 of Draft CMC.

The Draft introduces the focus of reforms in five bullet points. Our recommendations concern the following three points, and the issue of insurable interest:

a. The chapter reforming the insureds' duty of disclosure in order to reflect the demand of "mutuality" of the good faith principle. (see sections 14.8 and 14.9)
b. The chapter adjusting the rules relating to warranties by introducing causality in order to demonstrate fairness to insureds. (see section 14.22)
c. In response to demand from the insurance market, the chapter reforms insurers' duty of notifying and construing the exemptions to assureds at the time of formation. (see section 14.10)

(1) Suggestions on Section 14.8

Article 222 of the CMC 92 provides

> Before the contract is concluded, the insured shall truthfully inform the insurer of the material circumstances which the insured has knowledge of or ought to have knowledge of in his ordinary business practice and which may have a bearing on the insurer in deciding the premium or whether be agrees to insure or not.
> *The insured need not inform the insurer of the facts which the insurer has known of or the insurer ought to have knowledge of in his ordinary business practice if about which the insurer made no inquiry.* [10]

[8] Meixian Song, 'Introduction to Chinese Insurance Law' in *Insurance Law in China*, edited by Johanna Hjalmarsson and Dingjing Huang (Routledge, 2015) p 10
[9] Zhengliang Hu, 'A Study on the Revision of the Chinese Maritime Code' in *Maritime Law in China*, edited by Johanna Hjalmarsson and Jingbo Zhang (Routledge, 2015), p 10.
[10] Translation from the webpage of the Supreme People's Court of the PRC. http://english.court.gov.cn/2016-04/14/content_24532980_5.htm

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Draft section 14.8 retains the first paragraph. The second paragraph is amended as follows in Dr Song's translation:

> Under the following circumstances where the insurer has made no inquiry, the insured is not obliged to disclose:
>
> 1. The insured has provided certain information which is sufficient to make the insurer be aware of the need of further inquiry;
> 2. The insurer has known of or the insurer ought to have knowledge of in his ordinary business practice.

（下列情形保险人没有询问的，被保险人无需告知：

（一）被保险人已经告知的信息足以使得保险人意识到需要进一步询问相关情况的；

（二）保险人知道或者在通常业务中应当知道的相关情况的。）

The drafting of subsection 1 has ostensible grammatical issue in Chinese language. Dr Song's comment on the section 14.8(1) is that the draft is confusing in Chinese language expression and incorrect in legal logic. The draft rephrases the original paragraph 2 of Art 222 of CMC 1992, and also adds the subsection 1 into the statute. The draft is also comparable to section 3(4) and section 3(5) of the 2015 Act under English law. It is reasonable to venture that the draft combines the key substance of section 3(4) and section 3(5), but with different literal expressions. Under English law, a counter-part can be found in the 2015 Act,

Section 3(4)

> The disclosure required is as follows, except as provided in subsection (5)—
>
> (a) disclosure of every material circumstance which the insured knows or ought to know, or
>
> (b) ***failing that, disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances.***

Section 3(5)

> In the absence of enquiry, subsection (4) does not require the insured to disclose a circumstance if—
>
> (a) it diminishes the risk,
>
> ***(b) the insurer knows it,***
>
> ***(c) the insurer ought to know it,***
>
> ***(d) the insurer is presumed to know it, or***
>
> (e) it is something as to which the insurer waives information

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With regard to the expression of the draft, if the two subsections of section 14.8 are put into two separate sentences for describing the intentions of the law, it would be: where ***the insured has provided certain information which is sufficient to make the insurer aware of the need for further inquiry, the insured is not obliged to make further disclosure in the absence of inquiry***; the other sentence would be: *where the insurer has made no inquiry, if the insurer has known of or the insurer ought to have knowledge of in his ordinary business practice, the insured is not obliged to disclose*.

