第六章 审前与提前文件披露之八：CPR 的规定、中间程序/措施与简易判决的提前披露等

1. 提前文件披露

在《Rule of Supreme Court》（简称 RSC）下，英国法院接受一方在诉讼开始后向另一方要求提前披露文件的做法。这与本书较早章节所讲的诉前披露（pre-action discovery/disclosure）不同，诉前披露涉及管辖权（jurisdiction），在 RSC 下法院是没有在除人身伤亡案件外的民事案件中命令诉前披露的管辖权。因为当时法院的诉讼程序根本还没开始，一旦诉讼开始了，法院就对该案件有管辖权，也就是与管辖权无关而纯粹是由法官根据个别案情是不是适合提前披露而行使裁量权（discretion）。

已经在本书多次提到，英国法律下（RSC Order 24, rule [1]）的做法是双方在文书请求（pleadings）结束后同时交换披露的有关文件。如果要求一方当事人提前向对方披露文件，例如原告要向被告提前披露文件，则会带来不公平，因为被告就可以针对原告手中的文件证据（当然口头证据[1]也是一样）针对性地雕琢他的抗辩文书请求与证据。例如，本来会承认（admit）的事实就因为原告手中的文件证据不完整而变为是不承认，要原告证明。所以，通常是需要很好与很充分的原因与有特殊的案情，才能成功说服英国法院行使裁量权要求一方当事人向对方做出提前披露。

英国法院不轻易行使裁量权要求一方当事人向对方提前做出披露也有其他理由，Hirst 大法官在 Rome v. Punjab National Bank (No. 1) (1989) 2 All ER 136 先例解释说：

"I wish to stress that, as counsel for the plaintiffs himself accepts, the court will only exercise its powers under this heading very rarely, and will require the clearest

[1] CPR Rule 34.8 规定了可以通过口供书（deposition）的形式在开庭前提前获得对方证人的口头证据。上诉庭在 Barratt v. Shaw & Ashton (2001) EWCA Civ 137 针对通过口供书提前获得口头证据的标准时说："*... 4. It would be inappropriate for a party to use the procedure for the purpose of obtaining the evidence of a witness in advance simply in order to enable him to re-evaluate the strength of his claim against the present defendants to see whether a trial should now take place.*"

possible demonstration from the party seeking discovery that it is necessary for the fair disposal of the application. I say this for two reasons. In the first place, the court is naturally reluctant to place such a burden on a defendant who disputes the basic jurisdiction of the court, for the reasons put forward by counsel for the defendant. Secondly, applications under Ord 12, r 8 are a fairly common feature of court business, most particularly in the Commercial Court when dealing with applications to set aside leave granted ex parte under Ord 11 for service out of the jurisdiction, and they are normally dealt with by a hearing on affidavit evidence (see The Supreme Court Practice 1988 vol 1, para 12/7–8/5). It would be most undesirable, and productive of extra delay and unnecessary expense, if applications for discovery were to become a common feature in such cases."

在《Civil Procedural Rule》（简称 CPR）于 1999 年生效后，David Steel 大法官在 Harris v. Society of Lloyd's (2008) EWHC 1433 (Comm)先例中说：

"It is well established under the previous procedural rules that the power to order disclosure for the purpose of interlocutory proceedings should be exercised sparingly and then only for such documents as can be shown to be necessary for the just disposal of the application: Rome v Punjab National Bank ... There are good reasons for concluding that the same if not a stricter approach is appropriate under the provisions of CPR.[2]"

Steel 大法官在 Fiona Trust Holding Corporation & Others v. Yuri Privalov & Others (2007) EWHC 39 (Comm)先例也有同样的说法。

总结以上所讲，在一般的案件成功申请提前披露的机会不大。

1.1 提前披露的时间

RSC Order 24, rule 1 针对正常的双方相互文件披露规定：

"1. Mutual discovery of documents

[2] RSC 已经确立应尽量少为了中间程序命令提前披露，即使作出了提前披露的命令也应限制在处理有关申请必需的文件。例如法院有时需要下令提前披露部分文件才能公平合理地处理法院管辖权的争议（jurisdiction challenge），但由于这些文件与实质争议有关或是对处理实质争议有重要性，所以法院在决定是否在文书请求刚开始（被告必须在递交抗辩书[statement of defence]前挑战管辖权）就要求一方（如原告）作出提前披露时必须小心。即使需要作出提前披露，法院也应尽量控制在与管辖权争议有密切关系与对法院处理管辖权争议有重要性的文件，而不是命令全面披露整个争议（包括损失计算等）的全部有关文件。这样的做法有很好的原因支持，所以在 CPR 下没有理由不持续甚至是更严格。现在在法院诉讼与仲裁开庭时，常会要求在一位证人作证时，其他证人（包括己方与对方的证人）离开，以免听到证词后可以配合自己的盘问，这也是同样的道理。

(1) After the close of pleadings in an action begun by writ there shall, ... be discovery by the parties to the action of the documents which are or have been in their possession, custody or power relating to matters in question in the action. ...”

从这一个程序直到诉讼完毕前，双方都有持续的披露责任，即双方取得了新的有关文件之后必须持续做出披露，这一个责任是不需要法院另去作出命令的。

所以提前披露肯定是在双方的文书请求交换完毕（close of pleadings）与双方的正常与相互做出文件披露的程序之前发生的。但通常是不会发生在诉讼刚开始后，也就是原告向被告发出与送达告票但还没有递交索赔请求（Statement of Claim）之前。这里的原因很简单，因为在还没有索赔请求之前，法院根本不知道双方所争议的问题，特别是原告的索赔或指控（allegations）是什么，没有办法命令被告提前披露与披露什么文件。所以只有在早期的 Speyside Estate and Trust Co Ltd v. Wraymond Freeman (Blenders) Ltd (1949) 2 All ER 796 先例，法院在原告作出索赔请求之前，就允许原告要求被告提早披露被告在有关期限的银行账单的申请。在该先例，如果被告提前披露这些文件，就可以令原告在他的索赔请求有更完整的事实详情（particulars），特别是可以避免后来大面积修改（amend）原来的索赔请求，从而避免时间延误与浪费金钱。另可注意到在该先例，法院是不存在不知道原告的索赔与指控是什么。

而在一些特定类型的案件，例如是知识产权的案件，原告向法院显示根据一些可靠来源的资料可以合理怀疑被告侵犯了他的知识产权并希望向被告索赔与/或寻求其他救济，但缺乏重要事实（material facts）的证据支持，而原告是无法合理从其他渠道[3]找到更好的证据去作为支持索赔请求的重要事实。这一来如果作出空泛的索赔请求并在将来相互披露[4]后作出修改会是太迟，因为很可能马上面临被告把索赔请求撤销（strike out）的申请。[5]所以这也会是一种可以向法院申请在索赔请求作出之前就要求被告提早披露有关的重要文件的情况。

特别是在新的英国民事诉讼规则(CPR)下，法院会是更加愿意去作出提早的披露命令，特别是有了诉前披露议定书[6]的做法后，心态上不会对钓鱼取证/摸索证明（fishing expedition）[7]好像以往在 RSC 下这么担心与抗拒：见 Arsenal Football Club Plc v. Elite Sports Distribution Ltd (2002) EWHC 3057 (Ch)等先例。

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[3] 更好的渠道是本书第二章之 3 段介绍的搜查令，但受限于地域限制等问题并不一定做得到。

[4] 关于诉讼的正常相互披露程序在本书第七章有详细介绍。

[5] 这在本章之 4 段有详细介绍。

[6] 这在本书第二章之 2 段有详细介绍。

[7] 在《Dicey, Morris & Collins on The Conflict of Laws》（2012 年，第 15 版）之 Para.8-103，说：“*‘Fishing’ arises where what is sought is not evidence as such, but information which may lead to a line of enquiry which would disclose evidence; it is a search, a roving enquiry, for material in the hope of being able to raise allegations of fact.”*

1.2 有关提前披露情况

更常见的提前披露是在索赔请求发出之后，被告发现自己没有足够或任何有关该索赔的信息，进而无法对原告索赔请求中的指讼与重要事实作出实质性且有充分理据支持的抗辩。这里的原因可能是多方面，一个方面是被告自己的问题。例如是自己没有保存文件；或公司在改组之后处理有关争议事件的员工已经离开公司；又会是原告的索赔虽然仍在 6 年或 12 年（适用在契约）的时效内但也已过去了很多年，这导致被告都无法记得，可能记得的员工/证人已经流失，更无法找到有用的资料与文件证据协助作出抗辩书（Statement of Defence）等等。这种被告自己的问题会是比较难处理，法院会较难被说服作出提前披露的命令。但会有一些是行业特殊性或是外来的原因与被告本人的问题无关，这一来法院就会更加愿意去作出提前披露的命令，让被告提前从中找到有关重要事实的文件证据以作出抗辩（如果有的话）。这在英国法院已经是有了很久的历史，也就是在 RSC Order 72, rule 10[8]下的例外做法，即不必等到双方当事人在文书请求后才相互披露文件，而是允许承保海险的保险人（主要是劳合社的承保小组[syndicate]）可以在收到受保人的索赔请求之后向法院提出申请，要求原告提前披露所有的相关索赔的文件与资料，并在查看后再递交抗辩书：见 Boulton v. Houlder Bros (1904) 1 KB 784; Garra v. Eagle Star Insurance Co (1923) 16 Lloyd's Rep 339; Leon v. Casey (1932) 2 KB 576; Keevil v. Borg (1940) 3 All ER 346; The "Sageorge" (1974) 1 Lloyd's Rep 369 等先例。

在几百年前，国与国之间根本无法即时或快捷地通信与交往，而海上保险的业务偏偏又大部分涉及英国国外，导致索赔的意外也会是发生在国外。这种情况下，保险人是不会知道也不会可以通过其他途径调查到有关的意外事故，从而知道有关索赔的重要事实，如发生的事故是否是承保风险（insured peril），或有否涉及欺诈，或涉事的船舶是否适航（seaworthy），或索赔金额是否夸大等等。所以如果保险人对索赔有所怀疑，或至少是想要搞清楚有关事实后才作出决定是赔还是不赔与赔多少，就只能要求作为受保人的原告披露所有的文件与资料。而原告对造成索赔的意外事故，肯定会有文件与资料。否则他也无法在索赔请求中提出足够的重要事实，毕竟这需要证据不能信口开河讲故事。相比保险人，他对投保的船舶或货物有掌控，更了解意外事故的发生、经过与善后工作，也拥有其他相关的证据如航海日志、船长报告等有关文件。但到了今天，保险人或保险公司再也不会有同样困难，想在世界任何地方调查取证都不会是太困难。所以，在做法上也有了改变，这方面稍后在本章之 7 段会有进一步的探讨与介绍。

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[8] RSC Order 72, rule 10 规定："*(1) Where in an action in the commercial list relating to a marine insurance policy an application for an order … is made by the insurer, then, … the Court, if satisfied that the circumstances of the case are such that it is necessary or expedition to do so, may make an order,… for the production of such documents … (2) An order under this rule may be made on such terms, if any, as to staying proceedings in the action or otherwise, as the Court thinks fit…*"

另一个例子是涉及知识产权的争议，除了上一段提到有原告需要提前披露才能有证据支持索赔请求外，也会有情况是被告在毫不知情的情况下被原告指称产品侵犯他/她的专利或仿冒（passing off）他/她的产品。这一来，被告就需要原告提前披露后才能去作出抗辩：见 RHM Foods Ltd v. Bovril Ltd (1982) 1 WLR 661; C Shippam Ltd v. Princes-Buitoni Ltd (1983) FSR 427 等先例。

对不知情的被告而言，他/她可能希望通过在抗辩书中对原告所有的指控与重要事实都泛泛说否认（deny）来拖时间，直到文书请求结束双方相互做出披露有了进一步的文件与资料后再修改抗辩书。但这种做法并不是一个理想的做法，在 CPR 下更是被明示禁止。这有以下几个原因：

（一）一个纯否认（bare denial）的抗辩是违反 CPR Rule 16.5(2)的规定，再也不能被接受。其中一个严重的后果是除非法院批准（leave），被告不能事后挑战或质疑（challenge）原告的有关指控（allegation），也不能在开庭审理时针对原告的指控提交任何正面反驳的证据（positive evidence），因为已经被视为承认了对方的指控：见 Mitchell v. News Group Newspapers Ltd (2013) EWCA Civ 1537; DIL v. Commissioner of Police of the Metropolis (2014) EWHC 2184 (QB)等先例。CPR Rule 16.5(3)规定：

"3) A defendant who –

(a) fails to deal with an allegation; but

(b) has set out in his defence the nature of his case in relation to the issue to which that allegation is relevant,

shall be taken to require that allegation to be proved."

（二）现在在文书请求/案件陈述后，英国法院很快就会召开案件管理会议（Case Management Conference）。这一个会议要求双方代表律师都对自己的案件十分熟悉，这也表示被告要对自己的实质抗辩有所理解才行。另是 CPR Part 3 给了英国法院很大的案件管理的权利，包括撤销（strike out）一个不符合 CPR 对文书请求要求的纯否认。其中 Rule 3.4 针对文书请求说：

"Power to strike out a statement of case

...(2) The court may strike out a statement of case if it appears to the court –

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

...

(c) that there has been a failure to comply with a rule, practice direction or court order."

（三）总之，如果被告的文书请求中没有一个可争议的抗辩（arguable defence），原告会很快向法院申请撤销这一个抗辩。原告在同时会请求法院根据 CPR Rule 24.2 对索赔作出一个简易判决（Summary Judgement），这方面的内容会在本章稍后的第 4 段详细介绍。

（四）被告希望拖时间在稍后有了文件证据/资料后再修改抗辩书的做法，既劳民伤财也延误时间。

（五）CPR 下的心态是希望双方当事人能够提早谈判并达成庭外和解，以免官司打下去劳民伤财。一个纯否认但不说明原因与事实详情的抗辩书，是无法让原告理解并以为依据谈判。

所以这些原因加起来，很容易想到为什么在特殊的案件中需要命令原告提前披露以帮助被告作出符合 CPR 要求的抗辩。

2. 提前披露的立法规定

2.1 1999 年前的英国法院规定：RSC

RSC 下针对提前披露的规定主要是在 Order 24, rule 7，可节录如下：

*"7. **Order for discovery of particular documents***

*(1) Subject to rule 8, **the Court may at any time**, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of documents so specified or described is, or has at any time been, in his possession, custody or power, ...*

*(3) An application for an order under this rule **must be supported by an affidavit** stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, **in his possession, custody or power** the documents, or class of document, specified or described in the application and that **it relates to one or more of the matters in question in the cause or matter.**"*（加黑部分是笔者的强调）

另在 RSC Order 24, rule 8 针对与强调法院在必要的情况下才能行使裁量权命令提前披露，说：

*"On the hearing of an application for an order under rule 3, 7 or 7A the Court, if satisfied that discovery is **not necessary**, or **not necessary at that stage** of the cause or matter, may **dismiss or**, as the case may be, **adjourn the application** and shall in any case refuse to make such an order if and so far as it is of opinion that discovery is*

not necessary either for disposing fairly of the cause or matter or for saving costs.”（加黑部分是笔者的强调）

笔者可对上述节录规定中加黑部分稍作解释如下：

(A) “法院在任何时候”（the Court may at any time）：这指的是在 RSC Order 24, rule 1 强制规定双方诉讼方在诉讼开始后与文书请求后的正常相互披露程序之前的提前披露。

(B)“必须有誓章支持”（must be supported by an affidavit）：诉讼方申请提前披露时必须递交誓章，显示与证明他/她申请提前披露的理由是有正当理由与满足 RSC 中的两个特定要求。

(C) “在他拥有、托管或权力之下”（in his possession, custody or power）：这是第一个特定要求，逻辑上对方诉讼方只有拥有、托管或有权获得有关的文件或一类文件才需要披露这些文件。

(D)“文件与诉讼争议的一个或几个事件有关”（it relates to one or more of the matters in question in the cause or matter）：这是第二个特定要求，即被要求披露的特定文件（particular document or class of documents）必须与诉讼争议的一个或几个事件有关。这也很合理，在旧的 RSC 下，双方要交换所有有关（什么是有关可根据双方的文书请求中的争议/争端确定）文件，所以针对提前披露也是同样的标准。文件是否有关还会影响到法院做出提前披露命令的管辖权问题，例如在 AJ Bekhor & Co Ltd v. Bilton (1981) 2 All ER 565 先例，在有关冻结令（Mareva Injunction/Freezing Order）[9]的程序中，原告申请被告在 RSC Order 24, rule 7 下提前披露他的资产状况。一审法院同意了原告的申请，但这决定被上诉庭推翻，上诉庭判是法院没有要求被告提前披露的管辖权，因为这些文件与双方争议的事件无关。但在 RHM Foods Ltd v. Bovril Ltd (1982) 1 WLR 661 先例，上诉庭认为对 RSC Order 24, rules 1 & 7 中“relating to matters in question”的解释不应该太狭窄，所以在该先例被告对管辖权的挑战没有成功。

(E) “从公平处置有关争议或节省费用的角度都不需要”（not necessary either for disposing fairly of the cause or matter or for saving costs）：如果法院在考虑了誓章证据后认为无论是从公平处置有关争议（如在本章之 1.1 段介绍的海事与知识产权案件，中间措施或中间程序命令也往往需要一些特定的披露）或节省费用的角度都不需要提前披露，也不会作出命令。

[9] 在本书第三章有详细介绍。

2.2 目前的英国民事诉讼规则（CPR）的规定

CPR Part 31 针对了诉讼中的文件披露，其中正常的相互披露通常是在文书请求/案件陈述结束与案件管理会议的程序后。这一个重要课题会在本书第七章针对，这里只节录个别立法条文以显示与本章介绍的提前披露不同。如 CPR Rule 31.5(3)规定：

"Not less than 14 days before the first case management conference each party must file and serve a report verified by a statement of truth, which –

(a) describes briefly what documents exist or may exist that are or may be relevant to the matters in issue in the case;

(b) describes where and with whom those documents are or may be located; ..."

