



英国合同法入门 ——国际航贸合同的视角

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打开英国合同法大门的钥匙

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英国合同法如何促进国际航贸交易



打开英国合同法大门的钥匙 “合同自由”



英国最高法院/枢密院论 “合同自由”

Prime Sight Ltd v Lavarello [2013] UKPC 22, [47]:

“Parties are ordinarily free to contract on whatever terms they choose and the court’s role is to enforce them.”

Belmont Part Investments Pty Ltd v BNY Corporate Trustee Services Ltd [2011] UKSC 38, [103]:

“Despite statutory inroads, party autonomy is at the heart of English commercial law. It is desirable that, so far as possible, the courts give effect to contractual terms which parties have agreed.”



合同自由 (freedom of contract)

自由决定交易伙伴

Freedom to contract or refuse to contract with whomever one wishes.

自由决定合同内容

Freedom to contract on whatever terms they choose.



合同自由，然后呢？

自由订立的合同之效力通常受到尊重。

- 合同（条款）有效解释原则；
- 合同无效/法定解除事由严格受限。
 - e.g. 合同落空原则（frustration）适用条件极为严格

自由订立的合同之内容通常受到尊重。

- 法院/仲裁庭的工作是客观解释当事人自由订立的合同，而不是为当事人“重写”（rewrite）合同。



合同自由，然后呢？

Printing & Numerical Registering Co v Sampson (1875) 19 Eq 462, 465

- “If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that **you are not lightly to interfere with this freedom of contract.**”



合同自由，然后呢？

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合同自由，然后呢？ Makdessi v Cavendish [2015] UKSC 67

Consequences for breaching the restrictive covenants

- Withholding clause: the seller would not be entitled to receive the final two instalments of the price paid by Cavendish.
- Share transfer clause: the seller could be required to sell his remaining shares to Cavendish at a price that reflected the net asset value of the shares but excluded the value of the goodwill of the business.



合同自由，然后呢？ Makdessi v Cavendish [2015] UKSC 67

UKSC Judgement:

The two clauses were not invalid penalties.

- The penalty rule is an interference with freedom of contract. It undermines the certainty which parties are entitled to expect of the law.
- The court has to be careful not to set too stringent a standard and bear in mind that what the parties have agreed should normally be upheld, not least because any other approach will lead to undesirable uncertainty especially in commercial contracts.
- In a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption must be that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach.



合同自由，然后呢？

Barton v Morris [2023] UKSC 3

“此时无声胜有声” (the sound of silence)

- Oral contract: if B introduced to F a purchaser who bought the House for £6.5 million, F would pay B £1.2 million.
- Legal issue: what would happen if the House was sold for anything less than £6.5 million?
- Held by UKSC: F was NOT contractually bound to pay anything to B.
 - No express term; no implied term; no unjust enrichment



合同自由，然后呢？

合同神圣 sanctity of contract

当事人依照自由约定的条款履行合同。

不履行或未适当履行将承担违约责任。

《境外海事仲裁十案九败出路何在》

《经济参考报》2011年12月13日

- “中国远洋集团公司曾在2008年金融危机爆发前与一些海外船东签订租船协议，当时的日租金高达8万美元/天，而其后市场运价大幅下跌……已跌至1.8万美元/天。中国远洋提出和船东重新商定费率，但遭到部分希腊船东拒绝。双方由此产生纠纷，希腊船东甚至扣押了中国远洋至少3艘拖欠租金的船舶。”
- “中国远洋被扣船的纠纷中，希腊船东提出去伦敦仲裁，最终中国远洋只能履行合同，重新支付租金。”
- “从情理上说航运公司和船东是合作关系，中远遇到困难，船东应该有所让步。但遗憾的是，中国远洋签的租船合同中缺乏风险对冲条款，干的是一锤子买卖，碰到有些强硬的船东无处讲理。”



合同自由的例外

决定交易伙伴的自由受制于《2010年平等法》。

- the Equality Act 2010 “Protected characteristics”: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; sexual orientation.

决定交易内容的自由受制于6个例外情况。



交易内容的自由之限制

订约意思表示瑕疵	mistake, misrepresentation, duress, undue influence, or incapacity
依据法律默示的条款	implied terms by law
条款内容的法定控制	legislative control
条款内容非法或违反公共政策	illegality or against public policy
条款具有惩罚性	penalty rule
法定强制性条款	legislative provisions which the parties cannot contract out of



合同自由的时间节点

Rock Advertising v MWB Business Exchange Centres
[2018] UKSC 24, [11]

- “Party autonomy operates up to the point when the contract is made, but thereafter only to the extent that the contract allows. Nearly all contracts bind the parties to some course of action, and to that extent restrict their autonomy.”