Dr Song's comment on the first circumstance is that the draft is very similar to section 3 (4)(b), however, English law's expression is to impose an express statutory duty on the insured to make 'limited' disclosure to the insurer in the first place; failing to do so will mean that there is a breach of the duty of fair presentation. The drafting of subsection 1 fails to stipulate and define the insured's duty to disclose material information in a 'limited manner' in a clear manner. Moreover, since Art. 16 of the Chinese Insurance Act 2015 only recognises misrepresentation as a qualifying breach before the conclusion of insurance contract in general, it becomes more crucial for the CMC section 14.8 to provide its special rules relating to duty of disclosure in a clearer and fairer manner.

Dr Song's recommendation is that the two expressions under section 3(4)(b) of the 2015 Act and the draft should make a sensible difference in law when defining the insured's duty of disclosure. The expression and approach of English law is clearer in both legal intentions and literal expressions.

(2) Suggestions on Section 14.9

It can be perceived that section 14.9 retains 'termination' (as opposed to 'avoidance' of policy) and charging a higher premium as the key remedies when the insured breaches the duty of utmost good faith before the conclusion of the contract. It also adds that the right of termination will lapse when the insurer fails to exercise the rights after 30 days when the insurer knows or should have known about the breach. Section 14.9 is more in alignment with Art 16 of the Chinese Insurance Act 2015. However, the approach remains different from that in English law which is provided in Schedule I of the 2015 Act. A detailed introduction to proportionate remedies under English law is available upon request.

(3) Suggestions on Section 14.10

Section 14.10 is a new provision which provides that for marine insurance based on standard forms provided by insurers, insurers shall take reasonable steps to notify insureds of exemption clauses and provide for explanation upon insureds' request. The insertion of this new provision is questionable in Dr Song's opinion.

Under English law, unlike draft section 14.10, insurers of business insurance contracts in general do not have a general duty of notifying exemption clauses to insureds. This is a duty usually imposed for consumer contracts, under the UK Consumer Rights Act 2015. The old 1906 Act is inappropriate for modern consumer insurance and operates harshly, and there is a need to draw a distinction between consumer and business insurance in terms of the duty of fair presentation only.

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The insurer's duty of notification and explanation of 'the disadvantageous term' arises only in the UK 2015 Act for business insurance, where such term aims to opt out of the default rules set out in the 2015 Act, in order to apply the rules that are more stricter to insureds instead.[11] English law is very cautious about going to another extreme to the imbalance of the parties' interests by providing too much protection to insureds.

Dr Song would recommend that the Ministry of Transport reconsider whether the business insureds in Chinese insurance market should be protected as consumers under the CMC? This provision is potentially too favourable to business assureds.

(4) Suggestions on Section 14.22

In accordance with the second point of the Draft, the chapter adjusts the rules relating to warranties by way of introducing causality in order to achieve fairness to insureds. S 14.22 provides that the insurer may still be liable if the insured can prove a) the breach has no bearing on the occurrence of the loss, or (b) the loss occurred after the breach is remedied.

Part 3 of the UK Insurance Act 2015 (sections 9 to 11) which is headed "Warranties and other terms" is to reform the draconian remedies of promissory warranties. Section 10 provides that the automatic discharge of liability is abolished and replaced by a suspensive remedy. Section 10 (2) stipulates that an insurer has no liability under a contract of insurance in respect of any loss occurring, or attributable to something happening, after a warranty (express or implied) in the contract has been breached but before the breach has been remedied. The sub-section aims to lay down and emphasise the suspensive effect of a breach of warranty during the period of time in breach. This replaces the automatic termination of the policy entirely from the moment of breach in the old regime. Section 11 may apply in addition to section 10, in the way where a warranty that is for reducing the risk of a loss of a particular kind, at a particular location or time, but other than a term defining a risk as a whole is breached, the insurer could only rely upon to reject the claim if the breach would have increased the risk of the actual occurrence of the loss, otherwise, the breach will not affect the assured's right of recovery.

