

# 诺亚之风

2019/12/30 刊

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## 保险讲堂 | 海上保险中的“保证条款”

保证条款在船舶保险里必不可少，一旦违反，将导致保险损失得不到赔偿，甚至保险合同解除的后果。本文意在简略论述保证制度在英国法和中国法下的规定，以期被保险人们警惕和受益。

### 一. 英国保险法下的保证制度：

在英国普通合同法中，普通的商业合同条款传统上依照其重要性分为条件条款、保证条款（Warranty Clause）及中间条款。违反不同的条款所产生的后果不同。违反保证条款时，合同仍要继续履行，但无辜方可以要求相应的损害赔偿。而英国海上保险法是否也是如此呢？

在最为经典判例 *De Hahn v Hartley*[1] 中，保险单中设有一个条款：船舶在利物浦开航时拥有 14 支枪和 50 人以上。法官 Manifold 勋爵将其认作保证条款。该轮在开航时只有 46 名船员，在航行了 6 个小时之后，船舶在安格尔西岛时又有 6 名船员上船。该轮在 5 个月之后被一些反动势力捕获，船东向保险人请求赔偿。

我们可以看到，在该案中：1，虽然船舶开航时未能配备足额的船员，但是其在很短的时间内就做了改正；2，此违反保证可以说并未对后来的捕获并无因果关系。

但是，本案中船东的请求没有得到法院的支持。法院判定由于被保险人违反了保证条款，保险人没有赔偿责。Manifold 勋爵的判词至今仍然由重要的参考意义：It is perfectly immaterial for what purpose a warranty is introduced; but, being inserted, the contract does not exist unless it beliterally complied with.（保证是无论合同订立的初衷是什么，只要订立的保证被违反，合同就不存在了）。

基于包括上文提及在内的众多判例，1906 年英国海上保险法 (MIA 1906) 用了 8 个条文（33~41 条）详细地论述了保证条款，阐述了违反保证条款后的严苛法律后果[2]。





主要规定如下：1) 无论保证项目对承保风险是否重要，都必须严格遵守；2) 保险人从违反保证之日起自动解除赔偿责任；3) 保证一旦违反，事后补救并不能成为辩护理由。

在以前通讯不发达的时候，保险人凭借保证制度来遏制被保险人的某些投机骗保行为或者廓清承保风险，对海上保险业的发展起到了积极的作用。但是，由于违反保证的后果太过严厉（harsh），使得保证制度在某种程度上是海上保险中的大杀器，一旦违反，被保险人会受到严重甚至致命的损失。虽然英国司法界常常通过法官对合同的解释权利来平衡保险双方的利益，但是不解决根本问题。

在保险界的反思和调研下，2015 保险法 The Insurance Act 2015 应声而出，其对保证制度作了相当大的修改，其中第 10 条规定，违反保证的法律后果是保险合同效力中止，直到这种违约被修正，保险合同将继续有效。对于中止期间的损失，保险人不承担赔偿责任。可以说，上述新法的保证制度从很大程度上缓和了保险人和被保险人的强烈冲突。

但是，由于“合同自由”原则允许保险人选择适用的法律，保险人们就在合同中约定排除（contracting out）新法的适用[3]，所以，新法下的保证制度对于具体保险合同适用与否还要看具体的合同是否排除了新法。比如某英国著名保赔协会的 Rules 中就明确写有：Section 10 of the Act shall be excluded. As a result all warranties in these Rules or any contract of insurance must be strictly complied with and if the Member



or any insured fails to comply with any warranty the Association shall be discharged from liability from the date of the breach, regardless of whether the breach is subsequently remedied. 这是明显排斥了新法中的一些规定的。当然，新法的问世时间尚短，保险市场究竟会产生如何的相应，相关条文的解释、适用、协调等等问题，还有待时间检验。

## 二. 中国法下的保证制度：

我国《保险法》中没有保证制度，《海商法》作为优先适用法，仅有第235条对保证有所涉及：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。

《最高人民法院关于审理海上保险纠纷案件若干问题的规定》中第6, 7, 8条[4]是关于保证的条文，综合《海商法》235条，可以看到我国的保证制度有以下特点：1) 增加了被保险人的通知义务，未尽通知义务保险合同解除；2) 在保险人收到通知以后，保险人拥有选择解除合同或修改承保条件或增加保费的权利；3) 若新的条件没有达成合意，保险合同自保证违反之日解除。