合同自由的时间节点：不得口头变更条款的适用

“All variations to this contract must be agreed, set out in writing and signed on behalf of both parties before they take effect.”

- 问题：在有上述条款的情况下，当事人口头变更合同是否有效？



合同自由的时间节点：不得口头变更条款的适用

“All variations to this contract must be agreed, set out in writing and signed on behalf of both parties before they take effect.”

- 交易中使用该条款的理由：（1）防止书面合同被非正式的方式变更；（2）避免有关是否变更以及变更内容的争议；（3）便于当事人审查其关于变更授权的内部规则。
- “These are all legitimate commercial reasons for agreeing a (No Oral Modification) clause...the law of contract does not normally obstruct the legitimate intentions of businessmen, except for overriding reasons of public policy. Yet there is no mischief in No Oral Modification clauses, nor do they frustrate or contravene any policy of the law.”



合同自由的时间节点：不得口头变更条款的适用

Rock Advertising v MWB Business Exchange Centres
[2018] UKSC 24, [11]

- “The real offence against party autonomy is the suggestion that they cannot bind themselves as to the form of any variation, even if that is what they have agreed.”



合同自由的延伸：当事人自治 (party autonomy)

各类行业协会

各种标准格式

自行解决争议



各类行业协会

GAFTA

谷物及饲料贸易协会

- 80% of the global trade in grains is traded under the GAFTA contracts.

FOSEA

国际油、油籽和油脂协会

- 85% of the global trade in oils and fats is traded under FOSFA contracts.

LME

伦敦金属交易所

- The majority of all non-ferrous metal futures business is transacted on LME.

SAL

伦敦糖业协会

- The foremost trade association in the world for the international raw sugar trade.



各类行业协会



BIMCO

BIMCO is the world's largest direct-membership organisation for shipowners, charterers, shipbrokers and agents. **BIMCO** members cover over 60% of the global fleet measured by tonnage (weight of the unloaded ships).

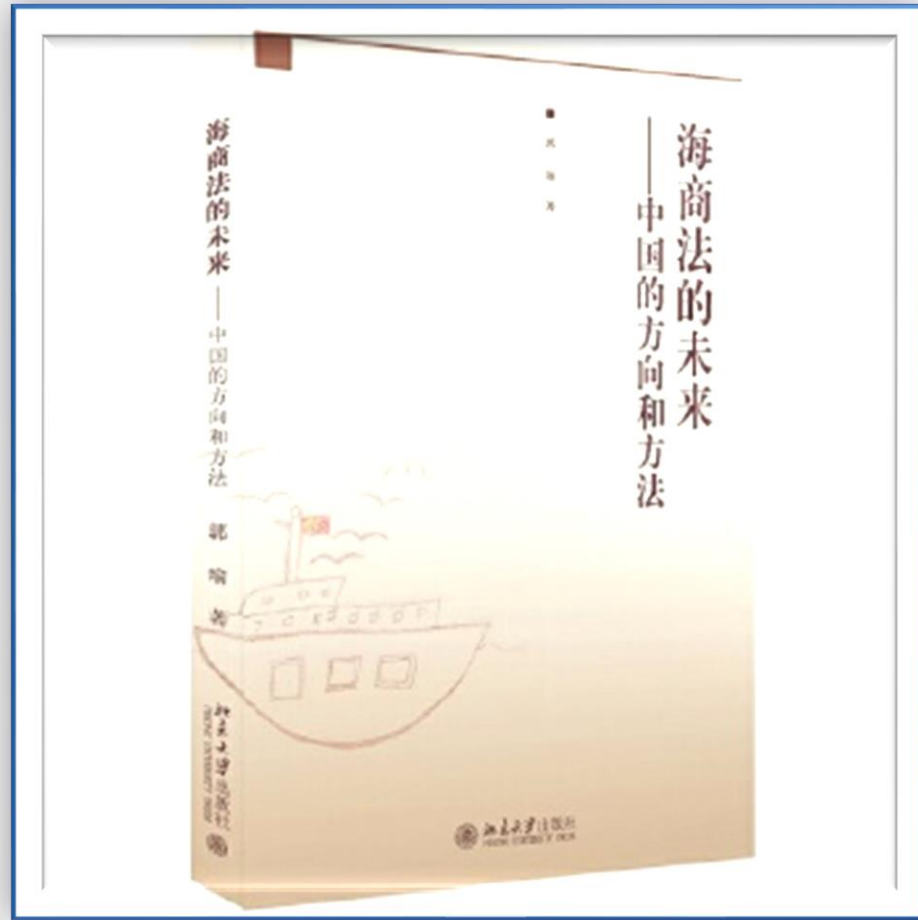
IGP&I

International Group of P&I Clubs

The International Group is a not-for-profit association of 12 P&I Clubs providing marine liability cover for 90% of the world's ocean-going tonnage.