An express causal rule was suggested by the English and Scottish Law Commissions in the past,[12] but in 2014 the Law Commissions rejected the idea, accepting opposition 'on the grounds of increased investigation costs, complex litigation, uncertain outcomes, and difficulties of proof'. It is clear that 'would have increased the risk' test is not a causal link in the view of English legislators. The Explanatory Notes state that "[i]n the event of non-compliance with such a term [under section 11], it is intended that the insurer should not be able to rely on that non-compliance to escape liability unless the non-compliance could potentially have had some bearing on the risk of the loss which actually occurred." It

[11] Section 17 The transparency requirements
(1) In this section, "the disadvantageous term" means such a term as is mentioned in section 16(2).
(2) The insurer must take sufficient steps to draw the disadvantageous term to the insured's attention before the contract is entered into or the variation agreed.
….

[12] See Meixian Song, Causation in Insurance Contract Law, (Routledge, 2014), Chapter 7

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continues that "a direct causal link between the breach and the ultimate loss is not required."[13]

In contrast, a direct causal limitation can be found in Australian insurance law. Warranties in **non-marine insurance** have been abolished and replaced by the principle in section 54 of the Insurance Contracts Act 1984 that an insurer has a defence only where the assured's failure to comply with contractual obligations has caused or contributed to the loss. That is to say, a breach by the insured of an express term will entitle insurers to be relieved of liability to indemnify the insured for a loss where the breach is causative of that loss. Marine insurance warranties still apply the old remedies of automatic discharge of insurers' liability at the time of breach.

The way in which section 14.22 is drafted is very similar to the UK Insurance Act 2015. Section 14.22 (1) does not explicitly adopt a causal expression. Dr Song suggests that if section 14.22 (1) intends to introduce a causative test, an express causal expression is best to replace an expression of 'a bearing' on the occurrence of loss.

(5) Insurable Interest

The following sets out the case for abolishing the requirement for an insurable interest in Chinese marine insurance law, or a definition of insurable interest that relies only on economic loss. The CMC contains no provisions on insurable interest. In the absence of any provision in the CMC, the Insurance Act governs the matter. Chapter II, Section I, Article 12 paragraph 2: "The insured in property insurance shall have an insurable interest in the subject matter when an insured event occurs." The insurable interest is defined as follows in paragraph 6 of the same section: "a legally recognised interest which the assured or the insured has in respect of the subject matter itself." This definition applies to life/person and property insurance alike. It is noted that there is no requirement for an insurable interest in liability insurance (including marine liability insurance). For life insurance, there is a further definition with reference to family relationships and consent in Article 31.[14] For property, there is no further definition.

Interpretation

The precise meaning of the definition depends on the meaning of the words 'legally recognised interest'. This could mean either a legal relationship [15] or an economic relationship.[16] This in turn is a matter for the courts, in particular the Supreme Court. The prevailing view appears to be that the words 'legally recognised relationship' should be given a 'wide and liberal' meaning, and that an economic relationship is sufficient to fulfil the requirement. However, the Supreme Court in its *Interpretation II* on the application of the

[13] The Explanatory Notes to the Insurance Act 2015, para [92]-[96].
[14] Zhen Jing, 'Insurable interest in life insurance: a Chinese perspective' [2014] JBL 337.
[15] As in the case *M/V Rong Sheng*; see Beiping Chu at page 97, 'Current issues and developments in Chinese insurance law' in *Insurance Law in China*, edited by Johanna Hjalmarsson and Dingjing Huang (Routledge, 2015).
[16] As in the case *M/V Yu Hang*; *ibid*.

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Insurance Act stopped short of asserting this explicitly although the principle was discussed in the Draft Interpretation.[17]

Authors Chu[18] and Wang[19] both note uncertainty surrounding this provision.