另在 Rule 31.10(1) - (3)规定：

"(1) The procedure for standard disclosure is as follows.

(2) Each party must make and serve on every other party, a list of documents in the relevant practice form.

(3) The list must identify the documents in a convenient order and manner and as concisely as possible."

CPR 下针对本章介绍的提前与特定披露的 Rule 31.12 可节录如下：

"**Specific disclosure or inspection**

(1) The court may make an order for specific disclosure or inspection.

(2) An order for specific disclosure is an order that a party must do one or more of the following things –

(a) disclose documents or classes of documents specified in the order;

(b) carry out a search to the extent stated in the order;

(c) disclose any documents located as a result of that search ..."

在《The White Book Service 2013: Civil Procedure》一书之 para. 31.12.1.1 提到这种特定披露的申请可以在诉讼任何阶段，这当然应该包括提前披露的情况。法院在行使裁量权时应考虑所有的情况与 CPR Part 1 中提到的 CPR 的首要目标，这包括要维持公正与确保双方被平等对待：见 CPR PD 31A para. 5.4。

除了 Rule 31.12，在 CPR Rule 18.1(1)下一方也有权要求对方当事人提前做出澄清/质询与/或提供进一步的信息（无论是否已在文书请求中提到）：

"(1) The court may at any time order a party to – clarify any matter which is in dispute in the proceedings; or give additional information in relation to any such matter, whether or not the matter is contained in or referred to in a statement of case."

在本章一开始就已经提到，新的 CPR 针对提前披露的规定与 RSC 没有本质上的不同，正如 Steel 大法官在 Fiona Trust Holding Corporation & Others v. Yuri Privalov & Others (2007) EWHC 39 (Comm)先例所说：

"It is of course open to the court to order disclosure at any stage of the proceedings, including for the purpose of interlocutory proceedings. But it is well established under the previous procedural rules that such a power should be exercised sparingly and only for such documents as can be shown to be necessary for the fair disposal of the application: see Rome v. Punjab National Bank (1989) 2 All England Reports 136. There are no reasons for concluding that any different approach is appropriate under the provisions of CPR... "

在《Disclosure》（2017 年，第 5 版）一书之 2.39 段也说：

"A further exception relates to disclosure ordered for the limited purpose of interlocutory proceedings. Under the old rules it was held that, in a dispute as to whether the court should set aside service of a writ for want of jurisdiction, the High Court had power to order discovery to be given going to that issue. However, such discovery would be ordered sparingly and only of such documents as could be shown to be necessary for the fair disposal of the application[10] ... Although the CPR are differently worded to the RSC, there seems little doubt that the position under the new rules is the same. Indeed, if anything the argument for the court having such power is stronger, for disclosure is no longer tied to relevance to issues in the action[11], but depends on what is ordered."

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[10] 见 Rome v. Punjab National Bank (No. 1) (1989) 2 All ER 136; Nissho Iwai Corporation v. Golf Fisheries Company (unreported, 12 July 1988); Canada Trust Co v. Stolzenberg (1997) 1 WLR 1582 等先例。

[11] 在 CPR 后不再存在必须与诉讼争议有关的要求，所以不需要等到文书请求（Pleadings）或案情陈述（Statements of Case）确定争议后，再看被要求披露的文件是否与争议有关。从本书第二章之 2 段介绍的诉前披露议定书（Pre-action Disclosure Protocol）可以看出 CPR 下不再拒绝提前（无论是诉前还是审前）披露，而是更关注提前披露在案件中是否公平。这取决于个别法院对每个不同案情的案件的看法，这也令法院有更大的裁量权（discretion）。

3. 有关提前披露的典型案例介绍

3.1 RHM Foods Ltd v Bovril Ltd

RHM Foods Ltd v. Bovril Ltd (1982) 1 WLR 661 先例是罕见的由原告在作出索赔请求（Statement of Claim）之前申请法院下令被告做出提前披露的案件。案情涉及知识产权争议中的仿冒（passing off），被告推广的名为 GRAVYMATE 的牛肉汁产品，外表、包装与电视上的广告都与原告在 1910 年已经推出市场并受到消费者欢迎与全球享有声誉的 BISTO 十分相似。在笔者（杨良宜）年轻的时候，这种牛肉汁是很有名的补身食品，也是当时的送礼佳品。

但光是两种商品外表接近并不足够支持原告仿冒的指控，另一个重要条件是证明被告向潜在的买方（消费者）误述，导致这些买方混淆，分不清原告或被告的商品。这才是仿冒，即被告有意瞒骗。

这一来，原告向法院申请要求被告提前披露被告与他的广告代理人之间关于 GRAVYMATE 的市场营销与广告（包括电视广告）的所有的文件与书信往来，包括被告向他们所作出的一些指示与代理人的回应，如怎样推广的商品。显然，在这些文件的内容中就有可能找出被告有否指示或要求广告代理人模仿原告的 BISTO 牛肉汁以及有否意图误导消费者。这一个申请在一审被接受，但在上诉到上诉庭之后被推翻。

上诉庭认为法院确实有在文书请求还没有开始，也就是原告还没有做出索赔请求之前就命令提前披露的管辖权，但只适用在很罕见与特殊的情况。而在该先例，由于索赔请求仍未作出，法院是无法知道该诉讼的事宜与问题（the matters in question in the action），无法满足 RSC 对提前披露与披露什么文件的要求。另是在当时的 RSC 下仍是抗拒通过披露调查而不是为了取得审理时要用的文件证据，认为这是钓鱼取证/摸索证明（fishing expedition），是不允许的。上诉庭的 Lawton 大法官是这样说：

“I am willing to accept that the affidavits … have reasonably given the plaintiffs cause for suspicion, but at present there is not, in my judgment, any satisfactory evidence of fraud or, indeed, of disreputable conduct short of fraud. In my judgment, it would be unfair to the defendants to allow the plaintiffs to have discovery before they have set out in a Statement of Claim such allegations of deliberate deception as they feel justified in marking… Until at least a Statement of Claim has been delivered the court can seldom know what are the matters in question in the action.

The need for definition of the issues probably explains why orders of the kind made by Mr. Justice Warner（一审法院法官）are so rare… this application was, of fishing for evidence to support an allegation which it was submitted could be inferred from conclusions set out in affidavits.

*... **if an order for discovery under Order 24, rule 7(1) could be made in this case, it could probably be made in every case in which a deliberate intention to deceive was alleged. The making of such orders would add greatly to the costs of litigation and would probably slow down the doing of justice. In my judgment, save in exceptional circumstances, order of the kind under discussion in this case should not be made until the plaintiffs' case has been fully and properly pleaded in a Statement of Claim.***"（加黑部分是笔者的强调）

3.2 C Shippam Ltd v Princes-Buitoni Ltd

C Shippam Ltd v. Princes-Buitoni Ltd (1983) FSR 427 先例也涉及知识产权的争议，原告与被告都是生产酱料的商人，原告在索赔请求指称被告出售的酱料仿冒他在多年前让艺术家设计的特有包装（雕有凹糟的罐子），是偷他的版权。被告在提交抗辩书前，向法院申请要求原告提前披露原始设计图的命令。法院支持了被告的申请，命令原告提前披露与提供进一步索赔的详情（further and better particulars）。Walton 大法官认为在该先例如果原告不提前披露，被告在抗辩书中就只能对原告仿冒的指控一概/纯否认，等到将来正常与相互披露阶段结束后才能修改并作出新的实质性抗辩，这是不合理与劳民伤财。Walton 大法官说：

"*Why ... should Mr Kitchen（被告代表大律师）have to put in a defence merely denying a large number of things whose truth or falsehood he does not know and then only painfully late come, by means of discovery and so on, to the conclusion that the defence ought to be scrapped and a totally different defence on totally different matters pleaded. That does not seem to me to be sensible.*"

Walton 大法官还说被告要求披露的文件原告无论如何都要在稍后的相互披露阶段披露，不提前披露对原告来说也没有什么好处：

"*... all the information which the defendants are now seeking would have to come out at some stage on discovery. It seems to be that, if it would have to come out at some stage, there is nothing more than perhaps some dim forensic advantage to be obtained by withholding it at this stage.*"

3.3 Vava v. Anglo American South Africa Ltd

Vava v. Anglo American South Africa Ltd (2012) EWHC 1969 (QB)这一个近期的重要先例涉及 CPR 生效后针对提前披露的做法，在笔者看来也一定程度上显示了 CPR 对提前披露的心态或理念。

案情是涉及了一个金额会是庞大的人身伤亡案件。原告有 19 名，但据知背后有 1,100 个以上的受害人，他们可能会根据案件的进展陆续加入成为共同原告。被告是一家可简称为 AASA 的南非公司，它们的主要业务是拥有在南非的金矿与采矿。原告的诉因是他们作为矿工在被告的矿场工作，但因为被告的疏忽，没有为原告采取适当的保护，导致他们患上了尘肺病（silicosis）。加上，因为 AASA

的公司医生的疏忽让原告的病情加重，AASA 作为雇主要承担雇员疏忽的雇主责任（Vicarious Liability）。

被告的所在地或整件事件的发生都是在南非，看来这一个案件的审理应该是在南非。但原告却在英国法院提起诉讼，看来是涉及择地行诉（forum shopping）的问题，这可能是原告有其他战略上的原因，例如希望获得更高的赔偿金额或其他原因刻意避开南非法院。但这一来，免不了要面对被告以英国法院没有管辖权作为第一线的抗辩。而这个昂贵的先例也就是原告为了应对管辖权的争议，申请法院命令南非被告提前披露与澄清约 80 条问题的质询。这里涉及 AASA 是一家位于英国的跨国公司 AA 的下属公司，它们是独立的公司或法人，但 AASA 对 AA 十分重要，占 AA 总资产的 40%。

在此先例，双方当事人的代表律师同意这一个申请原告需要满足两方面的要求。首先，原告要在表面证据显示他关于管辖权至少是有一个可争议的案件（their case on jurisdiction is at least arguable）。否则，如果什么都没有只凭胡思乱想就要求提前披露，就变了钓鱼取证/摸索证明（fishing expedition），而不是要求为了将来的审理取得证据了。第二个方面是原告要满足这一个申请要求提前披露对公平审理这一个管辖权争议是合理必要的（reasonable necessary for the fair disposal of the issue）。此外在 CPR 下也有利弊成比例（proportionality）的原则性要求，这表示要求的文件不能太多，不能给被告带来不必要的负担与费用。

显然原告希望英国法院有管辖权，就需要被告 AASA 的所在地是在英国，因为被告的所在地法院肯定有管辖权，也不涉及要把告票送达外国（serve out of jurisdiction）的问题。但表面看来，AASA 是一家南非公司，母公司 AA 才是英国公司。

针对公司所在地（place of domicile）的定义，英国适用欧盟的《Brussels Regulation》之 Article 60。它规定了只要满足以下三种情况中的一种，就可以算是公司所在地：

（1）法律所在地（statutory seat）。在此先例，AASA 显然是在南非。

（2）中央行政管理地（central administration）。

（3）主要业务地（principal place of business）。这也应是在南非，AASA 在英国没有业务。

所以原告只能坚持 AASA 的中央行政管理地是在英国（也就是 AA 在真正行政管理 AASA），否则就会败诉，因为英国法院不是被告所在地法院没有管辖权。

首先，什么是中央行政管理地的定义？这显然与法律所在地或主要业务地有分别。主要业务地显然只是针对经济与商业上的主要活动地点，与公司的主要行政管理地不一定在一起。这虽然是欧洲大陆法的说法，英国也有一些先例，如在 King v. Crown Energy Trading AG (2003) EWHC 163 (Comm)先例，判公司的法律

所在地是瑞士，但主要业务地与中央行政管理地是英国。另在 889457 Alberta Inc v. Katanga Mining Ltd (2008) EWHC 2679 先例，第一被告 Kaatanga 是加拿大公司（税务目的），被加入的第二被告与第三被告分别在百慕大与巴拿马注册。但根据资料与证据，虽然第一被告的主要业务是在刚果（采矿），但公司主要高管多数是在伦敦与公司主要决定几乎都是在伦敦作出，所以判中央行政管理地是伦敦，英国法院有管辖权。

在 Vava v. Anglo American South Africa Ltd 先例，针对的应是 AASA 公司的中央行政管理地而不是整个 AA 集团的中央行政管理地。原告提供的资料与证据显示 AASA 与 AA 不仅是集团公司与子公司之间的关系，很多有关 AASA 的行政管理决定都是在伦敦由 AA 作出，包括 AASA 的董事会不经常开，AA 宣告委任 AASA 的首席执行官（CEO）等等。

Silber 大法官判原告满足了他们对管辖权方面有一个可争议的案件的要求，但法院也说到原告目前拥有的资料与证据都是一些支离破碎与道听途说的传闻证据，不足以在管辖权争议的审理时胜诉。所以进一步的提前披露是有必要，否则在原告面对管辖权的争议时会处于不利地位，因为有关这方面的文件都单方面在被告手中，原告也无法从其他渠道取得。

所以，法院作出命令要求被告提前披露，而包括的部分文件有 AASA 过去两年的一些文件，例如是年度账目，公司章程（在南非无法公开取得），所有有关 AASA 对作出管理方面的决定的权利下放与保留的文件，AA 对 AASA 下放的权利的政策、指令、手册等文件，AASA 与它的董事之间的协议（会包括写明作为董事有什么责任与可以作出什么决定），董事会议的会议记录等等。

而对原告同时申请的澄清约 80 个问题的质询，Silber 大法官就认为这可以迟一步再考虑，毕竟在提早披露的文件中会包括了许多问题的答案。如果原告在审阅提前披露的文件后发觉部分问题仍要澄清，可以再次提出申请。

4. 撤销索赔或抗辩

在《Documentary Evidence》（2018 年，第 13 版）一书之 2-01 段有说到在一方当事人向法院申请简易与早期决定/处理案件（early disposal of case）的做法将另一方的索赔请求（Statement of Claim）或抗辩（Statement of Defence）撤销时，另一方抗拒申请时在适当的情况下可以要求申请人先做出提前披露：

"An application for early disclosure may sometimes be appropriate where the other side brings an ***application for summary judgment or a strike out*** *and the respondent is concerned that he is not being given sight of documents which would defeat the application."*（加黑部分是笔者的强调）

CPR Rule 3.4(2)针对法院撤销索赔或抗辩的权利说：

"A court may strike out a statement of case if it appears to the court that: (a) the statement of case discloses no reasonable grounds for bringing or defending the claim; (b) the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings."