各种标准格式



“一个经常进行租船业务的商人可能精通各种**租船合同标准范本**，但却完全不了解《海商法》中关于租船合同的规定。前者才是其行动的真正依据。”

郭瑜：《海商法的未来——中国的方向和方法》，北京大学出版社2022年版，第194页。



自行解决争议

- 国际商事仲裁是国际航贸合同争议的主要解决方式
 - 意思自治
 - 消除“主场优势”
 - 裁决易被执行
 - 专业、保密



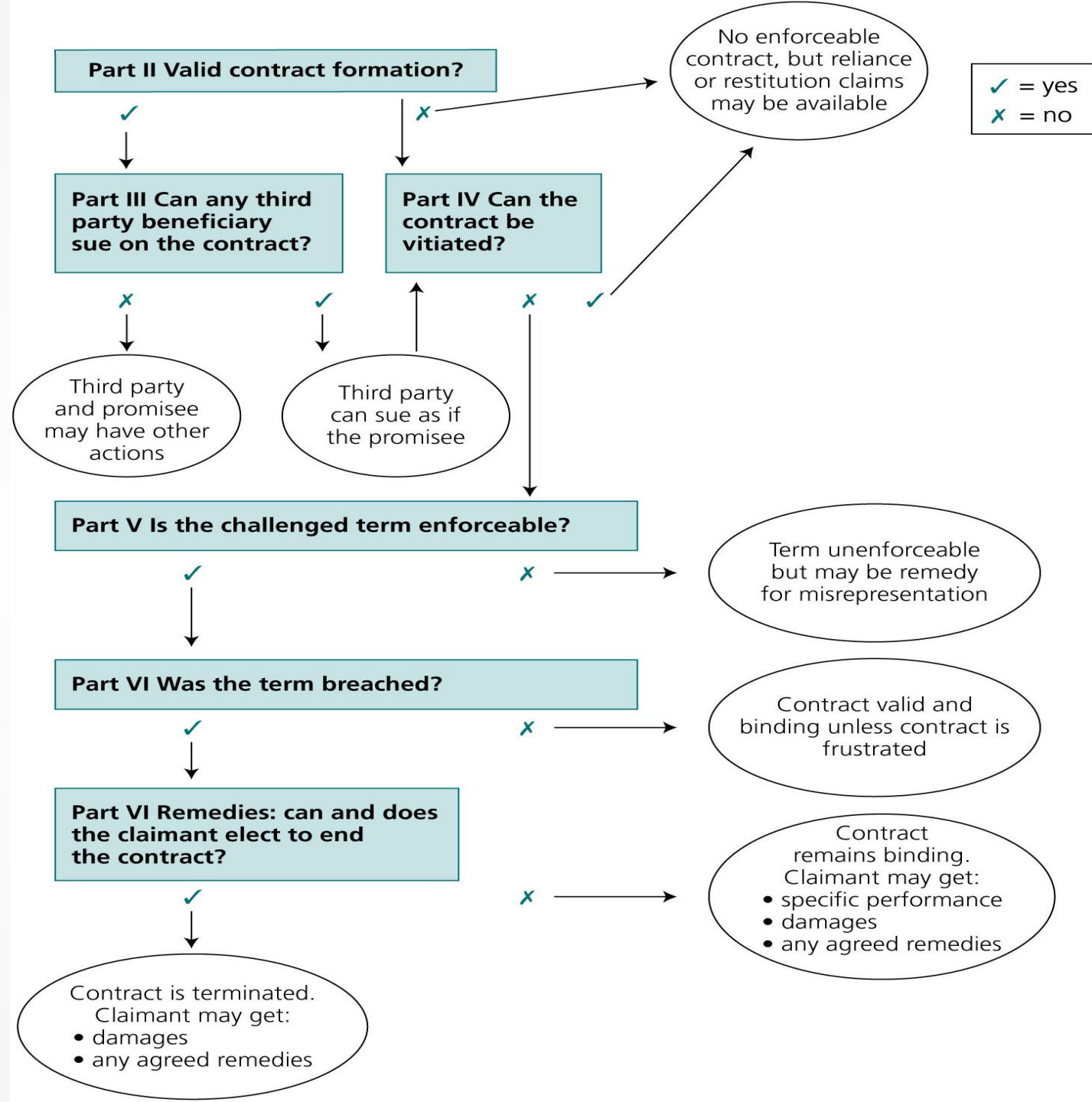


2

英国合同法如何促进 国际航贸交易？

合同争议概览

- 合同成立
- 合同效力
- 条款效力
- 条款违反
- 合同解除
- 违约救济
- 第三人权利





英国合同法如何促进国际航贸交易？

规则供给

- 效力基础：哪些交易应被强制执行
- 填补漏洞：补全不完整的合同内容



效力基础规则

合同成立生效法律规则

合同效力瑕疵判断规则



合同成立生效的基本规则

四 要 件

有效合意 meeting of minds

有效对价 consideration

内容确定 certainty

意图明确 intention to create legal relations



合同成立生效的基本规则：意图的保留

“subject to” 的适用

- subject to details
- subject to contract
- subject to board approval
- subject to shipper/receivers approval
 - *The Newcastle Express* [2022] EWCA Civ.1555