Wang states that Chinese courts have accepted economic interest and commercial expediency as lawful interests. He identifies as outstanding issues: "seller's legal interest after the goods are loaded on board the carrying vessel" and "the cargo insured's legal interest regarding a certain per cent of profit on goods in a marine cargo policy without a clear increased value clause."[20]

Chu states that "in judicial practice, the courts have also adopted different tests in determining the existence of an insurable interest".[21]

There appears to be an opportunity to advance the law of marine insurance by defining in wide and liberal terms the insured's interest required at the time of loss. It will be demonstrated in the following that the trend generally is towards reliance solely on the principle of indemnity for property insurance – that is, an economic loss must be demonstrated which results from the insured event. The factor holding many jurisdictions back is the UK Marine Insurance Act 1906 (and its equivalents in other jurisdictions) and its detailed definition of the insurable interest, which serve no purpose today.

Remedy

The Insurance Act 2015 provides the following remedy where there is no insurable interest at the time of loss in a property policy.

> Article 48: "Where the insured does not have an insurable interest in the subject matter insured at the time when an insured event occurs, the insured shall not claim for indemnity payment against the insurer."[22]

This article does not affect the existence of the contract, but concerns the conditions for making a successful claim. Logically, the article must imply that something more than proof of economic loss is required. If it were sufficient merely to provide proof of loss, the article would not be necessary. Although the Supreme Court appears to be inclined towards a 'wide and liberal' interpretation of the legally recognised interest in the definition of insurable interest, the logic of article 48 stands in the way of a pragmatic focus on the economic loss of the insured.

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[17] Beiping Chu at page 97, 'Current issues and developments in Chinese insurance law' in *Insurance Law in China*, edited by Johanna Hjalmarsson and Dingjing Huang (Routledge, 2015).
[18] Beiping Chu, 'Current issues and developments in Chinese insurance law' in *Insurance Law in China*, edited by Johanna Hjalmarsson and Dingjing Huang (Routledge, 2015).
[19] Pengnan Wang, 'An introduction to the law and practice of marine insurance in China' in Insurance Law in China, edited by Johanna Hjalmarsson and Dingjing Huang (Routledge, 2015).
[20] Wang, *Insurance Law in China*, page 213.
[21] Chu, *Insurance Law in China*, page 97.
[22] This contrasts with life insurance, where the policy is made void by article 31. Article 58 of the Contracts Act provides for the further consequences of the avoidance.

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Recent developments in other jurisdictions

In English law on marine insurance, the Marine Insurance Act 1906 requires a legal or equitable relation to the subject-matter insured at the time of loss.[23] This section is based on the opinion of Lord Eldon in *Lucena v Craufurd*.[24] In the same case, Lawrence J argued for a requirement that an economic loss be shown.

Although the Marine Insurance Act strictly speaking requires a legal or equitable interest (a 'legally recognised' interest), marine insurance cases have shown an overwhelming trend towards pragmatism. In *O'Kane v Jones (The Martin P),*[25] a ship manager was held to possess an insurable interest simply by virtue of being exposed to loss of business if the ship sank. In *Sharp v Sphere Drake (The Moonacre),*[26] the insured yacht was owned by a trust for tax reasons. The insured was the director of the trust, and the beneficiary of the trust with powers to decide over the use of the yacht. This was held to be a sufficient interest.

For non-marine property insurance, section 18 of the Gaming Act 1845 banned insurance contracts under which the assured lacked an insurable interest or an expectation to acquire such an interest at the time of entering into the policy. However, the Gambling Act 2005 repealed that section and inadvertently also abolished the requirement for an insurable interest in non-marine property law. This means that there is no longer a requirement for an insurable interest in non-marine property insurance.[27] In 2016, a Draft Bill issued by the Law Commission for consultation proposed that in non-marine property insurance, an economic loss must be shown at the time of loss.[28] A revised Draft Bill, issued in 2018,[29] has omitted the provision on non-marine property insurance and now only deals only with life insurance. It therefore looks as if there will continue to be no requirement for an insurable interest in English non-marine property insurance. Instead, the principle of indemnity will have the same effect, namely to require the claiming insured to show an economic loss.