撤销索赔或抗辩的逻辑是让对方诉讼方在一开始不必浪费时间与金钱应对完全站不住脚的指控。如果这指控是来自原告，被告就可以直接申请撤销索赔请求，而无需作出抗辩并一路进行到开庭审理，要最终胜诉后才让原告罢手。如果这指控是来自被告，原告也同样可以要求法院撤销被告的抗辩并作出简易判决（summary judgment）。法院在考虑是否撤销（以索赔请求为例）时要考虑两点：（一）索赔请求中是否有一个可以在法律上说得通/站得住脚的诉因（强弱是另一码事，要看后续程序披露的证据）；（二）索赔是否太过臆测（speculative）。

而第二个可以撤销索赔或抗辩的理由是滥用司法程序（abuse of the court's process），关于这个课题可见笔者《合约的履行、弃权与禁反言》一书第九章之8段。

4.1 撤销与 CPR 下的提前披露的关系

因为钓鱼取证/摸索证明（fishing expedition）已经不再是反对诉前披露（pre-action disclosure）的理由，同样道理，在 CPR 下申请提前披露也会更容易，这种态度的转变也显示在了法院对撤销索赔或抗辩的申请的处理方式上。

在 Arsenal Football Club Plc v. Elite Sports Distribution Ltd (2002) EWHC 3057 (Ch)先例，案情涉及原告（英国著名球会）声称被告错误使用球员比赛时的照片制作日历。原告许可（license）一些摄影经纪公司（photographic agency）与它们旗下的摄影师进入比赛场地摄影，但是对照片的使用有严格限制，其中包括不能使用照片制作非官方产品。原告既没有许可被告拍摄照片更没有许可被告使用照片，但问题是原告不知道被告是从什么渠道获得这些照片，所以只能在索赔请求中泛泛地"讲故事"，声称被告要么是说服了某家摄影经纪公司/摄影师（原告不知道哪家摄影经纪公司或哪位摄影师）给它照片，或是故意错误陈述自己对照片的使用目的而从某家被授权的摄影经纪公司偷取/骗取的照片。如果是前者，属于摄影经纪公司违反了与原告的合约。如果是后者，则属于被告干扰了摄影师的财产权与/或知识产权与/或误述（misrepresentation）或欺诈（deceit）。

被告在抗辩时提出原告在许可中对摄影师作出限制属于反竞争行为（anti-competitive），并以商业机密为由拒绝披露获得照片的途径。同时，被告向法院申请撤销原告的索赔请求，理由是原告的索赔请求完全属于臆测，被告完全有很多不涉及侵权的合法手段可以获得照片，例如有许可的摄影经纪公司将版权转让给了第三方，该第三方再转让给了被告。

被告依赖了 RCA Corp v. Pollard (1982) 3 All ER 771 先例与 Lonrho Plc v. Al-Fayed (No. 1) (1990) 2 QB 479 先例，这两个 RSC 下的先例都是法院在类似的情况下撤销了原告的索赔请求。但法院不接受被告的说法，认为这两个先例原告

臆测的程度是远远超过现在的案件。J Geoffrey Vos QC 大法官也提到了在 CPR 生效后，法院态度的改变：

"There is a further reason why I am not inclined to strike out the Statement of Claim at this stage … It seems to me that the position under the CPR is somewhat different from what it was under the previous rules of the supreme court. This is because under the CPR, Pt 31.16 enables the court to order disclosure in a case like the present to enable a potential claimant to ascertain whether he has a pleadable claim or not."

接着法院跟从了 Black v. Sumitomo Corp (2001) EWCA Civ 1819 上诉庭先例的判决，Rix 大法官在该先例中明确表示如果原告因为缺少信息无法开始诉讼，但原告的推测是合情合理，法院可以下令作出诉前披露。特别是考虑到 Arsenal Football Club Plc v. Elite Sports Distribution Ltd 先例的被告披露它是通过什么渠道获得的照片是很容易但仍拒绝披露，这暗示了被告是瞒着一些信息不让原告/法院知道，背后的原因很有可能是被告确实侵权。因此，在考虑了所有的文件证据（包括原告与被告之间的 7 封信件，内容包括被告拒绝披露照片来源）后，法院认为原告的索赔请求并非完全没有根据的臆测，并根据 CPR Rule 31.12 要求被告向原告作出提前披露。如果披露的信息显示被告没有做出错误行为（wrongdoing），只是介入（mixed up）了侵权（无授权使用日历中的照片），法院会作出第三方披露令（Norwich Pharmacal Order）[12]，要求被告披露真正做出错误行为的人士。

4.2 一概或纯否认的抗辩

这种被告在抗辩书中对所有或大部分的索赔事项与指控都只泛泛地说"否认"（deny）的情况经常发生。背后的原因可能是被告不清楚原告的指控，无法承认（admit）也就回应说不承认（not admit）或干脆说否认。但更多情况是被告不愿意面对这个索赔而选择不合作，希望通过拖时间让原告知难而退（这经常是被告一厢情愿，现实中很少会发生）。也经常有情况是被告或他的代表律师因为水平问题，或是因为自己没有好好保存文件并且在发生争议后有不肯花钱调查取证，而无法根据事实有理有据地提出抗辩，只能泛泛否认所有原告的索赔与指控作出一个"留守抗辩"（holding defence）。但在 CPR 下已经不再允许这样的做法。

笔者可先简单介绍不承认与否认的区别，不承认是代表"我要你证明你这一个指控"（I require you to prove this [allegation/assertion]），而否认是代表"我会向法院提供证据证明你的指控是错误"（I will bring evidence to court to contradict this and prove it wrong）。

[12] 本书第二章之 4 段对第三方披露令有详细介绍。

CPR 不允许被告在抗辩请求只是说否认但不说明为什么否认与不说清楚被告对原告指控有什么不同的说法与事实（将来再提供证据）。在 CPR Rule 16.5(2)规定：

"... (2) Where the defendant denies an allegation—

(a) he must state his reasons for doing so; and

(b) if he intends to put forward a different version of events from that given by the claimant, he must state his own version."

在较近期的刑事案例 DIL v. Commissioner of Police of the Metropolis (2014) EWHC 2184 (QB)先例，Bean 大法官说：

"One of the most important recommendations made by Lord Woolf in his Access to Justice report in 1996[13] was that pleadings should not be technical documents, and in particular that 'the Defence will set out the defendant's detailed response to the claim and make clear the real issues between the parties'."

所以在 CPR 下，纯否认的抗辩可被视为是被告没有针对原告的指控，而根据 CPR Rule 16.5(5)的规定，这会被视为是承认原告的指控（a defendant who fails to deal with an allegation shall be taken to admit that allegation）。显然，这会给被告带来严重的后果，即原告会马上向法院申请将被告的抗辩撤销。如果原告的索赔请求中包括一笔金额的索赔，也可同时申请法院作出一个简易判决（summary judgment）。但如果被告不是因为面对一个清楚不过的索赔（如欠下一笔债务）想以否认拖时间与扯皮，而是因为不知道原告的指控只能否认，就会抗拒这一个撤销与简易判决的申请并申请一个提前披露的命令：见 Arsenal Football Club Plc v. Elite Sports Distribution Ltd (2002) EWHC 3057 (Ch)先例。

所以，如果原告心里清楚被告在该案件有实质理由可以抗辩，而只是因为其他可能是莫名其妙的原因（如水平低，但被告稍后可能换一家高水平的律师代理）才泛泛否认，就会使用其他的办法来应对被告对部分指控的纯否认抗辩。在一些适合的案件，例如肯定需要开庭审理的案件，原告也担心被告在开庭时会节外生枝提出没有在文书请求说明的争端（pleaded issues in dispute），就可向被告作出通知告知他只是对某些争端（如索赔的损失计算与金额）说否认是违反 CPR 的规定，并要求被告改正说明否认的理由与相关事实详情（particulars）。而如果被告仍是置之不理，在将来开庭审理时就更不可能对有关的争端（如损失计算与金额）提出异议了。以下可节录一个这种通知的的例子：

"In paragraphs 3, & 7 of the Defence, it is 'denied' that the claimant is or was a bailee of the cargo of 200 metric tons of gold ....

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[13] 这份民事诉讼改革报告也带来了之后在 1999 年生效的 CPR。

The Defence does not comply with the rules of court, CPR 16.5(2) states that where a defendant denies an allegation 'he must state his reason for doing so'.

Kindly comply with the rules of court and

(i) State, with that particularity that will enable the claimant to know the case he will have to meet at trial, why the defendant denies the claimant was an agent.

(ii) CPR 16.5(2)(b) requires a defendant to 'state its own version' of events if it is to put forward a different version of events. If the defendant is denying the claimant's claim then comply with the rules of court and state, with full particularity, the version of events that the defendant will put forward in support of its assertion that the claimant was not an agent of the defendant at the material time.

In paragraph 12 of the Defence, the defendant 'denies' the claim for losses or damages contained in the claimant's Schedule of Loss in the Statement of Claim

(1) The Defence does not comply with the rules of court again. Kindly

(i) State, with full particularity, why the claimant's claim for losses or damages in the Schedule is denied.

(ii) State whether, if the claimant establishes liability against the defendant, the defendant admits the claim as pleaded in full.

(2) If the claim in the Schedule is not admitted in full, state with full particularity why the defendant has felt it is able to ignore the provisions of the rules, in particular PD 16.12.2 and file a counter schedule.

(For the avoidance of doubt the claimant will argue, at the trial of this action, that the defendant's failure to comply with the rules, to plead the defence fully and to file a counter-schedule, means that the defendant requires relief from sanctions if it is going to seek to challenge the claimant's case on damages. On the defendant's case as pleaded, it is not open to the defendant to adduce any positive case at trial. Further the defendant is not able to challenge the items in the Schedule.)"

4.3 简易判决（summary judgment）

上一小段已经提到，很多情况下被告泛泛地一概或纯否认（bare denial）索赔请求中的指控只是想扯皮，或是不知道怎样抗辩就以这种做法拖时间。如果走正常的诉讼程序，往往会拖上一年半载才会进行到开庭审理的一步，届时被告才会向原告投降。如果法院排期拥挤，开庭审理甚至可能要等上好几年，如在 80 年代英国法院开庭要等上 10 年之久。这不是一种理想的做法，也会严重浪费金钱与时间。

所以，英国法院很早就有了简易判决的做法以对付这种客观看来请求的索赔是明显不过，被告应没有什么可去争辩（所以在抗辩请求中只能泛泛地否认），只想扯皮与拖时间的情况。如 Halsbury 勋爵在 Jones v. Stone (1894) AC 123 枢密院先例中说：*"it is inexpedient to allow a defendant to defend for the mere purpose of delay."*

另 James 勋爵在 Jacobs v. Booth's Distillery (1901) 85 LT 262 贵族院先例也说：*"[summary judgment] must never be used unless it is clear that there is no real substantial question to be tried."*

RSC 下针对原告申请简易判决的规定是在 Order 14, rule 1(1)：

"Where in an action to which this rule applies a Statement of Claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant."

CPR 中针对简易判决的规定是在 Part 24 的 Rule 24.1 到 Rule 24.6。其中 CPR Rule 24.1 说明了简易判决就是不必开庭审理就马上对索赔或一个争议/争端（如责任方面，而损失金额稍后才核算[damages to be assessed]）作出判决：*"This Part sets out a procedure by which the court may decide a claim or a particular issue without a trial."*

而 CPR Rule 24.2 说明了法院可以作出简易判决的情况：

"The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –

(a) it considers that –

(i) that claimant has no real prospect of succeeding on the claim or issue; or

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial."

也就是说法院除了在 CPR Rule 3.4(2)(a)与/或(c)下有可以撤销索赔请求或抗辩的权力外，在 CPR Part 24 下也有作出简易判决的权力。可以说在 CPR 下这两种程序一起提供了早期决定/处理案件（early disposal of case）的做法，以速战速决处理掉一些在文书请求中显示不出有一个在法律或事实上站得住脚、连贯与有条理的说法的案件。例如被告没有准时作出抗辩请求，或是只一概或纯否认原告

的所有指控，作出一个拖时间的“留守抗辩”，原告就应该考虑申请简易判决。

当然，原告在申请简易判决前先确保已经把索赔请求（Statement of Claim）送达给被告，并且被告已经作出意图抗辩的通知，即委任的律师去法院挂了号，登记会代表被告。否则如果是被告缺席，对原告的起诉不理不睬，就不是简易判决而是缺席判决（default judgment）了。针对前者的规定是在 CPR Part 24，而针对后者的规定是在 CPR Part 12。

原告在申请简易判决之前，需要小心考虑所有被告存在的抗辩理由看看是否站得住脚。这时不能自欺欺人，因为即使原告“回避”存在的站得住脚的抗辩，不想“等死”的被告也提出存在这个抗辩，从而抗拒简易判决的申请并要求法院允许有关争议留待开庭去全面审理。原告也要考虑有关案件的本质，会有很多情况是不适合作出简易判决，也不太可能成功申请简易判决。例如有关的争议复杂，涉及很多事实（facts heavy）。或是涉及禁反言（estoppel）等争议对事实如何认定很敏感（facts sensitive）。又或是涉及双方证人矛盾的口头证据，如针对一个被指称有效的口头协议，一方证人说他没有承诺过而另一方不同意，无法明确在将来的开庭审理时谁会被采信。再或是涉及的有关法律仍在发展。也可能是原告估计被告在开庭审理时会提供进一步的证据，如被告是中间商，他抗辩的理由与证据需要合约链的下端（如分卖方或分承建商）提供。如果原告不考虑成功的可能性而随便提出简易判决的申请，只会导致原告承担所有因这一个不成功申请所带来的双方浪费的费用。

虽然上述所讲是针对原告主动向法院申请作出简易判决的情况，但在 CPR 下不再只有原告可以主动提出申请，被告也可以主动向法院申请作出简易判决（特别是在被告也有金钱上的反索赔的情况下）。但笔者相信现实中大部分情况下还是像以前 RSC 下的做法一样，仍然由原告主动。

最后笔者可节录一些近期的判决以显示简易判决的总体原则，由于仲裁员也逐渐开始遇到这类申请[14]，所以了解这个总体原则对中国公司来说是重要。首先在 Easyair Ltd v. Opal Telecom Ltd (2009) EWHC 339 (Ch)先例，Lewison 大法官说：

“… the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows[15]:

i) The court must consider whether the claimant has a ‘realistic’ as opposed to a ‘fanciful’ prospect of success[16]: Swain v Hillman [2001] 2 All ER 91;

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[14] 请参阅本章之 4.4 段。

[15] 法院在作出简易判决时要非常小心，如果被告提出反对，法院正确的应对是考虑如下的几个方面。

[16] 法院要考虑原告的索赔有真正成功机会而不是幻想或空想出来的成功机会。

ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable[17]*: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472;*

iii) In reaching its conclusion the court must not conduct a 'mini-trial'[18]*: Swain v Hillman;*

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents[19]*: ED & F Man Liquid Products v Patel;*