在某船务公司诉太保某分公司[5]中，保单约定被保险船舶的航行范围为“近海航区及长江A、B级”，为保证条款。保险单所附《沿海内河船舶保险条款》第十六条也规定，保险船舶变更航行区域未经保险人同意的，保险合同自动解除。该轮航行至保证航区外，后由于搁浅导致船舶全损，由于被保险人违反了保单中的保证条款，法院驳回了船东的保险赔偿金请求。

船舶在人保远洋船舶险（2009版）第六条第二款第三款中，列有的保证项目达十几项之多，包括船级保证、船级社保证、船旗保证、所有权保证、光船出租保证等等，这些保证与船舶的运营息息相关，一旦触发保证条款，保险合同就自动解除。同时，《海商法》第230条[6]明文规定，因船舶转让而转让保险合同需由保险人同意，否则保险合同自动解除，其效果和保证类似。除此之外，船壳险保单中通常会有一些特别约定，比如关于禁止运输原木：保险船舶不得装运原木，一旦装运，保单立即终止，以及其他的类似条款，需要因为足够的重视。

我国的《保险法》第17条[7]对格式条款以及免责条款有特殊的说明义务要求，这样保险人一般就担负更重的说明义务。那么，保证条款是否可以归于格式条款或者免责条款，从而能给被保险人带来相应的救济呢？最高院的一个复函[8]中指出，保证制度赋予的保险人解除保险合同的权利，不属于责任免除条款。所以对于保证条款，保险人没有义务向被保险人提示或明确说明，假如被保险人对具体条款、特别约定不甚理解，对保证条款的重要性没有足够重视的话，就可能遇到保证制度的“偷袭”。



通过以上分析，我们看到保证制度对保险合同的有效性威胁程度极高，一旦违反就会导致保险人可以不负赔偿责任或者保险合同解除，可谓是保险中的核武器。尤其是，英国 1906 年海上保险法没有被废除，还继续被国际保险人们选用。保证条款的严苛性不容忽视，所以被保险人还需谨慎行事，防止被保证制度这一“大杀器”所伤。如有任何不清楚事项，请及时和自己的保险人、经纪人沟通，以免造成不必要的损失。

以上，如有问题，也欢迎随时与我司联系。

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注：本文仅代表作者个人观点，如需法律帮助，请咨询专业律师。

[1](1786) 1TR 343

[2]笔者注：海上保险法下，违反保证条款，保险人并无向被保险人主张损害赔偿的权利。

[3]笔者注：排除新法要符合不利情况下的透明性要求，见新法第 16 条。

[4]第六条

保险人以被保险人违反合同约定的保证条款未立即书面通知保险人为由，要求从违反保证条款之日起解除保险合同的，人民法院应予支持。

第七条

保险人收到被保险人违反合同约定的保证条款书面通知后仍支付保险赔偿，又以被保险人违反合同约定的保证条款为由请求解除合同的，人民法院不予支持。

第八条

保险人收到被保险人违反合同约定的保证条款的书面通知后，就修改承保条件、增加保险费等事项与被保险人协商未能达成一致的，保险合同于违反保证条款之日解除。

[5]（2018）琼民终 354 号

[6]第二百三十条 船舶保险合同转让

因船舶转让而转让船舶保险合同的，应当取得保险人同意。未经保险人同意，船舶保险合同从船舶转让时起解除；船舶转让发生在航次之中的，船舶保险合同至航次终了时解除。合同解除后，保险人应当将自合同解除之日起至保险期间届满之日止的保险费退还被保险人。

[7]第十七条

订立保险合同，采用保险人提供的格式条款的，保险人向投保人提供的投保单应当附格式条款，保险人应当向投保人说明合同的内容。对保险合同

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中免除保险人责任的条款，保险人在订立合同时应当在投保单、保险单或者其他保险凭证上作出足以引起投保人注意的提示，并对该条款的内容以书面或者口头形式向投保人作出明确说明；未作提示或者明确说明的，该条款不产生效力。

[8] 《最高人民法院关于中国船东互保协会与南京宏油船务有限公司海上保险合同纠纷上诉一案有关适用法律问题的请示的复函》

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## 计划不周的维修导致机舱大量进水

本案例中的这艘散货船在中国装载了钢材，目的地是中东。天气很好，刮着和风，船舶以 12 节的速度全速航行在中国南海。突然，MGPS (船舶防海生物系统) 响起了警报，经值班轮机员检查，发现是电路出了问题。

在几个月前，曾经发生过一个类似的电气问题，船员进行了整改。值班轮机员通知了轮机长，并安排一个机工去检查阳极装置内部的电缆是否有松动。

MGPS 阳极是通过法兰直接固定在海底阀箱顶部的。在每个阳极中心有一个小盖子，电缆在此连接到阳极上。值班轮机员告诉机工拆掉盖子的螺母。轮机员帮助机工拆掉了其中的两个螺母，然后协助处理机舱里其它正在进行的工作。机工拧下整个法兰的固定螺母。在外部海水压力的作用下法兰连同阳极被吹开，大量的水通过海底阀箱涌入机舱。