In Australian insurance contract law, the requirement for an insurable interest was abolished through the Insurance Contracts Act 1984.[30] Section 16 of the Act states that no interest is required at the time of entering into the contract. This is already the case for property insurance under Chinese law. Section 17 further states that the lack of a legal or equitable interest ('a legally recognised interest') at the time of loss does not relieve the insurer of liability. This provision has been in force since 1 January 1986, without noteworthy problems in practise.

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[23] Marine Insurance Act 1906, section 5.
[24] (1806) 2 Bos & Pul MR 269.
[25] [2005] Lloyd's Rep IR 174.
[26] [1992] 2 Lloyd's Rep. 501.
[27] *Colinvaux*, para 20-001.
[28] Namely that the insured "will suffer economic loss if the insured event relating to it occurs". The Draft Bill 2016 is available at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2016/04/draft_Insurable_Interest_Bill_April_2016.pdf (accessed 29 November 2018).
[29] The Draft Bill 2018 is available at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/June-2018-Draft-Insurable-Interest-bill.pdf (accessed on 29 November 2018).
[30] Available at https://www.legislation.gov.au/Details/C2016C00820 (accessed on 23 November 2018).

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Australian marine insurance law relies on the Marine Insurance Act 1909, a statute very similar to the English Marine Insurance Act 1906 with minor amendments. Sections 11-21 are similar to the English statute. Section 11 requires a 'legal or equitable relation' to the subject-matter insured at the time of loss. This is similar to the Chinese regulation of property insurance. The Australian Law Commission (ALRC) recommended in a 2001 report that the requirement for an insurable interest be abolished, and that proof of economic loss should suffice.[31] In doing so, the ARLC pointed out a number of difficulties with the existing requirement.[32]

In Canadian law, which is also based on the Marine Insurance Act 1906, the Supreme Court has rejected the legal or equitable relation test in non-marine property law in favour of a requirement of economic loss.[33] In marine insurance law, a recent case from the Ontario Superior Court of Justice in practice rejects a strict test, in focusing on the legal or equitable relation to the *adventure*, rather than the specific property at issue.[34]

Summary

The trend in jurisdictions influenced by the Marine Insurance Act 1906 is to move towards a concept of insurable interest that is based on the principle of indemnity, or economic loss. The Australian Insurance Act 1984 has implemented this reform. The Chinese Insurance Act 2015, the Australian Marine Insurance Act 1909 and the English Marine Insurance Act 1906 have not yet implemented this reform. It appears that the existing legislation stands in the way of a modern approach. In English law, there is however a convincing trend in modern case law towards an economic loss concept of insurable interest. There is currently no requirement for an insurable interest in general property insurance in English law, following the entry into force of the Gambling Act 2006. Abolishing the 'legally recognised interest' criterion has not caused any problems in the jurisdictions that have done so and is consistent with the logic of property insurance.

Amending the CMC in accordance with these criteria would place CMC ahead of slower jurisdictions as it would give statutory form to the current and future trend in marine insurance law.

Dr Johanna Hjalmarsson's Recommendation

Uncertainty persists due to the lack of a Supreme Court interpretation. An important purpose of marine property insurance is the insurance of shipped goods which will be bought and sold throughout the voyage. The status of sellers' and buyers' interest before and after loading is a real concern. Any uncertainty is unhelpful to commerce.

[31] See report http://www.austlii.edu.au/au/other/lawreform/ALRC/2001/91.html (accessed on 23 November 2018), Summary of recommendations paragraph 28.
[32] *Ibid*.
[33] *Kosmopoulos v Constitution Insurance* [1987] 1 SCR 2.
[34] *Broadgrain Commodities Inc v Continental Casualty Co* [2017] ONSC 4721.

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Amend the Chinese Maritime Code in accordance with the Australian Insurance Act 1984 and ALRC's recommendation that economic loss at the time of loss is a sufficient criterion to recover under a marine insurance policy.

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