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial[20]*: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;*

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case[21]*: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;*

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it.[22] *The reason is quite simple: if the respondent's case is*

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17 有真正胜诉机会的索赔表面看来有一定程度的说服力，而不只是有得争。

18 法院针对简易判决申请的开庭也不是一个小型的开庭审理（mini-trial），不应对实质争议与提交的文件证据作出任何实质决定。毕竟在早期阶段，法院没有全面的证据而是只有部分文件证据。

19 但这不表示法院只看表面证据而不对原告在索赔请求与誓章/证人证言中的陈述做任何分析。有时根据常识与逻辑分析就可以看出原告的事实指控没有实质性支持，甚至可能与作为附件的当场文件证据有冲突。

20 法院在作出最后决定之前应该考虑的不止是双方通过附件、誓章/证人证言等提供的文件证据，也要考虑根据案件的本质是否可以合理推断在将来的开庭审理时会有更多证据（无论是文件还是口头证据）。

21 即使有关的案件看起来并不复杂与当时的文件证据也没有冲突，但这并不表示就不应该允许进一步与全面的调查，而是可以简易判决速战速决处理。特别是如果被告仍在积极进行调查，也显示有合理理由相信如果全面调查可能会有新的证据出现改变案件结果，就不应该轻易剥夺被告抗辩的权利。

22 如果只是涉及一个简单的法律问题或是解释合约的一条或几条起争议的条文，因为不涉及事实问题，加上法院认为文件证据已经足够对有关问题作出决定并且双方已经有足够机会作出争辩，就应该以简易判决

bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better.[23] *If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success.*[24] *However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction*[25]*: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.*"

在 Attrill v. Dresdner Kleinwort Ltd, Fahmi Anar v. Dresdner Kleinwort Ltd (2011) EWCA Civ 229 先例，一审的 Simon 大法官总结了简易判决的总体原则（基本上与 Lewison 大法官在 Easyair Ltd v. Opal Telecom Ltd 先例所讲相同，只因为是更近期的先例才节录，所以不再作中文解释）并被上诉庭节录如下：

"*The principles to be applied … were summarised by the judge …, in terms which have not been criticised, as follows:*

a. The Court must consider whether the Claimants have a 'realistic' as opposed to a 'fanciful' prospect of success: Swain v Hillman [2001] 1 All ER 91.

b. A realistic claim is one that is more than merely arguable: ED&F Man Liquid Products v Patel [2003] EWCA Civ 472...

c. In reaching its conclusion the court must not conduct a mini-trial: Swain v Hillman .

d. This does not mean that a court must take at face value everything that a claimant says in statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED&F Man Liquid Products v Patel [2002] EWCA Civ 1550 …

作出决定。

[23] 原因很简单，如果被告的抗辩在法律上站不住脚，那他就没有一个真正的胜诉机会。同样，如果原告的索赔请求在法律上站不住脚，也是越早让他知道越好，免得劳民伤财最后还是一场空。

[24] 如果有初步证据显示将来开庭时会有新的文件与口头证据证明拟定起争议的文件（例如是双方的合约）时的背景/语境（factual matrix）会令合约有字面意思以外的解释，法院就不应作出简易判决，因为原告（或被告）是有一个真正而不是幻想或空想的胜诉机会。这方面的课题请参阅笔者的《合约的解释：规则与应用》一书第六章。

[25] 但只简单说开庭时可能出现新证据影响对合约的解释，所以不应作出简易判决是不足够。这种没有证据与实质性的"可能"只是臆测。

e. However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) (2001) EWCA Civ 550.

f. Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on a summary judgment hearing. Thus the court should hesitate about making a final decision without a trial, even when there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case[26]: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical 100 Ltd (2007) FSR 3."

4.3.1 简易判决与作为战略提前披露/摸底

在有些情况下，原告虽然明知道成功申请简易判决的机会不大但仍会尝试。这是为了战略的一部分（tactical approach）而提前对被告摸底，虽然要付出花费一些诉讼费用的代价，但在个别案件（例如涉及庞大金额）仍是值得这样做。一个战略目的当然是虽然成功机会不大，但是如果运气好法院还是有可能同意作出简易判决。另一个战略目的是迫使被告作出庭外和解，由于在诉讼早期双方尚未花费大量律师费，所以会更容易。当然最重要的战略目的还是为了提前了解被告到底有什么抗辩理由与事实证据。原告在诉前（pre-action）向被告追讨这些信息与文件/资料时，被告常常不理不睬，或是挤牙膏一样讲一两个言之不详的抗辩理由。商场如战场，到了诉讼更是一场文斗的战争。原告要进攻被告的防线，显然是越早知道后者兵力的强弱、粮草等正确信息越好。在民事诉讼，原告明知成功申请简易判决的机会不高仍要申请，就是为了这个目的。

因为向法院申请撤销抗辩与作出简易判决以及被申请人抗拒时都需要以誓章（affidavit）或证人证言（Witness Statement）提供证据，但后者需要加上一个真实声明（Statement of Truth）。这誓章或证人证言通常会附上大量的附件，而即使誓章或证人证言的内容中提及（referred to）的其他文件没有作为附件，对方也可以申请要求披露以供查阅，这稍后在本章之 5.1 段会详论。如果原告作出的誓章或证人证言的内容全面、清楚明确与详尽，被告在对抗简易判决申请的时候也需要针对每一点作出回应。这一来，被告在誓章或证人证言的内容再加上附件与原告可以进一步申请要求披露被提及的文件，会让原告非常了解被告当时的抗辩理由与手中证据的强弱。

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[26] 这可参阅在本章稍后的 4.3.4 段会介绍的笔者（杨良宜）早年参与的 The "Heruvim" (unreported, 1989, Hong Kong High Court)先例。

因此，即使原告撤销或简易判决的申请不成功，被告提前在誓章或证人证言中写明的抗辩理由与披露的文件证据/资料仍会在接下去的诉讼中对原告有很多帮助。例如，原告将来在庭外和解的谈判中能够知已知彼占有优势；或是用来支持将来双方在文书请求结束后的正常互相披露阶段要求的特定披露（specific disclosure）；又或是可以绑定被告令他/她将来在持续的诉讼中不容易改口，否则会被丑化，毕竟他较早前已经向法院作出过誓章或证人证言，这不是开玩笑；还会是之后的诉讼程序会进行得更加顺利与快速，例如可能再也无法提出有矛盾的新争议与新事实等等。

4.3.2 作出简易判决的情况

CPR Part 3 针对法院案件管理的权利，包括召开案件管理会议（Case Management Conference 或简称 CMC）等。其中 Rule 3.4(2)(b)允许法院在没有合理的理由提出这一个索赔或抗辩（no reasonable grounds for bringing or defending the claim）时撤销索赔或抗辩。而在针对简易判决的 Part 24 下的 Rule 24.2(a)允许法院在诉讼一方对有关争议/争端没有一个真正的胜诉机会（no real prospect of succeeding）时作出简易判决。看来针对这两个提前决定/处理争议（early disposal）的不同做法的立法措辞有所不同，但已经有先例（如 Balamoody v. UKCC [2001] EWCA Civ 2097 先例）说明它们之间并没有什么分别，只要从案件陈述（Statements of Case）加上当时只有部分的文件证据看来这一个索赔或抗辩是站不住脚，不应该允许拖下去劳民伤财。

Woolf 勋爵在 Swain v. Hillman (2001) 1 All ER 91 先例定义“没有真正机会胜诉”是说胜诉机会不能是幻想或空想的（fanciful prospect of success），说：

“The words ‘no real prospect of succeeding’ do not need any amplification, they speak for themselves. The word ‘real’ distinguishes fanciful prospects of success … they direct the court to the need to see whether there is a ‘realistic’ as opposed to a ‘fanciful’ prospect of success.”

这被很多先例跟从，例如 Ward 大法官在 Balamoody v. UKCC 先例说：

“The terminology in the CPR is different. CPR r 3.4(1)(a) allows the court to strike out a statement of case if it appears that the statement of case discloses ‘no reasonable grounds for bringing … the claim’. Part 24.2(a)(i) gives the court a new power to enter summary judgment against a claimant if it considers that ‘that claimant has no real prospect of succeeding on the claim or issue’. Under CPR r 52.3(6)(a) permission to appeal will only be given where the court considers that the appeal would ‘have a real prospect of success’. ***There is probably very little difference between those three expressions. ‘Real’ means that the prospects of success must be realistic rather than fanciful. If the grounds are fanciful, they are not likely to be reasonable.”***（加黑部分是笔者的强调）

另是上诉庭涉及简易判决的 The Royal Brompton NHS Trust v. Hammond &

Ors (No.5) (2001) EWCA Civ 550 先例，也是同样判法。

在贵族院的Three Rivers DC v. Bank of England (No.3) (2001) UKHL 16先例，Hobhouse 勋爵说简易判决不是考虑胜诉的机率或可能性有多高，而是考虑是否真正缺乏胜诉机会：*"The criterion that the judge has to apply under Part 24 is not one of probability; it is the absence of reality."*

Hope 勋爵在同一先例也说幻想或空想代表索赔（或抗辩）没有实质性的事实依据，也会清楚看到与其他文件证据有矛盾。越简单的案件（open and shut case）就越容易决定是否应作出简易判决。当然案件是否简单要看原告与被告双方的争辩与提供的文件证据。法院要小心原告会尽量把案件说得简单，而被告会尽量把案件说得复杂。撤销与简易判决的目的是提前处理那些完全不值得开庭审理的案件。如果法官认为需要看更多的文件或口头证据甚至小型开庭审理（mini-trial）才能决定是否作出简易判决，那就说明索赔（或抗辩）并非没有真正成功机会，不应作出简易判决。Hope 勋爵说：

"In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. ***But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents****, without discovery and without oral evidence. As Lord Woolf said in Swain v. Hillman …, that is not* ***the object of the rule. It is designed to deal with cases that are not fit for trial at all."***（加黑部分是笔者的强调）

接着在 Downtex v. Flatley (2003) EWCA Civ 1282 先例，Potter 大法官说：

"Summary procedure should not involve the conduct of a mini-trial in a case where the defence advanced is 'fact sensitive' and there is no reason to think that further facts may emerge or require investigation at trial before a fair and/or final conclusion can be reached. However, where there is sufficient material before the court on the pleadings or in evidence advanced and the case is not fact sensitive in the sense that the essentials have all been deployed and there is no reason to think that the defendant will be in a position to advance his case to any significant extent at trial, then that the court should not shy away from careful consideration and analysis of the facts relied on in order to decide whether the line of defence advanced is indeed no more than fanciful."

在近期的 Standard Bank Plc v. Via Mat International Ltd (2013) EWCA Civ 490 先例，案情略过不谈，只说上诉庭的 Moore-Bick 大法官对简易判决给了颇为全面的说法，包括 CPR Part 24 的简易判决只是让法院以简易的手段把一些幻想或空想、没有希望或免不了会败诉的案件处理掉。Moore-Bick 大法官说：

"It is as well to remind oneself at this stage that the court is concerned with an application for summary judgment. It follows that in order for the defendants to succeed it is necessary for them to satisfy the court that the Bank's（原告）claim has no real prospect of success. That inevitably involves a degree of judgment, but it is important to recognise that the purpose of Pt 24 is to enable the court to dispose summarily of cases that are fanciful, hopeless or bound to fail, not to conduct an abbreviated form of trial on the basis of incomplete evidence.[27] *When the relationship between the parties involved in or connected to the dispute is contained or reflected in a series of documents, the court may be able to see without further evidence that the claim or defence has no substance.*[28] *However, documents do not always speak clearly for themselves and it is not at all uncommon to find that it is not possible to appreciate their true significance without a clear understanding of the context in which they were created*.[29]"

在千变万化的不同案件中，很难列举法院是否会作出简易判决。例如原告索赔未支付货价并证明已经交了货，被告也不否认。这一来，这就是一笔债务（debt），[30]被告抗辩欠下的货价就很困难。如果作为买方的被告的抗辩是他已把货物即时转售，分买方还没给钱，这在法律上是完全站不住脚，因为这是两个不同的合约，法院应可作出简易判决。而如果买方的抗辩是货物严重货不对板，可能的损失足以抵销（set off）欠下的货价，并且分买方提供了检验报告等证据显示了一个表面可争议的案件，那就不适合以简易判决解决争议了。但如果买方的抗辩是分买方说分买方认为货物严重货不对板所以不肯支付货价，但没有任何证据或事实详情（particulars），这也不足以成功抗拒原告的简易判决申请。稍后在本章之 4.3.6 段会介绍一些常见的会作出简易判决的情况。

4.3.3 举证责任

在一个简易判决的申请，法律的举证责任明确是在申请人的头上。通常申请人是原告，他要获得一个胜诉的判决并且不允许被告在开庭审理时抗辩，除了要证明自己的索赔请求之外，根据 CPR Rule 24.2(a)(ii)的规定也要证明被告的抗辩（如果有作出）是没有一个真正的胜诉机会（real prospect of successfully defending the claim or issue）。被告的责任充其量只是对他提出的抗辩是有胜诉机会提供初步证据。Henderson 大法官在 Apvodedo NV v. Collins (2008) EWHC 755 (Ch)先例中说：

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[27] 法院虽然要对案件作出判断，但必须区分这里不是根据不完整证据进行一个压缩了的开庭审理，而是判断案件的抗辩是否只是幻想/空想，没有真正成功机会。

[28] 如果双方当事人的交往与发生的争议都在文件记录（这种情况在国际商品的货物买卖交易与航运经常发生，整个交易中双方从来不会见面也很少会通电话，只通过文书往来通讯），法院在看了这些文件后会可以看出索赔或抗辩是否在实质上站得住脚。

[29] 当然，会有些文件写得不够清楚需要理解背景/语境后才能明确它的重要性，这就代表需要开庭审理而不能以简易判决处理掉。

[30] 见本章 4.3.6.3 段。

"It is well established that in order to defeat an application for summary judgment it is enough for the defendant to show a prospect of success which is real in the sense of not being false, fanciful or imaginary. However the burden on the defendant is at most an evidential one. The overall burden of proof rests on the claimant to establish, if it can ..."

在 CPR Rule 13.3(1) 中也同样有"一个真正的胜诉机会"（real prospect of successfully defending the claim）的措辞，但针对的情况是在法院已经做出了一个缺席判决（default judgment）后，因缺席而败诉的判决债务人（judgment debtor）向法院申请撤销该判决，让他有机会作出抗辩。这一来法院会要求申请人解释为什么他在较早前会对诉讼置之不理让法院在没有抗辩的情况下作出这个缺席判决。另外申请人也要有举证责任证明如果他有机会对这个案件作出抗辩的话是有真正的胜诉机会。这种情况在中国公司也经常发生，它们在接收到外国法院的告票后没有尽快委任律师到法院挂号作为它的代表律师，然后作出抗辩，而往往是一厢情愿地以为不加理会，这个麻烦事就会过去。但这一来，在一定程度上反而让外国的原告更加容易对付自己。它可以很快与花很少费用取得一个全部胜诉的缺席判决，然后向中国公司执行。中国公司往往到了执行成功的时候，例如被处国公司冻结了一大笔金钱或被申请破产清盘，才警觉已经被对方杀到门口，不得不出来对抗并委任律师。有水平的律师会马上建议此时最重要的事情就是向法院申请撤销缺席判决使之无效，如果成功，才能进行下一步的实质抗辩。笔者见过不少这种案件，觉得中国公司如果一早就委任称职与水平好的律师作出抗辩，道理根本是在它的一方，可令外国公司知难而退或败诉。在缺席判决的败诉，根本就是因为处理不当的问题，也不一定能成功申请撤销该判决，因为法院不会善待这种申请。

所以，虽然立法的措辞是一样的文字，在 ED & F Man Liquid Products v. Patel (2003) EWCA Civ 472 先例就提到了举证责任是不同。在申请一个简易判决时，原告有举证责任。但在申请撤销缺席判决时，被告有举证责任，而且这会是一个沉重的举证责任，因为已经说过法院不会善待这种申请。Potter 大法官说：

"In my view, the only significant difference between the provisions of CPR 24.2 and 13.3(1), is that under the former the overall burden of proof rests upon the claimant to establish that there are grounds for his belief that the respondent has no real prospect of success whereas, under the latter, the burden rests upon the defendant to satisfy the court that there is good reason why a judgment regularly obtained should be set aside. That being so, although generally the burden of proof is in practice of only marginal importance in relation to the assessment of evidence, it seems almost inevitable that, in particular cases, a defendant applying under CPR 13.3(1) may encounter a court less receptive to applying the test in his favour than if he were a defendant advancing a timely ground of resistance to summary judgment under CPR 24.2."