合同成立生效的基本规则：意图的保留

“subject to” 的适用的例外

- *RTS Flexible Systems v Mokra Alois Muller* [2010] UKSC 14
 - Lord Clarke: “The moral of the story to is to agree first and to start work later.”
- *The Pacific Champ* [2013] EWHC 470 (Comm)
 - “subject to Charterer’s reconfirmation”



合同成立生效的基本规则：意图的保留

The Ever Given [2023] EWHC 697 (Admlty):
双方达成了有约束力的合同救助协议吗？

“根据电话中的商定，我们谨代表‘长赐’轮的船东确认如下内容：……

- 1. SMIT的人员和设备使用将按SCOPIC 2020费率支付报酬。
- 2. SMIT雇佣的任何人员和设备，将按SCOPIC 2020费率+15%支付。
- ……
- 我们期待您的确认，然后我们可以开始基于Wreckhire标准格式起草协议，以便尽早签署协议。”



“非常感谢。我会通知我们的团队，我们将在收到您/您的客户对我们昨晚发送的草案的反馈后，跟进协议的起草工作。”



合同成立生效的基本规则：意图的保留

The Ever Given [2023] EWHC 697 (Admlty):
双方没有达成约束力的合同救助协议。

Conclusion

100. By the exchange of emails relied on by the defendants, upon their terms read objectively and in context, Capt Sen and Mr Janssen did not purport to conclude a contract between SMIT (let alone any of the other claimants) and the defendants or either of them. By that exchange, agreement was reached, after a period of uncertainty in part created by some of Capt Sen's earlier messages, on the remuneration terms for a contract that was being negotiated. However, the parties made clear to each other that they were still negotiating, indeed the detailed work of negotiating the contract terms by which they would be bound was only thus able to commence, albeit there was room for the view that it ought not to require much time to complete.
101. The parties did not communicate to each other an intention to be bound in the absence of completing that work of negotiating and agreeing a detailed set of contract terms. The tenor of their exchanges, to the contrary, was that they did *not* intend to be so bound. In the event, that work was not completed, as the counter-proposal on detailed terms later sent by Capt Sen put the parties some considerable distance apart, and that gap was never closed.
102. Therefore, no contract such as is alleged by the defendants was concluded.



合同效力瑕疵判断规则

Mistake

错误

Misrepresentation

误述

Duress

胁迫

Undue influence

不当影响

Illegality

非法

Capacity

行为能力

合同效力瑕疵判断规则：合法行为胁迫

The Cenk K [2012] EWHC 273 (Comm) (1)



4.2 双方订立航次租船合同，船东指定K轮履约，解约日为4月21日。

4.3 船东想更换履约船舶（合同未约定更换权），并将意图通知租家，但租家未回复。

4.7 船东将K轮另行出租且未告知租家。

4.15 船东明确告知租家，其将另派他船履约，新的解约日为4月24日。租家坚持要求K轮履约，因为变更船舶需要得到买卖合同买方批准。

4.16 租家发现K轮已经另作他用。租家认为船东的行为构成拒绝履行，但未接受。

4.18 船东认错，并表示能够找到船舶在27-30日之间完成装货，并愿意赔偿租家损失。租家放弃寻找替代船。

合同效力瑕疵判断规则：合法行为胁迫

The Cenk K [2012] EWHC 273 (Comm) (2)



4.23 船东提议A轮履约，租家将信息转给买方寻求批准。

4.27 买方同意A轮履约，同意延长装运期，但前提是货物价格每吨少8美元。因市场条件，租家另到各处出卖货物会导致更大的损失。

4.27 租家要求船东为货价损失负责。船东同意就每吨货物少收2美元运费。

4.27 买方最终同意货物价格每吨少6美元。承租人接受A轮履约，也接受船东减少的运费数额，但保留了违约损害赔偿权。

4.28 船东要求租家签订弃权书，放弃索赔所有因出租人指定替代船舶履约而产生的损失。

4.28 租家回复：“考虑到情况的紧迫性，我们迫切需要减少损失并满足买方的需要，我们不得不在抗议下接受出租人的条件。”

合同效力瑕疵判断规则：合法行为胁迫

The Cenk K [2012] EWHC 273 (Comm) (3)