轮机员要求机工封堵进水。机工试图把法兰装回去，但徒劳无功。启动所有发电机，打开压载泵通舷外的液压阀，打开所有舱底水泵，消防泵和通用泵的阀门以便可以向外抽水。船员启动了所有水泵，而所有泵花了两分钟才能开始运转。主机在进水后几分钟停车了。

15 分钟后，因为水泵不能使水位保持稳定，机舱和舵机间被 200 吨的水淹没了。发电机停止工作，全船停电。为了防止油污泄漏，船员关闭了所有速闭阀和百叶窗。



机舱进水情形（与本案无关）



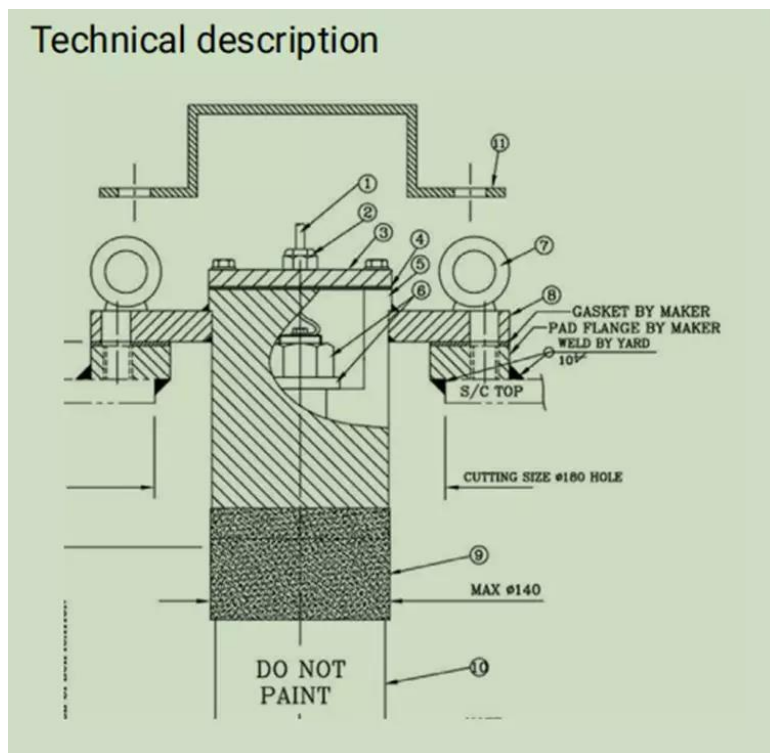


### 阳极装置（与本案无关）

在此情况下，船长意识到必须弃船，于是疏散了船上人员。船员被附近的一艘船从救生艇上救起。

2 天后打捞团队登上该轮，把它拖到港口并花费了好几个月进行修理。

下面是 MGPS (船舶防海生物系统) 的结构图：





小盖子（图中 3）位于大盖子（图中 11）下面。在大盖子下的小腔室里，阳极电缆（图中 1）连接着阳极（图中 10）。这个腔室是与水隔离开的。机工要拆下的是阳极固定法兰（图中 8），固定法兰是用来把阳极装置固定到海底阀箱。阳极（图中 10）是浸在海底阀箱中的。

实际上，机工是不应该触动固定法兰的。这是一项至关重要的工作，在开始工作之前，应该由轮机长签发风险评估报告并由轮机员进行检查。以上，仅供参考，具体请以下附英文内容为准。

如有问题，也欢迎随时与我司联系。

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## Poorly planned maintenance led to engine room flooding



The bulk carrier had loaded steel cargo in China and was bound for the Middle East. It was a nice day with a moderate wind and the vessel sailed at 12 knots in the South China Sea at full draught. Suddenly the MGPS (Marine Growth Prevention System) sounded an alarm and the duty engineer could see that there was an electrical problem.

A similar electrical problem had occurred a couple of months earlier and had been rectified by the crew. The chief engineer was informed, and he instructed an oiler to do an inspection to see if there were any loose wire cables inside the anode assembly.

The MGPS anodes were bolted with flanges directly on top of the sea chest. In the centre of each anode was a small cover where the cable was connected to the anode. The duty engineer told an oiler to remove the nuts for the cover plate. The engineer helped the oiler with the first two bolts and then assisted with other jobs that were being done in the engine room. The oiler also unscrewed the fixing nuts for the entire flange. The flange with the anode blew off because of the sea water pressure from the outside, and large amounts of water poured through the sea chest into the engine room.