Potter 大法官在该先例还强调了有真正胜诉机会要求不能只是一个可争辩/有得争的抗辩，而必须是有一定程度的说服力（carry some degree of conviction）。

在 Korea National Insurance v. Allianz Global Corporate (2007) EWCA Civ 1066 先例，上诉庭也判最重要的是有现实（realistic）而不是幻想或空想（fanciful）的胜诉机会。但这不表示抗辩要有很高（substantial）的胜诉机会与十分有说服力的证据[31]，只要证明有真正机会胜诉就足够；也不表示只有有关的抗辩绝对不会被法院接受，才能成功申请简易判决。

原告在作出简易判决的申请时无需证明根据平衡的可能性（on a balance of probability）他的索赔与指控更可能是真相，毕竟简易判决的申请不是案件审判，法院只要满意被告没有一个有真正胜诉机会的抗辩就已足够：见 Day v. Royal Automobile Club Motoring Services Ltd (1999) 1 WLR 2150 先例。

Males 大法官在 Sargespace Ltd v. Natasha Anastasia Eustace (2013) EWHC 2944 先例总结说简易判决中原告的举证责任是说明被告的抗辩是没有现实中真正的胜诉机会。至于什么是真正胜诉机会的抗辩，已经有不少先例分析过，大致上是不只是有得争，也不是幻想/空想，但也不需要达到 50%的几率：

"*Summary judgment – the test*

In order to obtain summary judgment on one or both of its claims the claimant must show that the defendant has no real prospect of successfully defending the claim, and that there is no other compelling reason why the case should go to trial. Although there have been cases in which this test has been analysed in greater detail, it is sufficient for present purposes to say, as was common ground, that a real prospect of a successful defence is one that is better than merely arguable, and is not fanciful or imaginary, but that the prospect of success need not be as high as 50%. While summary judgment offers a valuable opportunity to prevent inappropriate cases from causing trouble, expense and delay to a claimant and unnecessarily taking up the court's resources for a trial, it must not be used to prevent genuine disputes from being properly investigated and determined."

4.3.4 对简易判决申请的抗辩

被告如果对原告提出申请简易判决是有异议（如果是被告申请，就会是原告了），他/她最重要也可以说是唯一能成功抗拒的理由就是提供一些证据令法院同意他/她的实质抗辩有一个真正的胜诉机会（a real prospect of success）。简易判决申请的开庭不是一个实质的开庭审理，时间应该短，几个小时甚至顶多一到两天。这开庭也不是一个小型的开庭审理（mini-trial），法院不应对实质争议与提交的文件证据作出任何决定。

[31] 胜诉机会很高与有十分有说服力的证据是原告在申请针对被告的冻结令（Freezing Order）时的举证责任，原告要证明自己的索赔是良好论据案件（good arguable case）：见本书第三章之 1.7.1.3 段。

被告只要满足与说服法院有关的争议涉及一些事实争端（factual issues）是必须要开庭审理，有真正胜诉机会，就可以成功抗拒简易判决的申请。例如争议涉及双方对某一个特定事实（如被告是否曾收到一封关键的信函）有不同说法，需要证人作出口头证据并接受反盘问（cross-examination）后才能决定：Apvodedo NV v. Collins (2008) EWHC 775 (Ch)先例。

简易判决也是在双方正常的相互披露文件的程序前，所以如果被告指出某方面需要披露某些特定文件后才能肯定有关事实的真相，也会是一个抗拒简易判决申请的好理由。如果有这方面的文件，例如曾经向原告要求披露一些账目或报告，但原告没有理会，应将这份文件作为誓章或证人证言的附件呈交给法院。

所以，被告的重点是要在事实方面做文章，显示有争议，有进一步调查取证的必要或需要引入口头证据，而不是在法律方面（legal issue），如合约条文的解释。除非法律方面的争议是复杂与/或仍在发展与没有定论，否则会有危险法院针对一个简单明确的法律方面的争议，决定作出简易判决。正如 Henderson 大法官在 Apvodedo NV v. Collins 先例所说：

"...The court should not hesitate to give summary judgment in a plain case, and if the case turns on a pure point of law, it may determine that point."

显然，简易判决的开庭是不会有证人出庭接受盘问，法院也应知道文件证据也只会是片面，法院依赖的只是誓章证据（affidavit evidence）或证人证言证据，并加上会是双方当事人个别挑选与不会是全面的文件作为附件。所以一直有判决强调法院在决定是作出简易判决还是允许被告在最后开庭审理时全面抗辩的过程中，是不应该对案件的实质争议有任何定论，即使凭审理大法官的经验会是对这一个争议是怎样一回事猜得十之八九。在 ED & F Man Liquid Products v. Patel (2003) EWCA Civ 472 先例，一审的大法官在判决中说被告的抗辩是不诚实，这被上诉庭的 Potter 大法官批评说是对实质争议有了定论，是不恰当的，说：

"It does seem to me unfortunate that the judge felt constrained to make the observation he did as to the likelihood that the defence was dishonest... The observation was unnecessary and collateral to the judge's decision..."

除此之外，被告也可说服法院有关的争议仍在调查取证，有进一步出现重大与跟目前法院看到的有限文件证据很不一样的证据的可能：见 Easyair Ltd v. Opal Telecom Ltd (2009) EWHC 339 (Ch); AC Ward & Son v. Catlin (Five) Ltd (2009) EWCA Civ 1098 等先例。例如，被告正在向法院申请第三方披露令（Norwich Pharmacal Order），又或在这同一个争议下已经启动了诉讼向背靠背合约链（chain contracts）的下一位当事人要求补偿，预计他会抗辩并交出新证据。

笔者仍记得一个早期不愉快的 The "Heruvim" (unreported, Hong Kong High Court, 1989)先例。该先例涉及租约下的滞期费（demurrage）争议，租约中有一条伦敦仲裁条文。当时香港《仲裁条例》是跟从了英国 1950 年/1975 年的《Arbitration Act》，说明如果法院认为双方没有实质争议需要仲裁解决（or that there is not in fact any dispute between the parties with regard to the matter agreed to

be referred），就可以拒绝中止（stay）法院程序让出管辖权给双方同意了的仲裁解决争议，并且会马上作出一个简易判决。这种先例有不少，如 The "Fuohsan Maru" (1978) 1 Lloyd's Rep 24; The "Cleon" (1983) 1 Lloyd's Rep 586 等先例都在笔者的《仲裁法——从 1996 年英国仲裁法到国际商务仲裁》（2006 年）一书第四章之 2.2.1.1 段有介绍。这个问题在 1996 年《Arbitration Act》之后已经有了改变，不多重复该书内容。只说在 The "Heruvim"先例，笔者当时的客户是中间商，即他把该船舶从船东租来后以二船东（disponent owner）身份转租给了承租人执行该航次租约。所以，客户对航次中发生了的事情也不清楚。后来船东在要求客户支付卸港的一笔滞期费不果后，没有启动伦敦仲裁而是在香港法院提起诉讼。

在笔者客户向香港法院要求中止法院程序，让双方去伦敦仲裁解决争议后，船东随即向法院提出双方并没有争议，这笔滞期费的欠下是清楚无误，客户从未提出过也提不出任何的实质抗辩，所以申请一个简易判决。虽然在笔者客户的誓章中，说明了案件的本质（涉及合约链）与证明这滞期费已经向真正的承租人要求确认与支付，但还在等待承租人的回应。客户也向香港法院指出，滞期费的计算一向是很有争议性与复杂，也对事实敏感（fact sensitive）。因为客户不是真正履行租约的航次，所以对卸货作业的事实不了解也不会有证据，例如在卸港到底发生了什么事情，天气好不好或如果不好有否或会否影响卸货作业等等。这些证据只能是承租人通过他在卸港代理人或收货人取得，而这些事实真相都会影响滞期费的计算。誓章中希望法院给笔者客户一点时间，让承租人表明立场后才作打算。如果该承租人确实提出异议并提供有关的证据，大家（承租人、船东与作为二船东的客户）如果还是有争议的话，大可以去伦敦仲裁并把两个仲裁同步进行，但可惜还是没办法说服香港法院。香港法院马上作出了简易判决，迫使客户只能投降并支付该笔判决债务。不出所料后来不久承租人对船东计算的卸港滞期费提出了不少异议，并提供了文件证据显示滞期费的计算不对，算多了不少钱。可惜为时已晚，最后笔者的客户被夹在合约链当中而无端端蒙受损失。在笔者看来，这种简易判决显然是不正确也不公平的。

4.3.5 法院（与将来的仲裁庭）面对简易判决申请的困难

Mummery 大法官在 Doncaster Pharmaceuticals Group Ltd v. The Bolton Pharmaceutical Co 100 Ltd (2006) EWCA Civ 661 先例中说是否作出简易判决在大道理或原则上是简单与明确，就是看被告在将来开庭审理时是有真正的胜诉机会还是只是幻想/空想或顶多是有得争辩，这也是法院的裁量权（discretion）。

虽说道理是简单，但操作起来并不容易。相比之下，全面开庭作出审理对于法院来说会更容易，在看了与聆听了全面的证据后通常会更好地掌握案件谁是谁非。例如一方提交的证据也会被对方代表律师通过反盘问等方式质疑，法院也就更能掌握特定证据的可信程度与强弱。再加上不像在简易判决的申请，法院在最后实质争议的开庭审理后也有更宽松的时间考虑清楚后才作出判决。而在申请简易判决时，法院面对的只是部份与片面的文件证据，而且要小心作出申请的原告会尽量把案件说成与包装为一个简单（open and shut）与黑白分明的索赔。毕竟，原告免不了对自己的索赔抱着乐观的心态，不认为有开庭审理的必要。而抗拒的

被告则会尽量把案件包装得复杂与困难，不能草草了事以简易判决处理掉。例如被告不管有用没用刻意提供大量文件以影响决定申请的大法官。

Mummery 大法官也说到他对有关简易判决的申请应由懂行的专业法官或是一般的“万金油”法官来审理的看法。关于这一点是有争议的，有人认为法官要很快决定是否作出简易判决，懂行的专业法官在压力之下会更警觉与敏感。但 Mummery 大法官认为这不重要，因为是否作出简易判决是程序问题而不涉及实质问题，一位好的与有经验的“万金油”法官也可以胜任。顺便一提，该先例的案情涉及知识产权争议，一审的高院大法官作出了简易判决，但在上诉庭被推翻。笔者估计一审大法官是“万金油”法官，所以 Mummery 大法官有感而发。

最后，Mummery 大法官说到简易判决的结果通常比较难以预测（unpredictable），欠缺肯定性（uncertainty），这也是让个别法官行使裁量权作出决定免不了的后果。

Mummery 大法官的判词可节录如下：

“Summary judgment procedures, which are designed for the swift disposal of straight forward cases without trial, are only available where the applicant demonstrates that the defence (or the claim, as the case may be) has no ‘real’ prospect of success and if there is no other compelling reason why the case or issue should be disposed of at a trial: CPR Pt 24.2. Thus, without the assistance of pre-trial procedures, such as disclosure of documents, and without the benefit of trial procedures, such as cross examination, the court's function is to decide whether the defendant's prospect of successfully establishing the facts relied on by him is ‘real’, that is more than ‘fanciful’ or ‘merely arguable.’ ...

Although the test can be stated simply, its application in practice can be difficult. ***In my experience there can be more difficulties in applying the ‘no real prospect of success’ test on an application for summary judgment … than in trying the case in its entirety … The decision-maker at trial will usually have a better grasp of the case as a whole, because of the added benefits of hearing the evidence tested, of receiving more developed submissions and of having more time in which to digest and reflect on the materials.***

The outcome of a summary judgment application is more unpredictable than a trial. *The result of the application can be influenced more than that of the trial by the degree of professional skill with which it is presented to the court and by the instinctive reaction of the tribunal to the pressured circumstances in which such applications are often made.*

I doubt, however, whether the decision to have or not to have a trial of the action is much affected by the fact that it is heard by a specialist judge. *I see no objection, for example, to the use of judges or deputy judges, who are not intellectual property specialists, to hear and decide applications for summary judgment in this*

field. I mention this topic and wish to say a little more about it for two reasons. First, as a result of hearing some recent appeals against the grant of summary judgments in a variety of areas of law, I have some general concerns about the use of the summary judgment procedure. Secondly, I am aware of views recently aired in the profession questioning the 'efficiency' of using non-specialist judges for summary judgment applications in intellectual property cases.

In my opinion, the decision whether or not an action should go to trial is more a matter of general procedural law than of knowledge and experience of a specialised area of substantive law. *All judges, specialist and non-specialist, are experienced in procedure and practice. Procedural justice is the judicial specialisation par excellence. It may take a little longer for the application to be opened to a non-specialist judge, but that may be no bad thing. I am confident that all judges to whom such applications are likely to be made will have the necessary procedural expertise to sort out those cases that can properly be disposed of without a trial. ...*

...

Everyone would agree that the summary disposal of rubbishy defences is in the interests of justice. The court has to be alert to the defendant, who seeks to avoid summary judgment by making a case look more complicated or difficult than it really is.

The court also has to guard against the cocky claimant*, who, having decided to go for summary judgment,* ***confidently presents the factual and legal issues as simpler and easier than they really are*** *and urges the court to be 'efficient', i.e. produce a rapid result in the claimant's favour.*

...

Take this case. *Although it was described by the claimant's counsel as an open and shut case in which a 'smoke screen' defence was being raised, it was rightly accepted in the court below that* ***the evidence 'looks quite lengthy.'*** *It certainly is lengthy for a Pt 24 application.* ***The papers look to me more like a set of trial bundles rather than interlocutory application bundles.*** *...*

The claimant's counsel supported the application for summary judgment by a 22-page skeleton argument*, accusing the defendants of 'diversionary tactics designed to try to avoid summary judgment,' ...* ***But already the seeds of doubt have been sown about how open and shut the case really is*** *and whether the court should set out along summary judgment road at all.*

..., ***the case may turn out at trial not to be really 'complicated', but it does not follow it should be decided without a fuller investigation into the facts at trial than***

is possible or permissible on summary judgment.