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School of Law Shanghai Maritime University

胁迫 Duress

- 当甲实施不正当威胁或施加不正当压力迫使乙订立或变更合同时，甲的行为就构成胁迫。
- 甲实施了不正当威胁或施加了不正当压力；
- 不正当威胁或不正当施压是乙订立合同的原因；
- 除了屈服于不正当威胁或不正当施压，乙没有其他合理选择（经济胁迫额外要件）。

合法行为显失公平时即不正当。

甲利用其对乙或与乙亲近之人的犯罪行为的知情来威胁乙。

甲在面临乙的民事索赔时，使用应受谴责的手段操纵乙并将乙引向弱势地位，迫使乙放弃索赔。

立德树人，德法兼修

With morals is the fountain of life. in laws and morals we shall grow

合同效力瑕疵判断规则：合法行为胁迫

The Cenk K [2012] EWHC 273 (Comm) (4)



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判决

出租人违约未安排原定船舶履约是造成所有问题的根源。出租人此后的一系列行为，包括故意拒绝遵守他们做出的提供替代船舶并赔偿所有相关损失的保证，目的就是为了让承租人逼到无可选择的境地，为了避免买卖合同下的巨额损失而不得不同意接受出租人的提议。结合案件事实，出租人的行为属于不正当施压，承租人有权要求撤销因此而订立的弃权协议。

立德树人，德法兼修

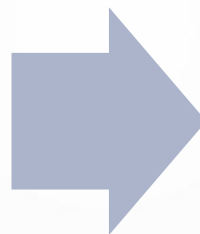
With morals is the fountain of life. in laws and morals we shall grow



漏洞填补规则

为什么合同有漏洞

- 智识局限
- 成本过高



合同漏洞如何填补

- 默示规则
- default rules
- 合同解释
- interpretation



默示规则：整套规则 (e.g. Sale of Goods Act 1979)

第一编 本法适用的合同 (s.1)

第二编 合同的订立 (ss.2-15)

- 合同定义、形式、标的、价格、默示条款

第三编 合同的效力 (ss.16-26)

- 所有权转移、所有权转移对第三人的影响

第四编 合同的履行 (ss.27-37)

- 交货与收货

第五编 未受偿的出卖人对货物的权利 (ss.38-48)

- 留置权、中途停运权、转卖问题

第六编 违约诉讼 (ss.49-54)

- 诉请价款、特定履行、损害赔偿

第七编 补充规定 (ss.55-64)

- 解释

几乎所有的条文都有判例法解释

✓ = Recoverable
 ? = Uncertainty over recoverability

IP = innocent party
 CB = contract-breaker

Compensatable loss: the 'plus' side



A. Loss of the performance

✓ if conventionally measurable by diminution of value, or cost of cure

? otherwise, recovery for loss of performance under *Panatown* 'broad' ground?

B. Consequential loss (loss of what the performance was *for*, failure to achieve the *purpose* of performance)

This may take the forms of:

not being better off:

- ✓ physically (eg health not improved),
- ✓ financially (eg loss of profits), or
- ? non-pecuniary satisfaction-wise (eg enjoyment or amenity); and/or

being worse off:

- ✓ physically (eg building destroyed by breach),
- ✓ financially (eg wasted expenses, reasonable costs of mitigation, liability to third parties),
- ? non-pecuniary satisfaction-wise (eg pain and suffering, physical inconvenience, damage to reputation).