The engineer asked the crew to block the ingress of water. The oiler tried to put the flange back, but it was futile. The auxiliary engines were started and the hydraulic valve that could expel water outboard through the ballast pump was opened, and all valves for the emergency bilge pump, fire pump and general pump were also

opened so the water could be pumped out. The crew turned on all the pumps. It took two minutes for all the pumps to start working. The main engine was stopped a couple of minutes after the water ingress.

After 15 minutes the engine room and steering gear room were flooded with 200 MT of water as the pumps couldn't keep the water level stable. The auxiliary engines stopped, and the vessel blacked out. All quick closing valves and shutters were closed to prevent any oil from leaking out.

The master realised that the vessel had to be abandoned and evacuated the vessel. The crew were rescued from their lifeboat by a vessel in the area.

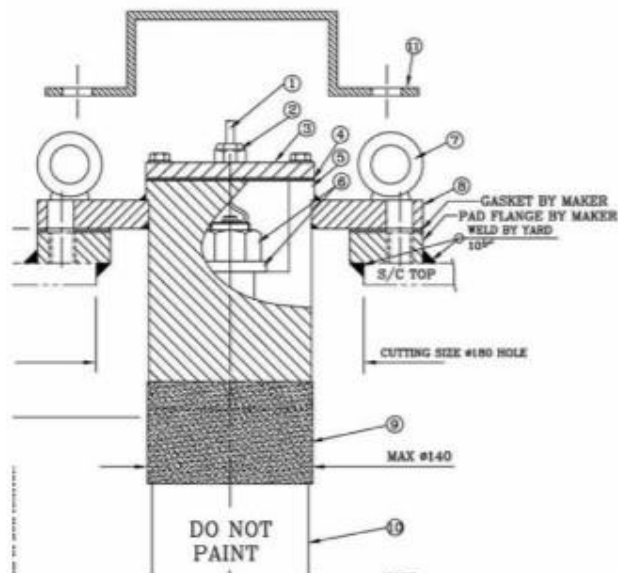
Two days later a salvage team boarded the vessel and towed it into port for repairs which took several months.

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## Technical description



The small cover (item 3) is underside the lid. There is a small chamber where the anode cable (item 1) is connected to the anode (item 10). The chamber is isolated from water.

The anode mounting flange (item 8) is what the oiler removed. It is used to secure the anode assembly to the seawater chest. The anode (item 10) is submerged in the seawater chest.

The oiler should never have touched the mounting flange.

This is a critical job and a risk assessment should have been issued by the chief engineer and inspected by an engineer before the job commenced.

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## Discussion

Go to the "File" menu and select "Save as..." to save the pdf-file on your computer.

You can place the marker below each question to write the answer directly into the file.



When discussing this case please consider that the actions taken at the time made sense for all involved. Do not only judge but also ask why you think these actions were taken and could this happen on your vessel?

1. What were the immediate causes of this accident?

2. Is there a risk that this kind of accident could happen on our vessel?

3. How could this accident have been prevented?

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4. What sections of our SMS would have been breached if any?

5. Is our SMS sufficient to prevent this kind of accident?

6. Does our SMS address these risks?

7. When maintenance is being done in the engine room is this discussed with the bridge officers?

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8. Are our procedures on how to operate systems with pressurized seawater (open to sea) sufficient?

9. Jobs on systems which are pressurized should be considered critical jobs and need a risk assessment and work permit. If this job had been done on our vessel what are the procedures?

10. When critical jobs are being done are two people present?  
Would this be beneficial?

11. In this case there was no sign highlighting that the flange was connected directly to seawater. Would this have been beneficial?

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12. Do we have procedures on how to remove nut/bolts to prevent all bolts being removed simultaneously, as in this case?

13. Do we ever train on how to use the bilge pumps with suction in the engine room?

14. Do we have any other possibilities for bilging in an emergency e.g. direct suction with Fi-Fi pumps from the engine room?