…

It is well settled by the authorities that the ***court should exercise caution in granting summary judgment in certain kinds of case. The classic instance is where there are conflicts of fact on relevant issues****, which have to be resolved before a judgment can be given …. A mini-trial on the facts conducted under CPR Pt 24 without having gone through normal pre-trial procedures must be avoided, as it runs a real risk of producing summary injustice.*

In my judgment, the court should also hesitate about making a final decision without a trial where, even though there is no obvious conflict of fact at the time of the application, ***reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.****"*（加黑部分是笔者的强调）

4.3.6 简易判决常见例子介绍

简易判决（summary judgement）在很多类别的案件都会发生，笔者可举几个简单例子介绍。

4.3.6.1 商标的执行

侵犯商标的救济做法通常是向法院申请向被告作出一个永久禁令（permanent injunction）与一个宣示判决（declaration of infringement），要求被告交出（delivery up）所有侵犯商标的商品，披露这些侵犯商标的商品的供应商等等，并赔偿金钱损失[32]。

由于法律严格保护商标，被告不能以对侵犯商标的行为并不知情作为抗辩，所以这种案件一般都是清楚明了，被告通常不会有成功抗辩这一个索赔与救济的真正机会（no real prospect of successful defending the claim）。这一来，法院针对侵犯商标案件一般就会以简易判决（summary judgment）的形式作出救济。

但会有个别侵犯商标的争议并非是一般的案件，这一来，处理的办法就会不一样。在上一段已经提到过的 Doncaster Pharmaceuticals Group Ltd v. The Bolton Pharmaceutical Co 100 Ltd (2006) EWCA Civ 661 先例，案情涉及用来治疗成人高血压（hypertension）的 KALTEN 药丸。在该先例，原告声称被告侵犯了他的商标。该药品原本的商标持有人是著名的跨国药厂 AstraZeneca（简称 AZ）。据知

[32] 由于商标被侵犯造成的损失不容易计算，所以通常是要被告交出赚取的利润（account for profit），这课题在笔者《损失赔偿与救济》一书第一章之 7 段有详论。

AZ 在欧洲的业务很好，而由于欧盟成员国之间容许商品的流通，有约 70%在英国销售的 KALTEN 药丸是从西班牙进口。这在当时这完全是合法的平行贸易（parallel trading），背后的原因可能是生产成本便宜或集团公司的结构或是统筹等。但接着 AZ 把该药品的商标，也就是 KALTEN 药丸，转卖与转让（assign）给了欧盟成员国的不同公司，其中在西班牙是转让给了当地的一家名为 Teofarma 的公司，而在英国就把商标转让了给一家名为 Bolton 的英国公司，也就本先例的原告。但接下去英国销售的药丸仍有 70%是通过被告 Doncaster 从西班牙进口。这一来原告 Bolton 的利益就无可避免地受到影响，而它与 Teofarma 没有任何经济上的关系，也没有同意 Doncaster 在英国使用 KALTEN 的商标，所以是它在英国拥有的商标受到了侵犯。原告在一审法院成功获得了简易判决，法院向被告作出禁令以及其他的救济。但被告上诉，上诉庭推翻与改变了一审判决。

这里涉及了一个复杂的商标权利用尽理论（doctrine of exhaustion of rights），简单说就是如果商标权所有人与/或被许可人以合法的方式出售或转让了商标权商品，他们对该特定商品上的商标权就用尽，无权禁止他人在市场上再行销售该产品或直接使用。但这个理论仍在发展之中并没有最后定论，很大程度上依赖各国国家/地区的法律规定与双边/多边协定。欧盟为了解决欧盟范围内货物自由流动原则与商标权的地域保护之间的冲突，通过立法与判例确立了欧盟范围内的商标权利用尽理论。例如在 IHT Internationale Heiztechnik GmbH v. Ideal-Standard GmbH (1995) FSR 59 先例，讨论了商标或专利等在转让给了欧盟不同公司之后，如何处理它们之间的经济联系与管制。由于这与中国公司关系不大，笔者无意在这里多作介绍，只简单说被告以商标权利用尽理论作为抗辩。在一审的法院，Martin Howe QC 大法官认为被告在这一个说法下，仍是没有成功抗辩的机会，所以作出了简易判决。但这在上诉庭被推翻，其中主要原因是上诉庭认为商标权利用尽理论是仍在发展中的法律说法，所以不应该作出简易判决。加上该案件并非是一个明确无误的简单案件（open and shut case），是不适宜这样速战速决处理掉。Mummery 大法官说：

"… this case is not a suitable case for summary judgment. There needs to be more investigation into the circumstances of the assignments of the trade mark by AZ and, in particular, into the facts about the economic links (if any) between AZ and Bolton and the possibility of control and the application of the principles of exhaustion of rights ..."

另上诉庭的 Longmore 大法官也说：

"... I do not regard it as beyond argument that successive assignment ... were not a 'disguised restriction on trade between Member States' within the concluding words of Art.30 of the EC Treaty. It would ... be a little surprising if an assignor can, by assignment, convey more rights than he himself has. If the owner of a trade mark could assign his mark successfully to different entities in each EU country, freedom of movement of goods could be said to be more of an inspiration than a reality. ***The relevant law is still in the process of formulation … summary disposition is not appropriate in what is a developing area of law."***（加黑部分是笔者的强调）

4.3.6.2 银行与金融

简易判决的做法在处理银行与金融行业的争议时是经常发生。据悉，由于这一个行业认为商业仲裁中不像伦敦、纽约或香港法院，没有同样的简易判决的做法，所以一直对仲裁没有太大兴趣，这与其他商业合约（特别是跨国的商业合约）是很不一样。但由于近年来在发展中国家的业务发展，执行国家法院的判决（包括简易判决）毕竟有局限，所以这一个行业也开始对仲裁产生兴趣。

银行常用的合约，如最常见的银行贷款协议（loan agreement），在拟定时都会非常请楚明确地全面保护银行的利益。一旦发生事故，由于贷款协议中已经有明确针对，所以贷款人无法争议，属于明确无误的简单案件（open and shut case），完全适合以简易判决处理掉。例如，贷款协议总会有一条详细针对所有贷款人会构成违约的事件（Events of Default）的条文，其中除了包括贷款人没有准时支付利息或偿还分期债务，也包括许多其他较次要的事件（如没有对抵押品投保或维修保养等危害抵押品价值的行为）。贷款协议也请楚说明一旦发生了违约事件，根据该贷款协议的约定，银行就可以做一连串事情终止贷款协议与提前收回债务/借款，例如可通知贷款人要求马上提前归还所有的债务与利息（accelerated repayment of indebtedness），或同时采取行动把所有做为担保的抵押品（如房子[会是贷款人所居住的]、船舶[在船舶融资]、公司股票[作为质押品]）等等出售套取现金以还债。

为了平衡，英国法律有默示条文或地位要求银行在行使这些权利时要同时保护贷款人的利益，即银行在处理与出售抵押品时有善意与合理谨慎的责任。例如贷款人早已将银行的借款还得七七八八，但由于大环境变坏，贷款人无法准时偿还剩下的贷款，于是银行行使权利把抵押品处理变卖。但经常会有抵押品的市场价值会超出剩下的债务。这一来可以想得到银行的心态会是不关心出售抵押品的价格是否合理，只要足够清还尚剩下不多的借款，出售的过程与方法越简单快捷越好。反正即使出售价格高了，比欠下债务多的钱仍是要退还给贷款人。所以，法律需要去有这一个默示责任加在银行的头上。这一个课题在笔者（杨良宜）的《船舶融资与抵押》一书第五章之 4.3 段有详论，这里不再重复。

这一来，如果有这种情况发生（不一定会有，例如贷款协议不涉及抵押品或行使权利前抵押品已因事故灭失等），作为被告的贷款人就有了拒绝简易判决的理由。因为银行有否合理履行法律的默示责任是事实敏感（facts sensitive）的问题，要看每一个不同案件的事实而决定，所以不适合以简易判决去简单处理。

这种案例有不少，笔者随便挑一两个先例作介绍。第一个是香港发生的 China and South Sea Bank Ltd v. Tan Soon Gin (alias George Tan) (1990) 1 AC 536 先例。作为原告的债权人银行向作出个人担保的被告陈松青先生索赔当时香港著名的佳宁集团公司（Carrian Group）的债务/借款欠下的本金与利息，并申请简易判决。这本来是明确无误的案件，但由于涉及一笔作为担保的集团公司股票被质押（pledge）在原告的手中却没有及时出售，随着佳宁集团公司的丑闻（也是涉及马来西里用来援助马来人土著的资金被贪污受贿而非法挪用）越来越大而变成不值钱，并在最终因为佳宁集团公司的清盘结业而变为废纸。这一来，作为担保人

的被告面对原告申请简易判决的抗辩理由就是原告应在违约事件一发生的时候就赶紧把手中质押的股票在市场出售，而由于当时丑闻还没有街知巷闻，所以可以顺利出售并取回足够清还债务的金钱。香港的一审法院给予了原告银行一个简易判决，但香港上诉庭推翻了一审法院的判决并认为陈松青先生作为被告有权无条件作出全面抗辩（unconditional leave to defend）。当时香港仍是英国殖民地，所以最后上诉到了英国的枢密院（Privy Council）。英国枢密院再度推翻了香港上诉庭的判决，容许原告取得一个简易判决。

第二个是近期涉及两艘船舶融资的 HSBC Bank Plc v. Antaeus Shipping Co SA (2018) EWHC 1733 (Comm)先例。由于航运市场下滑，作为贷款人的希腊船东无法向汇丰银行支付到期的分期债务与利息。这导致汇丰银行向希腊船东作出了通知，要求马上提前归还欠下的债务/借款与利息，并很快把两艘作为抵押品的船舶在市场出售，但在最后结算时仍不够还清希腊船东的所有借款。所以汇丰银行作为原告将贷款人、作为担保人的希腊母公司与作出了个人担保的船老板作为共同被告在英国法院提起诉讼。一开始原告申请简易判决，但被告通过代表律师抗拒申请并提出原告是否合理出售抵押的船舶的质疑。这一来，有经验的汇丰银行就知道不能通过这一个简单与快捷的做法处理，所以撤回了简易判决的申请。最后，被告没有在实质的开庭审理时出庭抗辩，而原告提供给法院的所有的证据（文件、事实与专家证人）有包括了出售的船舶获得了当时合理的市场价格，所以法院最后作出了原告胜诉的判决。

至于银行作为被告时，原告作出简易判决的申请的情况，在信用证（letter of credit）与见索即付担保（demand guarantee）经常发生。如果银行没有向信用证的受益人作出支付，这种案件应是一个明确无误与简单的案件，法院会毫无犹疑地作出简易判决。毕竟这种国际上的支付一向被法院认为是国际贸易的生命线，支付时不能也不容许有任何拖延或扯皮，否则国际贸易就会对这种支付办法失去信心而崩溃。一般而言，银行在面对受益人申请简易判决的时候是很难抗拒。银行如果指称结汇的付运文件有瑕疵与不符点，法院可以马上看到银行已经过了退还付运文件的时限而造成了弃权（UCP 600, Article 14），或是所谓的不符点只是银行吹毛求疵的借口，是不能成立的。唯一会有机会成功抗拒的是银行提供一些表面证据指称有关的付运文件有虚假，例如是倒签提单[33]或提单陈述的货物是根本不存在，而且受益人应该知道甚至是参与这一份虚假的文件与欺诈：United City Merchants (Investment) Ltd v. Royal Bank of Canada (1983) 1 AC 168 先例。这一来就有可能成功抗拒简易判决，让法院在将来开庭全面审理最后决定是否付运文件真有虚假与受益人是否参与。

4.3.6.3 债务或是被告承认的欠款

在笔者《损失赔偿与救济》一书第十一章对债务（debt）与损失赔偿（loss or damages）的分别有详细介绍，这里不再重复。只简单说，债务通常是一笔清楚

[33] 这课题可参阅笔者的《提单与其他付运单证》（2016 年）一书第六章之 7.1.6 段。

欠下的固定金钱或顶多只需要简单计算就可以确定金额的金钱。所以在一般的情况下，债权人作为原告是可以成功申请一个简易判决（summary judgment）。但涉及所谓的非议定金额（unliquidated sum）的损失，就需要通过困难、复杂与富争议性的计算才能确定金额。其中会包括许多事实敏感（facts sensitive）的争议，例如损失的遥远性（remoteness of damage）或受害人有否合理减少损失（mitigation）。这些争议都会涉及大量的事实与证据，所以并不适合作出简易判决。

在商业合约，通常是通过明示条文或是法律的默示条文产生债务的，即根据债务人作出的合约承诺，只要在一些条件满足后，他就要支付一笔固定金额给债权人。支付这笔钱与债务人有否违约或犯错是毫无关系的。相反，损失赔偿就与违约或犯错有密切的关系。损失赔偿是第二种履行合约承诺的方式，如果其中一方（违约方）没有严格实际履行合约作出的承诺，就有了第二种的履行合约责任的方式，就是赔偿无辜方的损失让他回复到合约被履行的地位。至于要赔偿多少，就需要通过困难、复杂与富争议性的损失计算。

最常见的债务是在买卖合约，英国《Sale of Goods Act 1979》之 Section 28 下买方有在提取了货物后马上支付货价（price for the goods）这笔债务的默示责任。当然，如果买卖合约有明示条改变这一个法律的默示地位，是另一回事。但如果案情是买方无理拒绝提取货物令卖方无法交货给买方，这属于买方违约，无辜方的卖方只能索赔损失，与欠下债务（货价）无关。

在提供服务的行业，也经常有债务产生。例如雇佣合约就会涉及雇主明示承诺雇员提供了一个月的服务后就支付一笔固定的工资，这是债务。在航运的期租合约，通常会承诺每 15 天的服务后，承租人需要支付船东一笔很容易计算出来的租金，这也是债务。另一种在航运常见的提供服务合约是程租合约，合约中有明示或法律默示船东把货物运到目的地港后，承租人必须支付给船东一笔固定或很容易计算出来的运费（freight），这又是一笔债务。笔者已经见过与经历过无数次船东就被欠下的运费向英国法院申请简易判决的情况，而且经常会成功：见 The “Aries” (1977) 1 Llody’s Rep 334; The “Brede” (1974) QB 233; The "Dominique" (1987) 1 Lloyd's Rep 239 等先例。

在上一小段提到的贷款协议也经常涉及债务的问题，即合约规定了贷款人要定期支付给银行一笔到期的利息或分期的还款，这也是债务。银行在贷款人没有支付的时候，可向法院申请作出一个简易判决。

作为被告的债务人是很难抗拒一个对欠下的债务作出简易判决的申请，法律只允许极少的抗拒理由。一种是合约明示可以作出扣减，所谓的合约抵销（contractual set-off）。但在现实中，就很难想象债权人的原告会忽视这一个扣减就提起诉讼与申请简易判决。而法律默示的情况会是立法与衡平法容许的抵销（legal and equitable set-off）。立法抵销是如果作为原告的债权人在其他不同的合约中对同一被告欠下一笔债务，这两笔债务就可以用来相互抵销。早在《Insolvent Debtors Relief Acts 1729》就有规定说：“*mutual debts between the plaintiffs and the*

defendant ... one debt may be set against the other." 在《Senior Courts Act 1981》 之 Section 49(2) 与 CPR Rule 16.6 也有相应规定。

至于衡平法抵销，在涉及期租合约（time charter-party）的贵族院 The "Nanfri" (1979) 1 Lloyd's Rep 201 先例有详细介绍。背后的大道理是有关的债务是债权人提供服务的报酬，而如果提供的服务有瑕疵令债务人没有享有承诺的服务，就没有理由不允许他在欠下的债务作出扣减。例如在一个期租合约下船东的违约（如不合理饶航或是船舶在海上的航程中不符合租约规定的航速）导致了时间的损失，承租人可以通过衡平法抵销扣减应该支付的租金。显然，扣减的这笔钱还是要通过困难、复杂与富争议性的计算才能固定下来，毕竟要扣减的这笔钱本质上是损失赔偿。法律是允许债务人扣减一笔通过合理计算与估计的金额。所以如果债务人作出合理估计的金额是完全抵销了欠下的债务，也就可以成功抗拒债权人的简易判决的申请。但如果扣减只能部分抵销债务，就免不了剩下的部分债务在毫无争议的情况下，被法院去作出简易判决。

而涉及程租合约（voyage charter-party）的运费就严格不允许衡平法抵销，这是因为欠下的运费由于历史原因被视为是要马上支付与神圣不可侵犯（sacrosanct）的债务。如在上述提到的 The "Aries"贵族院先例，承租人在支付运费时扣下了 3 万美元用来抵销该航次中的货物短缺。船东在该航次的两年后向英国法院起诉并申请简易判决，贵族院同意一审法院与上诉庭的决定，向承租人作出了简易判决。因为英国法下是不允许抵销运费，承租人货物短缺的损失需要另外提起诉讼。但在该先例因为 1 年的货损货差时效已过，所以承租人已经不可能再提起诉讼。

针对货物买卖也是同样的道理，如果买方在提取货物后发觉货物是有瑕疵，甚至在提取货物之前就已经发现有瑕疵，但市场急涨或买方紧急需要这票货物的关系仍要提取货物的情况下，都可以作出扣减或抵销尚未支付的货价，而扣减的金额就是这票货物的瑕疵所带来的合理估计的损失。

另一种情况是如果违约方曾经向无辜方承认或同意过一笔损失金额的赔偿，但之后拖拖拉拉不支付这笔金钱，也会导致无辜方向法院起诉并申请简易判决。这种情况甚至会发生在仲裁的过程中，被告答应向原告支付一笔金钱，但后来又拖拖拉拉。而如果被告在抗拒简易判决的申请时向法院解释较早的承诺是因为希望息事宁人，让双方保持良好合作关系等等不是理由的理由，法院不会接受并会马上作出简易判决。当然如果被告作为违约方及时委任了一位称职与有水平的律师，可能会到时候想出一个法律完全站得住脚的抗辩，这一来会是可以推翻或改变较早时没有对价（consideration）的承诺。在英国法下，大原则是只要没有太迟而导致对方蒙受不能以金钱补救的损害，任何一方当事人都可以在最后判决前将过去错误依赖的理由修改（amend）为他/她认为最正确的理由。如果这站得住脚的抗辩理由是事实敏感的话，就可以成功抗拒原告对简易判决的申请。在 ED & F Man Liquid Products v. Patel (2003) EWCA Civ 472 先例，上诉庭的 Potter 大法官说：

"I would only add that, where there is a claim or judgment for monies due and issue of fact are raised by a defendant for the first time which, standing alone would demonstrate a triable issue, if it is apparent that, with full knowledge of the facts raised, the defendant has previously admitted the debt and/or made payments on account of it, a judge will be justified in taking such acknowledgements into account as an indication of the likely evidence of the issues raised and the ultimate success of the defence belatedly advanced.