Restrictions and deductions: the 'minus' side

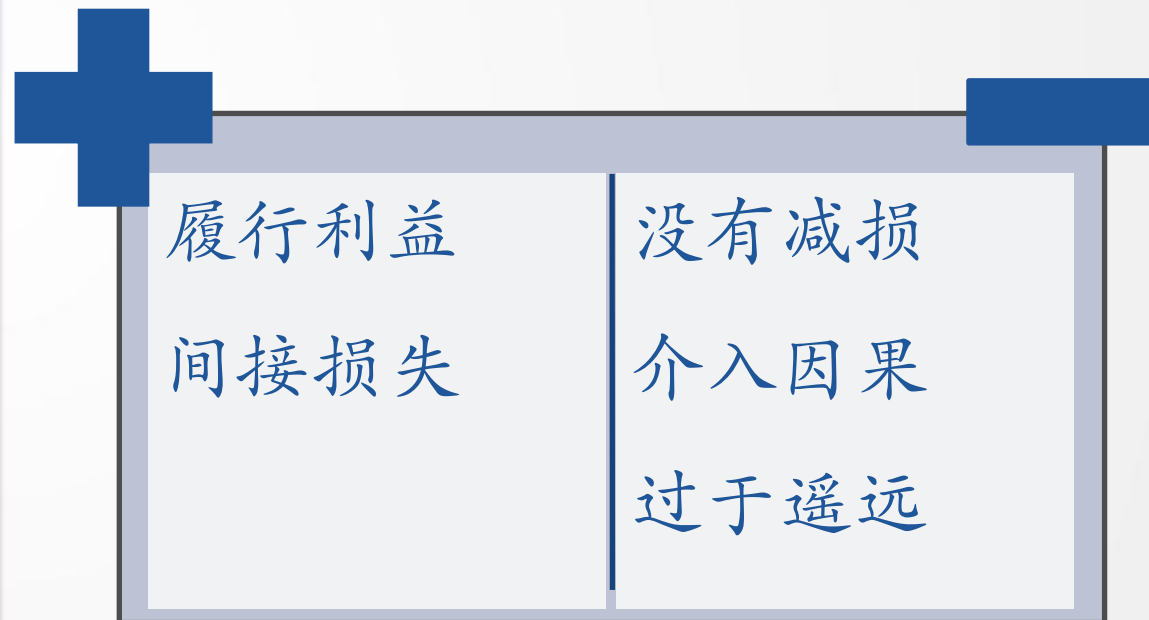


1. **Costs saved** by IP from terminating performance
2. **Benefits received** from CB's part-performance
3. **Gains** from breach or **mitigation**
4. Failure to **mitigate**
5. Generally **loss measured at time of breach**
6. IP's **contributory negligence**
7. Loss from **intervening causes**
8. Loss **too speculative**
9. Loss **too remote**