15. If procedures were breached, why do you think this was the case?

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## 甲板货物：不受《海牙-维斯比规则》保护

英国高等法院裁定，对于船舶装运甲板货，如果提单中合并了甲板货除外条款，那么船东对甲板货物的灭失或损坏不承担责任。

“ELIN”轮本航次装载了 201 包货物，从泰国驶往阿尔及利亚。该批货物已签发提单，货物描述如下：

“根据甲板货物装载清单，其中 70 包甲板货的承运风险由发货人或/和收货人或/和货方承担。承运人和/或船东和/或船舶不承担该甲板货物在任何情况下发生的货物灭失或损坏责任。”

提单背面条款的标准措辞包括：

“(c) 承运人对甲板货物及活畜，无论是在装船前、卸船后、或任何情况下由其他承运人保管期间发生的灭失或者损坏，不负任何责任。”

船舶在航行途中遭遇恶劣天气，导致部分货物灭失或损坏。货物权益人/货方声称货物灭失或损坏是由于船东未能在开航时恪尽职责保证船舶适航，或未能妥善、谨慎地装载、积载、搬运和照管货物所致。





在一个案件审理会议上，Picken J. 下令对甲板货物的案子进行初步判定：

“就[提单]的本意而言，无论因何种原因造成甲板上所载货物的任何灭失或损坏，包括因不适航和/或被告人的疏忽而造成的灭失或损坏，被告人均不承担任何责任。”

英国高等法院法官 Stephen Hofmeyer QC 裁定，对积载在甲板上的货物的灭失或损坏，船东不承担责任。

他指出，在甲板上运输货物本身就是有风险的，因此，甲板货物在法律上被区别对待。在甲板上运载并在提单中注明的甲板货物不属于《海牙规则》或《海牙—维斯比规则》中所指的“货物”。船东可以根据自己的条件签订不受规则约束的装运合同。

在英国法中，如果合同的一方想要排除或限制其责任，就必须使用明确的词语，而这些措辞对试图依赖它们的一方具有限制性。

在此案中，法官认为提单上的措辞是清晰而明确的。他指出，事实上很难想象出比“howsoever caused”范围更广的豁免措辞，在过去的100年里，“howsoever caused”已经成为排除疏忽和不适航责任的经典措辞。

因此，在此类案件的初步审判上，基于提单的本意出发，船东不承担任何甲板货物灭失或损害的责任，包括由于船舶不适航和/或船东疏忽而导致的甲板货物灭失或损坏。

如有问题，也欢迎随时与我司联系。

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## On Deck but Outside Hague-Visby Rules

September 2019

The English High Court has decided that a shipowner has no liability for loss or damage to deck cargo where the bill of lading covering the cargo stated that the cargo was carried on deck and incorporated a clause excluding liability for such cargo "howsoever arising."

A project shipment comprising 201 packages of cargo was shipped from Thailand to Algeria onboard the ELIN. A bill of lading was issued for the cargo, which included in the description of the cargo:

*"(of which 70 pkgs as per attached list loaded on deck at shipper's and/or consignee's and/or receiver's risk; the carrier and/or Owners and/or Vessel being not responsible for loss or damage howsoever arising)"*

Standard wording on the other side of the bill of lading included:

*"(c) The Carrier shall in no case be responsible for loss of or damage to the cargo, howsoever arising prior to loading into or after discharge from the Vessel or while the cargo is in the charge of another Carrier, nor in respect of deck cargo or live animals."*

Some of the cargo was lost or damaged when the vessel encountered heavy weather on the voyage. The cargo interests alleged that cargo was lost or damaged because the Owner failed to exercise due diligence to make the ship seaworthy at the commencement of the voyage, or to properly and carefully load, stow, carry and care for the cargo.

At a case management conference, Picken J. ordered the trial of a preliminary issue with respect to any deck cargo:

*"Whether, on a true construction of [the Bill of Lading], the Defendant is not liable for any loss or damage to any cargo carried on deck howsoever arising, including loss or damage caused by unseaworthiness and/or the Defendant's negligence."*

Stephen Hofmeyer QC, sitting as a Judge in the High Court decided that the Owners had no liability for loss or damage to the cargo that had been stowed on deck.

He commented that the carriage of goods on the deck of a ship is inherently risky, so that deck cargo is treated differently at law. Goods carried on deck and stated to be carried on deck in the bill of lading are not "goods" within the meaning of the Hague or Hague-Visby Rules. A shipowner can contract to ship such goods on his own terms, and not be bound by the Rules.

In English law clear words are necessary if a party to a contract wants to exclude or limit their liability, and such words are read restrictively, against the party that seeks to rely on them.

In this case the judge considered that the words on the bill of lading were clear and unambiguous, and he commented that "words of exemption which are wider in effect than "howsoever caused" are difficult to imagine, and, over the last 100 years, they have become "the classic phrase" whereby to exclude liability for negligence and unseaworthiness."

It was therefore held, on the preliminary issue, that in this case: "On a true construction of the Bill of Lading, the Owner is not liable for any loss of or damage to any cargo carried on deck, including loss of or damage to any cargo carried on deck caused by the unseaworthiness of the Vessel and/or the Owner's negligence."



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