...

I would accept, as the judge accepted, that ... in a case where, with knowledge of the material facts, clear admissions in writing are unambiguously made by a sophisticated businessman who has ample opportunity to advance his defence prior to signed, a judge is in my view entitled to look at a case 'in the round', in the sense that, if satisfied of the genuineness of the admissions, issue of fact which might otherwise require to be resolved at trial may fall away."

这种情况也会涉及中国公司，它们为了息事宁人，经常在没有委任律师的情况下承诺支付一笔钱，但承诺之后又因为其他原因拖拖拉拉不支付这笔钱。这一来在英国法律下就会有严重后果，对方可以此作为证据，说服法院作出简易判决。正如 Potter 大法官说：

"I consider the judge was entitled to reject as devoid of substance or conviction such explanation as was advanced for the making of those admissions and in my view he [the judge] was entitled to conclude that the first defendant lacked any real prospect of successfully defending the claim."

4.3.6.4 没有说服力的抗辩

被告的抗辩没有说服力的情况是经常发生。在这个世界上，本来每个人的水平就都不一样，有高有低，水平高的就往往可以从水平低的对手身上获利。有部分公司对英美法连粗浅的了解都没有就毫不迟疑地参与国际贸易活动，甚至鲁莽地在昂贵的合约中同意适用英国法与去伦敦/新加坡/香港仲裁，这是笔者至今仍无法理解的。虽然委任称职与有水平的律师会在很大的程度上弥补这种当事人水平之间的差异，但问题是部分水平成问题的公司没有判断力去区分针对有关的争议谁才是有水平的律师。这一来在现实中当事人自己或他委任的律师就经常会提出一些站不住脚与没有任何说服力的抗辩。往往早在还是双方当事人接触的阶段，原告就已经感觉被告无理可说。而如果在开始诉讼之后，被告通过他的律师作出的抗辩中提出的仍是一些站不住脚与没有说服力的理由，原告就会有很大的诱因向法院申请一个简易判决，务求速战速决早日把诉讼了结并取回索赔的金额。

这种情况在仲裁中发生得更多，因为无论是什么人与什么国家的律师，甚至当事人自己都可以做代表。而对国家法院而言，由于当事人都需要委任当地的律师，至少在水平上有一定程度的控制，但程度也有限，因为本土律师也常常有巨大的水平差异。

这种站不住脚与没有任何说服力的抗辩的情况，有太多千变万化的例子。读者可以想得到或自己经历过，故笔者在此不再多说。只随意地提一个例子是原告指称被告没有严格履行合约的承诺，但被告在抗辩中只是泛泛与没有情（particulars）地声称是大陆法下的不可抗力或情势变更或不是他的错导致无法履行。但英国法律是没有这个概念或说法，而有关的合约也没有这方面的明示条文。另一个典型的例子是在本章之 4.2 段针对的被告在抗辩书中对原告所有的索赔与指控一概否认，但没有说明否认的理由，这也显示被告根本没有站得住脚的抗辩理由。

如果被告一开始就讲不出抗辩理由，通常后来也不会因为原告申请简易判决而有所改变。这样一来，原告至少在责任方面就会顺利取得法院同意作出的简易判决，只留待核算损失（damages to be assessed）。但有风险是如果被告转而聘用一位懂行与高水平的律师，而他在考虑案件后很快想出了一个或多个是完全说得通的抗辩理由，原告的申请就会有问题了。这种情况不少，被告本来是可以有理有据地抗辩，只是因为水平的关系而不觉察也说不出来，例如索赔时效已过（time bar）。原告不能一口咬死被告在较早的抗辩书中没有提出这一个理由，因为当时时间尚早，没有理由不允许被告修改抗辩书（amendment of defence），如果不允许被告提出新的与强而有力的理由或观点显然是不合情理。原告如果有浪费的金钱，完全可以要求被告补偿。例如原告的索赔请求显示了被告没有履行合约责任这一个非常清楚与简单的违约行为，而被告除了泛泛否认外一直没有提出过什么实质的抗辩理由。但到了原告申请简易判决的时候，被告的代表律师就提出原告曾经有过言行可以构成合约更改、弃权与/或禁反言[34]，并提供了显示了有关言行的表面证据。虽然最终弃权与/或禁反言能否成立还要根据事实看有否满足所有的先决条件，例如被告有否改变地位、依赖并蒙受损害等，但这些事实敏感（facts sensitive）的争议都必须在最后开庭审理时处理，不适合以简易判决处理掉。

4.3.6.5 允许被告抗辩会导致滥用司法程序

滥用司法程序（abuse of process）的课题，在笔者《合约的履行、弃权与禁反言》一书第九章之 8 段有介绍，这里不再重复。

一种允许被告抗辩会导致滥用司法程序的情况是被告在一个刑事起诉中被定罪（convicted）后，再被受害方以民事诉讼去索赔金钱的赔偿。被告在较早的刑事起诉中被定罪是需要满足更严格的举证责任，通常就是证明被告犯了被指控的罪是没有合理疑点。相对而言，在民事诉讼平衡的可能性（balance of probability）的举证责任就宽松得多了。这一来，如果被告在民事诉讼中不能够提出较早的刑事审理时没有来得及披露出来的强而有力的新证据，就不允许再次审理（relitigate）[35]，而是会在民事诉讼中很快以简易判决处理掉责任方面的争议。在 Brinks v. Abu-Selah (1995) 1 WLR 1478 先例，案情涉及价值高达 2,700 万英镑的黄金在伦

[34] 见笔者《合约的履行、弃权与禁反言》一书第三章。
[35] 见笔者《合约的履行、弃权与禁反言》一书第六章，其中 8.6.3 段有详细针对。

敦的希思罗机场被抢劫。之后参与抢劫、接赃与协助洗钱的人士纷纷被捕并被刑事起诉与定罪。失去这批黄金的托管人（bailee）以及他的保险公司向多位被告提起民事诉讼，企图追回部分失去的黄金与已经变卖的钱。部分已经刑事定罪的被告仍提出抗辩，但法院以这属于滥用司法程序为由作出了简易判决。Jacob 大法官说：

"To relitigate the matter now they need to show at least that new evidence not called at the criminal trial will be called at the civil trial. Such evidence must not only be new but must 'entirely change the aspect of the case'. That is so is apparent from Hunter v. Chief Constable of the West Midlands Police (1982) AC 529, where convicted criminals were not permitted to relitigate matters determined against them in criminal proceedings... In the case of RSC Order 14 therefore, a defendant cannot show that there is an issue which ought to be tried if he has lost that issue in a criminal trial and is simply seeking its relitigation on essentially the same evidence. His defence would be an abuse of process."

涉及商业犯罪，除了刑事诉讼还会有相关的商业诉讼或仲裁。笔者近期的一个香港仲裁案件中，就涉及在中国法院的刑事诉讼，估计很快会出判决。如果中国法院定罪，处理的律师就可能在香港仲裁中提出一事不再审（*res judicata*）与滥用司法程序的问题。

4.3.7 延误申请简易判决

一般简易判决的申请都是在诉讼的早期，毕竟这种做法是为了提前处理争议，以免一些无望的案件拖延下去浪费双方当事人的时间与金钱，也浪费宝贵的法院资源。但延误申请简易判决本身并不是拒绝申请的理由，Jacobs 大法官在 Brinks v. Abu-Saleh (1995) 1 WLR 1478 先例说：

"What then is the rule as regards delay and Order 14（RSC 下针对简易判决的条文）? It is said that the plaintiffs have delayed so much, and the case is so close to trial, that I should regard the application as an abuse of process. Now it is true that ***normally plaintiffs use Order 14 shortly after they commence proceedings, normally, but not always, before a defence is filed.*** *But there is nothing in the rules precluding an application at a later stage in the proceedings. I do not see why delay, of itself, should be a relevant matter. If there is no 'defence to the claim' or the defendant cannot show that there is an 'issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim' then delay can make no difference. Of course in some circumstances delay in proceeding summarily, coupled with an adoption of the procedures for full trial, may well suggest a weakness in the plaintiff's case or may even sometimes suggest some other reason for trial. But it would be that weakness or reason, not the delay itself, which led to refusal of the application. Moreover the plaintiff may well, having indicated an intention to go to full trial and then having both incurred his own costs and caused the defendant to*

incur his in going down that route, have to suffer a penalty in costs if he brings his Order 14 application late. But otherwise ***I can see no objection to a late application for judgment under Order 14.*** *Indeed, in some cases, and I think this is one, its use may be commendable as saving both the extra costs and time involved in a full trial."*
（加黑部分是笔者的强调）

4.4 仲裁机构提前决定争议的新规定

国际仲裁之前是没有撤销索赔请求或抗辩的说法与做法。双方当事人的仲裁协议给予仲裁庭的管辖权只是解决双方的争议，仲裁也没有像国家法院要小心防止宝贵与有限的司法资源被滥用的考虑，所以在《联合国示范法》（UNCITRAL Model Law）没有条文针对这一个课题。但在英国的《Arbitration Act 1996》之 section 41 有规定在两种特定的情况下，仲裁庭可以撤销索赔请求。第一种是 section 41(3)规定的原告在开始仲裁程序不再担心时效问题后不合理延误推进诉讼程序，导致证据流失等造成无法公平审理，即所谓的原告懈怠诉讼（want of prosecution）的情况。另一种情况是在 Section 41(6)规定的仲裁庭在向原告作出了费用担保（security for costs）的命令后原告不提供担保。注意是这两种特定的权力都是针对原告的索赔，撤销被告的抗辩会是更加敏感，毕竟从起码的公正与基本人权考虑也不应该轻易剥夺被告在面对原告攻击时抗辩的权利。也可以从解释立法的角度来看，如果仲裁庭像法院一样有广泛的撤销索赔与抗辩的权力，就无须明示两种可以撤销索赔的情况，这默示了仲裁庭除了这两种情况外没有权力撤销索赔或抗辩。此外香港《仲裁条例》（第 609 章）也有同样的规定。

但在本章较早前介绍的法院的两种提前处理（early disposal）双方争议的做法，即撤销索赔或抗辩与作出简易判决，在有些案件或情况下（包括对银行与金融行业）确实有吸引人之处，仲裁看来是有所不足。所以，现在新加坡仲裁中心（Singapore International Arbitration Centre 或简称 SIAC）首先创新在 2016 年的规则中加进了允许仲裁庭提前处理双方争议的规定，可节录如下：

"Rule 29: Early Dismissal of Claims and Defences

29.1 A party may apply to the Tribunal for the early dismissal of a claim or defence on the basis that:

a. a claim or defence is manifestly without legal merit; or

b. a claim or defence is manifestly outside the jurisdiction of the Tribunal.

29.2 An application for the early dismissal of a claim or defence under Rule 29.1 shall state in detail the facts and legal basis supporting the application. The party applying for early dismissal shall, at the same time as it files the application with the Tribunal, send a copy of the application to the other party, and shall notify the Tribunal that it has done so, specifying the mode of service employed and the date of service.

29.3 The Tribunal may, in its discretion, allow the application for the early dismissal of a claim or defence under Rule 29.1 to proceed. If the application is allowed to proceed, the Tribunal shall, after giving the parties the opportunity to be heard, decide whether to grant, in whole or in part, the application for early dismissal under Rule 29.1.

29.4 If the application is allowed to proceed, the Tribunal shall make an order or Award on the application, with reasons, which may be in summary form. The order or Award shall be made within 60 days of the date of filing of the application, unless, in exceptional circumstances, the Registrar extends the time."

SIAC 对这一条新规则的介绍也可节录如下：

"*The SIAC Rules 2016 are the first set of arbitration rules published by a major arbitration institution to incorporate an early dismissal procedure. Its introduction appears to be SIAC's answer to the criticism that international arbitration has no equivalent to the summary judgment and striking-out procedures found in litigation, thereby allowing parties to advance unmeritorious claims or defences.*

Under the SIAC Rules 2016, a party may request the tribunal to dismiss a claim or defence at an early stage of the proceedings where the claim or defence is either 'manifestly without legal merit' or 'manifestly outside the jurisdiction of the tribunal' (rule 29). The legal test to be satisfied is therefore a stringent one. Only claims and defences which 'manifestly' do not withstand scrutiny, whether on the legal merits or on the jurisdictional basis asserted, may be dismissed.

As a safeguard against unmeritorious applications for early dismissal, the tribunal has the discretion whether to allow the application to proceed. If it does, the tribunal is then required to render its decision on the application, with reasons in summary form, within 60 days of the date of application – unless, in exceptional circumstances, the registrar extends the time. We don't know yet how SIAC tribunals will deal with applications for early dismissal but the imposition of this deadline of 60 days suggests that parties may have relatively limited time to make their submissions on early dismissal, whether in writing or at a hearing.

From a practical perspective, the introduction of the early dismissal procedure may place an increased emphasis on the 'Response to Notice of Arbitration' (Response). A respondent may no longer be able to safely defer setting out its defence until the submission of its Statement of Defence by making bare denials against the claimant's claims in its Response. The risk is that a claimant may apply for early dismissal, which would compel the respondent to assert the prima facie strength of the defence set out (if at all) in the Response against the 'manifestly without legal merit' test. Respondents in any SIAC arbitrations commenced after August 1 should be

prepared to include in their Response substantive comments on the defence arguments that are likely to be relied on in the arbitration.”