默示规则：领域规则

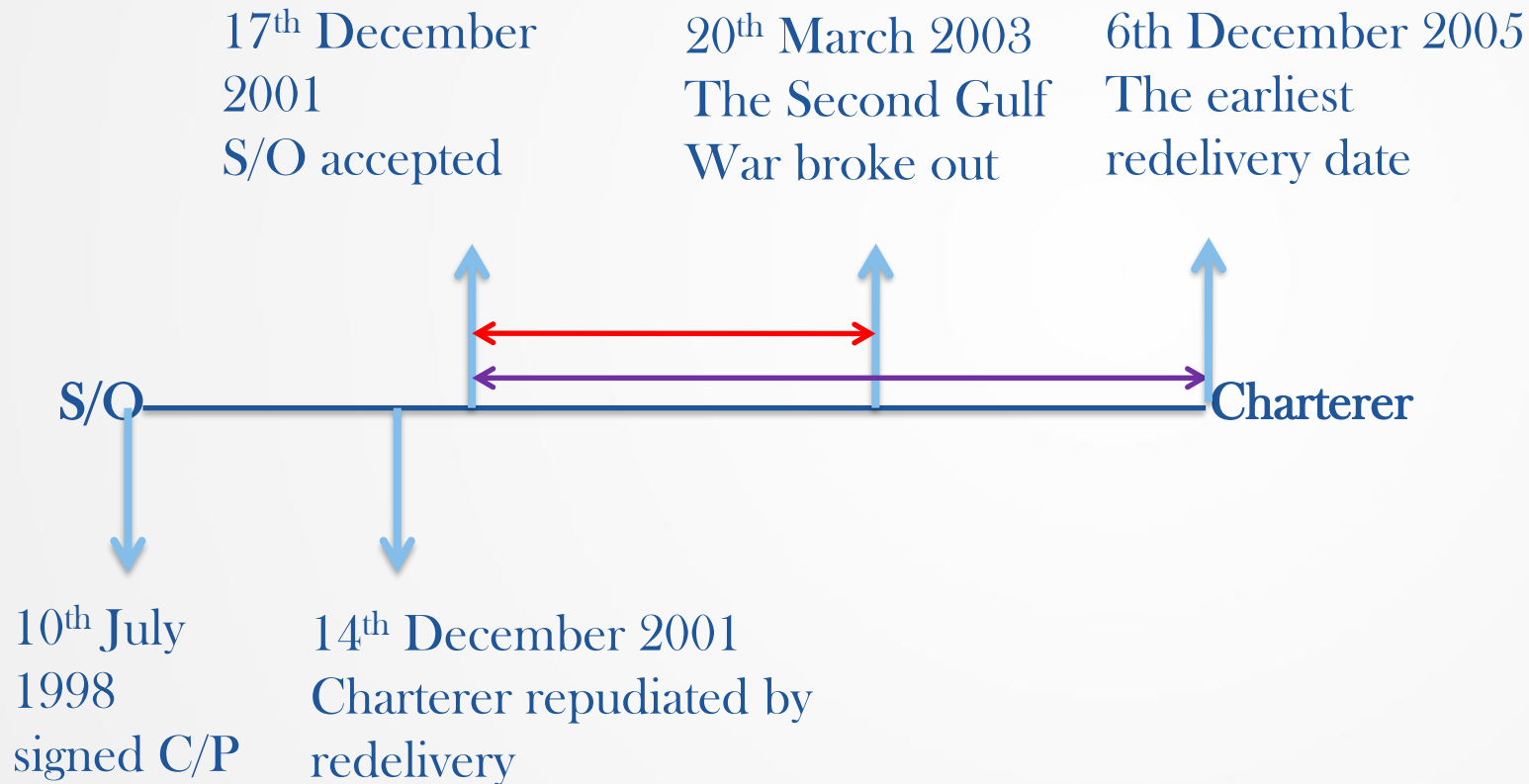
违约损害赔偿计算





违约损害赔偿规则的适用：

The Golden Victory [2007] 2 Lloyd's Rep.164



Clause 33: Both parties should have the right to cancel the charter if war or hostilities were break out between certain countries.



违约损害赔偿规则的适用：

The Golden Victory [2007] 2 Lloyd's Rep.164

Where a party sustains loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

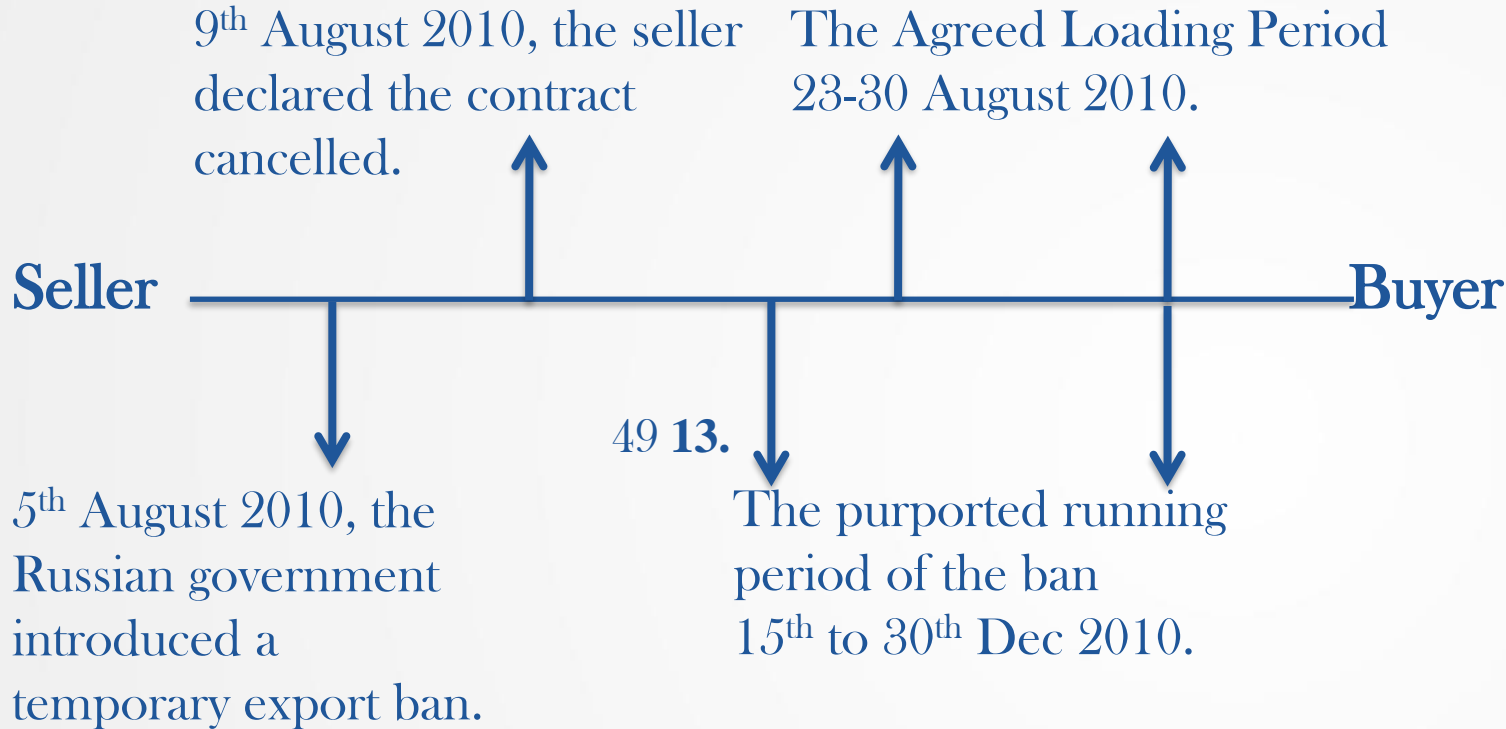
Damages should be assessed at the date of the trial rather than at the date of the breach or any intervening events. Damages may be reduced where subsequent events are known to the court at the date of the trial and those events would have reduced the actual loss suffered.

违约损害赔偿规则的适用



Bunge SA v Nidera SA [2015] UKSC 43

GAFTA Form 49



“13. PROHIBITION - In case of prohibition of export, blockade or hostilities or in case of any executive or legislative act done by or on behalf of the government of the country of origin of the goods, or of the country from which the goods are to be shipped, restricting export, whether partially or otherwise, any such restriction shall be deemed by both parties to apply to this contract and to the extent of such total or partial restriction to prevent fulfilment whether by shipment or by any other means whatsoever and to that extent this contract or any unfulfilled portion thereof shall be cancelled. Sellers shall advise buyers without delay with the reasons therefor and, if required, Sellers must produce proof to justify the cancellation.”

- FOB (新罗西斯克) , 2.5万吨俄罗斯制粉小麦;
- GAFTA Form 49适用;
- 8月11日, 买方视卖方解除合同行为为预期违约, 并根据货物合同价和市场价的差价请求损害赔偿。
- 俄罗斯严格执行了出口禁令。



违约损害赔偿规则的适用：Bunge SA v Nidera SA [2015] UKSC 43

GAFTA Form 49 Clause 20 DEFAULT - In default of fulfilment of contract by either party, the following provisions shall apply:

- (a) The party other than the defaulter shall, at their discretion have the right, after serving notice on the defaulter, to sell or purchase, as the case may be, against the defaulter, and such sale or purchase shall establish the default price.
- (b) If either party be dissatisfied with such default price or if the right at (a) above is not exercised and damages cannot be mutually agreed, then the assessment of damages shall be settled by arbitration.
- (c) The damages payable shall be based on, but not limited to the difference between the contract price and either the default price established under (a) above or upon the actual or estimated value of the goods on the date of default established under (b) above.
- (d) In all cases the damages shall, in addition, include any proven additional expenses which would directly and naturally result in the ordinary course of events from the defaulter's breach of contract, but shall in no case include loss of profit on any sub-contracts made by the party defaulted against or others unless the arbitrator(s) or board of appeal, having regard to special circumstances, shall in his/their sole and absolute discretion think fit.
- (e) Damages, if any, shall be computed on the quantity called for, but if no such quantity has been declared then on the mean contract quantity and any option available to either party shall be deemed to have been exercised accordingly in favour of the mean contract quantity.”



违约损害赔偿的适用：Bunge SA v Nidera SA [2015] UKSC 43



- The Golden Victory判例法规则适用于一次性（one-off）合同。
- GAFTA Form 49第20条未排除普通法规则适用。
 - 该条适用于一方当事人不履行合同的情况。
 - 该条提供的计算规则不同于普通法规则，不是损害赔偿的完整准则（complete code）。
 - “shall be based on”，not “shall only be based on”；
 - 未规定其他减损方法（如接受合理新要约）；
 - 既没有规定也没有排除违约后发生的事件对违约损害赔偿计算造成的影响。



解释规则：为什么重要？

大量国际航贸合同争议涉及合同解释

大量国际航贸合同基于标准格式订立

大量国际航贸律师的工作是审查合同

EE Caledonia Ltd v. Orbit Valve Co Europe
[1993] 4 All ER 165, 173:

- “It has to be borne in mind that commercial contracts are drafted by parties with access to legal advice and in the context of established legal principles as reflected in the decisions of the courts. Principles of certainty, and indeed justice, require that contracts be construed in accordance with the established principles. The parties are always able by the choice of appropriate language to draft their contract so as to produce a different legal effect. The choice is theirs.”



解释规则：为什么重要？

Gerard McMeel, “A code of English Commercial”

[2021] LMCLQ 233, 249:

- “The construction or interpretation of contractual provisions is a topic at the very heart of English commercial law. If contract law is the principal vehicle of commercial law, the construction of contracts is the engine room.”



解释规则





解释规则

- *The Port Russel* [2013] EWHC 490 (Comm)

“Such Notice of Readiness may be given either by letter, facsimile transmission, telegram, telex, radio or telephone (and if given by radio or telephone shall subsequently be confirmed in writing and if given by facsimile transmission confirmed by telex).”

- *London Arbitration* 30/22

“Upon arrival at customary anchorage at each port of loading or discharge, the Master or his agent shall give the Charterer or his agent notice by letter, telegraph, wireless or telephone that the Vessel is ready to load or discharge cargo.”

根据两个案件中的条款，电子邮件都是合同允许的出租人递交 NOR 的方式吗？



3

结论





英国合同法是一套高度精细、复杂且仍在不断发展的规则体系。

掌握英国合同法的目的主要不是为了解决争议，而是预防争议。



汇报完毕， 恳请指正

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