香港国际仲裁中心（HKIAC）也跟从了这一做法，并在 2018 年的仲裁规则中加入了同样的规定，可以想到其他国际仲裁中心也会跟从。笔者只在这里简单提出几个方面的问题来看看这一个新的规定是否是好事，或是在哪些方面要小心。

（一）在本章之 4.3 段有提到法院在 CPR 下会更加愿意在撤销原告的索赔或被告的抗辩前下令提早披露文件与资料，并且会允许一定程度的钓鱼取证/摸索证明（fishing expedition）。但在仲裁程序，即使仲裁庭愿意以同样的手法应对，相比法院仍有一定的困难与效果成疑。

（二）更加值得关心的是在本章之 4.3.5 段所提到的 Mummery 大法官所说的英国法院面对的问题。如决定简易判决比最终全面审理后的判决会是更加困难，简易判决比较最后判决是更不肯定与不可预测，Mummery 大法官也提到了到底是哪一类的法官（专业或非专业）更适合处理简易判决等等。与 Mummery 法官不同，在笔者看来，由有专业知识的法官决定更有优越性。因为要在有限的证据下很快作出决定，例如法院或仲裁员要在紧急情况下对案件的实体方面作出正确决定的即时判决或裁决（instant judgment or award），不内行的法官或仲裁员是做不到的。笔者确实见到不少简易判决的一审决定被上诉庭推翻。如果英国法院在这种程序上遇到了问题与困难，可想象得到同样的问题与困难在国际仲裁会翻倍。例如常见被委任的国际仲裁员中的绝大多数是西方国家的商事“万金油”律师（general commercial lawyer），什么类型的案件都接受，谈不上对任何专业熟悉等等。加上国际仲裁还要面对法院不会面对的问题（例如国际执行），因此笔者对仲裁员在一审终局的仲裁中行使这方面的权力或裁量权的安全程度感觉担心。所以需要建立更多的保护机制，笔者想到的其中一个做法是对撤销或简易裁决建立一个上诉机制，由仲裁机构委任适合与高水平的人士处理。

（三）国际仲裁的费用越来越昂贵与时间延误越来越严重是现在讨论的热门话题，也是事实。笔者认为这在一定程度上与仲裁机构的不断创新有关系，例如紧急仲裁员程序（Emergency Arbitrator Procedure）、仲裁庭秘书（Tribunal Secretary）等等都带来新问题与费用及时间延误的增加。笔者对这种容许仲裁庭提前处理双方争议的做法会否带来同样的后果感到有些担忧。

（四）笔者感觉撤销索赔还比较安全，但仲裁庭撤销抗辩并作出简易裁决（summary award）是剥夺了被告进一步要求原告文件披露、通过其他渠道调查取证、最重要的开庭审理（evidential trial）以陈述被告的案件（present case）以及质疑原告的案件与证据等的机会。这在将来会导致更多问题，如原告向被告执行简易裁决时，被告就可以振振有词地指称简易裁决令被告失去了陈述案件的机会，违反了 1958 年《纽约公约》。

（五）最后是已经提到过，法院要关心宝贵与有限的司法资源不要被滥用，所以有严格阻止滥用司法程序的做法，但仲裁庭没有这方面的考虑。

5 提前文件披露：要求文书请求、誓章与/或证人证言提及的文件

5.1 提及的文件需要马上披露给对方查阅的原因

在文书请求中（例如原告的索赔请求）如果提及（referred to）一份报告或一封信函或简略提到某类文件（class of documents），但没有把该文件作为附件披露，即使当时被告还没有递交抗辩书也可以提前要求原告作出披露：见 Quilter v. Heatly (1883) 23 ChD 42; Mantaray Pty v. Brookfield Breeding Co Pty Ltd (1992) 1 QdR 91 等先例。即使被告可以估计到原告在索赔请求中提及的文件到底有什么内容甚至自己也可能有一份（例如是一份验检报告），但最好还是向原告要求披露文件，因为这一来就可以明确、肯定以及全面地知道原告在索赔请求中的指控，以免将来出现什么误解。当然也有情况是被告不知道原告在索赔请求中提及的文件的内容，这一来就更有必要要求原告作出披露以供查阅后才作出抗辩。毕竟，原告可能提及该文件时有错漏，或只是断章取义。

在 Quilter v. Heatly 先例，原告在索赔请求中提及他自己的账簿里的部分内容，被告就向法院要求原告披露他的账簿以及在索赔请求中没有提到的两封特定信函以供被告查阅。在一审法院，Chitty 大法官拒绝了被告的申请，原因是不希望容许被告在作出抗辩请求之前就通过披露看到原告的文件证据，然后再针对性地雕琢他的抗辩。但上诉庭推翻了一审判决，支持被告可以要求披露与查阅原告的账簿。原因就是原告在索赔请求中提及了账簿，被告就有权要求披露与查阅。至于另外两封特定的信函，由于在索赔请求中没有提反，所以要到双方的正常互相披露文件证据的程序时才需要披露。上诉庭的 Jessel 大法官说：

"(the Defendant may say) Your case depends partly on a set of documents which you may have set out incorrectly. I wish to see them. It may be I have made admissions which will put me out of Court. I wish to see the documents to know whether I have made such admissions, and it is important for me to see them before I put in my defence."

另 Bowen 大法官也同意，说：

"Thus in an action on a policy of marine insurance the underwriter can get it at once[36], and in some other cases the Courts have said that discovery may be required at an early stage, but as a general rule, discovery is not given before the issues are defined by the delivery of a statement of defence."

中间禁令（interim injunctions）的申请或对方的抗拒通常都是要有誓章

[36] 这里以海上保险为例支持提前文件披露，在本章之 1.2 段与 7 段对这个课题有详论。

（affidavit）作为证明，在同样的道理下，只要在誓章中提及但没有作为附件的文件，都可以要求申请方或抗拒方披露：见 Quilter v. Heatly; Smith v. Harris (1883) 48 LT 869; Marubeni Corporation v. Alafouzos (1986) 11 WLUK 46; Rafidain Bank v. Agom Universal Sugar Trading Co Ltd (1987) 1 WLR 1606; Mantaray Pty v. Brookfield Breeding Co Pty Ltd; Robinson v. Adskead (No.1) (1995) 12 WAR 574 等先例。

同样，双方为了支持或抗拒对许多中间命令/批文的申请而提供的书面证人证言（witness statement）中提到的文件，如果对方要求也需要马上披露让对方查阅：见 Rubin v. Expandable Ltd and Others (2008) 1 WLR 1099; Barr v. Biffa Waste Services Ltd (2009) EWHC 1033 (TCC); Danisco A/S v. Novozymes A/S (No.2) (2012) EWHC 389 (Pat); Wm Morrison Supermarkets Plc v. Mastercard Inc (2013) EWHC 2500 (Comm)等先例。注意这里针对的是为了申请或抗拒中间命令而递交的证人证言，不是在正常的诉讼程序中为了最终审理交换的用来替代主盘问（examination-in-chief）的书面证人证言。对于为了最终审理而交换的证人证言，由于往往距离开庭时间很短，来不及再进行一轮披露，加上可以在最终开庭时反盘问（cross-examination）证人（例如为什么不披露提及的文件），所以有不同的对待。

事实证人的证人证言常常内容冗长，虽然会有很多附件，但不会把提到的每一份文件都作为附件。尤其是证人为了增强可信度，一般希望每一句话都提到一些文件作为依据。例如会说他是在查询了律师意见后才去回应对方，这就提到了律师意见这份文件；或是提到他的朋友告诉他某一件相关的事情，但他无意公开这封朋友的信函或电邮，因为信函中有其他涉及私人机密的内容；又或是在证人证言中提到公司的账簿与发票，如果要披露给对方，除了涉及大量的工作外也免不了透露了公司业务的许多隐私。在古老的 Smith v. Harris 先例，就是因为在证人证言中概略地提及了公司的商务账单、信件等，就要披露大量的公司文件与纪录。因此证人证言提及的文件，会被以各种理由（例如是特免权、无关、机密、隐私、或利弊完全不成比例等）抗拒披露与提供给对方查阅，这会在本章稍后的 5.5 段详论。

最后一提的是专家证人报告（expert report）也是同样的道理，但在 CPR 下另有专门的条文针对，会在《证据法》的下册详细讨论。

5.2 RSC 与 CPR 针对提及文件要提供让对方查阅的立法条文

可先节录有关的立法条文。首先是在 1999 年以前适用的 RSC Order 24, rule 10，如下：

“10. Inspection of documents referred to in pleadings, affidavits and witness statements

(1) any party to a cause or matter shall be entitled at any time to serve a notice on any other party in whose pleadings, affidavits or witness statements reference is

made to any document requiring him to produce that document for the inspection of the party giving the notice and to permit him to take copies thereof.

(2) The party on whom a notice is served under paragraph (1) must, within 4 days after service of the notice, serve on the party giving the notice a notice stating a time within 7 days after the service thereof at which the documents, or such of them as he does not object to produce, may be inspected at a place specified in the notice, and stating which (if any) of the documents he objects to produce and on what grounds."

另外 RSC Order 24, rule 13 要求申请提前披露的诉讼方说服法院为了公平合理地处理这一个诉讼程序以及节省诉讼费用有必要提前披露这一份或多份文件，虽然这往往只是一个例行公事的要求：

"*(1) No order for the production of any documents for inspection ... or for the supply of a copy of any documents, shall be made under any of the foregoing rules unless the Court is of opinion that the order is necessary either for disposal fairly of the cause or matter or for saving costs....*"

但新的英国民事诉讼规则 CPR 的有关条文 Rule 31.14 有不同措辞，可节录如下：

"***DOCUMENTS REFERRED TO IN STATEMENTS OF CASE ETC.***

31.14 (1) A party may inspect a document mentioned in –

(a) a statement of case;

(b) a witness statement;

(c) a witness summary;

(d) an affidavit; or

(2) subject to rule 35.10 (4) [37], a party may apply for an order for inspection of any document mentioned in an expert's report which has not already been disclosed in the proceedings.

(Rule 35.10 (4) makes provision in relation to instructions referred to in an

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[37] Rule 35.10(4)规定："*(4) The instructions ... shall not be privileged against disclosure but the court will not, in relation to those instructions –*
(a) order disclosure of any specific document; or
(b) permit any questioning in court, other than by the party who instructed the expert,
unless it is satisfied that there are reasonable grounds to consider the statement of instructions given under paragraph (3) to be inaccurate or incomplete."

expert's report)."

除了 Rule 31.14，CPR Part 31 也有其他条文针对文件只要被提及就要在对方要求下披露与提供给对方查阅这一个课题，可节录如下：

"***31.1 (1) This Part sets out rules about the disclosure and inspection of documents***

…

Right of inspection of a disclosed document

31.3 *(1) A party to whom a document has been disclosed has a right to inspect that document except where –…*

31.4 *In this Part – 'document' means anything in which information of any description is recorded …*

Inspection and copying of documents

31.15 *Where a party has a right to inspect a document–*

(a) that party must give the party who disclosed the document written notice of his wish to inspect it;

(b) the party who disclosed the document must permit inspection not more than 7 days after the date on which he received the notice; and

(c) that party may request a copy of the document and, if he also undertakes to pay reasonable copying costs, the party who disclosed the document must supply him with a copy not more than 7 days after the date on which he received the request.

(Rule 31.3 and 31.14 deal with the right of a party to inspect a document)"

5.3 什么才算是"提及"？

针对以前在 RSC 下什么才算是"提及"（referred to）的文件，有不少有趣与权威性先例。首先，应该明确的是如果在文书请求或证人证言中明示提到的文件（如某某人在某天寄出的一封信函或是某一个检验机构作出的报告等），毫无疑问是应该包括在内。这种文件可称为是"直接提及"（direct allusion）的文件。但有先例表示如果只是"默示提及"，简单说就是提到了某件事情并显示或默示很可能会有文件存在，仍是不包括在内。在 Dubai Bank v. Galadari (No. 3) (1990) 1 WLR 731 先例，上诉庭的 Slade 大法官说：

"*It seems to us to involve reading the phrase 'reference is made to any*

document' as including reference by inference. This we do not regard as the natural and ordinary meaning of the phrase. To our minds, the phrase imports the meaning of a direct allusion to a document or documents."

由于有千变万化的写法，所以区分到底有否直接提及并不容易，其中会涉及一些很微妙的区分。例如在 Marubeni Corporation v. Alafouzos (1986) 11 WLUK 46 先例，有关的誓章中提到原告曾经取得的日本法律意见中很肯定这份协议并没有令买卖合约的履行变为非法（*The plaintiffs have obtained outside Japanese legal advice which categorically states that this agreement does not render performance of the sale contract illegal in any way whatsoever*），法院判这份日本法律意见没有被直接提及。

但在 Dubai Bank v. Galadari (No. 3)先例，在有关誓章所提到的是 3 句话是"*instrumental in setting up a discretionary trust*"、"*with a guarantee*"与"*by virtue of a mandate from the account holders*"，双方的争议是这几句话是否属于直接提及文件。上诉庭同意"提及"可以只是略及（compendious）而不必特定提出某份文件。Slade 大法官接下去举例说明它们的分别，如果只是提到有一宗交易，如 A 刚把某栋房子转售给了 B，可以说法律要求这个交易肯定是有文件的存在，但是仍是没有在誓章中提及任何文件，而只是提到这个交易。所以，在上述的 3 句话中，上诉庭判第一句话只是提及成立一个全权信托（discretionary trust，这种信托的受托人具有很大的处理受托财产的自由裁量权），即使这一个信托肯定有文件存在，但仍不算提及了某份文件。第二句话提及了担保（guarantee），至于是哪一份担保可以从誓章的上下文确定，第三句话提及了户口持有人的授权书，所以上诉庭命令必须披露这些文件并允许对方查阅。

在较近期的 Rubin v. Expandable Ltd and Others (2008) 1 WLR 1099 先例，Rix 大法官提到了 Dubai Bank v. Galadari (No. 3)先例并总结说：

"*It appears ... that a reference to a conveyance, guarantee, mandate or mortgage ... would be a reference to a document, as would reference to the contents of such documents; but that mere reference to the effect of some transaction or document, such as to say that a property was conveyed or that someone had guaranteed a loan would not be sufficient.*"

以上 Rix 大法官所举的例子显示了是否属于"提及"文件看来有十分微妙的区别。笔者的理解是如果提到"担保"，由于根据《Statute of Frauds 1677》的规定担保一定要有文书与担保人签名，所以是提及了一份文件。但如果提到是有人为一笔贷款提供了担保，这只是提到有这件事情，即使这件事情或行为很可能有文件，但也只是"默示提及"，所以不足够，毕竟会有其他办法提供担保。看来关键区别仍是在文字上提及的是文件本身还是一件事情或交易。

到了 CPR 的时代，可先介绍 Rigg v. Associated Newspapers Ltd (2004) EMLR 52 先例。该先例的案情涉及了被告（一家英国报社）在抗辩书（Statement of Defence）中大篇幅节录了被告的一位记者曾经采访原告时双方见面与交谈的部

份内容。这就令原告要求被告披露采访见面所有的记者笔记与记录并允许查阅。笔者粗略估计会是原告知道该采访与交谈的内容很多，如果能够看到该记者的所有笔记，可能会找到一些对被告不利的内容，甚至有其他意外的发现，例如有诽谤性的内容让原告可以大做文章。再说，如果原告随口向被告要求披露，但被告拒绝甚至不惜打这场官司抗拒，也显示了部分笔记有一些见不了光的内容，让原告有机可乘。可能有部分有“小聪明”的人士会想在这种情况下不如干脆把这些有不妥内容的笔记销毁，然后推说剩下的部分就是所有存在的文件。但这种手段是正规的公司或有水平的自然人不会干的，因为这种行为涉及刑事犯罪。他们还是按照规则办事，但会灵活使用一切合法的计谋与手段。

在 Rigg v. Associated Newspapers Ltd 先例，Gray 大法官最终判抗辩书中并没有直接提及文件，即记者采访与见面的笔记与记录，所以不需要作出披露与提供查阅。但在后来的 Rubin v. Expandable Ltd and Others 先例，Rix 大法官曾提到如果有关的抗辩书中的措辞/文字稍有不同，例如说“该记者写下了采访内容”（written up the interview）结果就会不一样。

Rubin v. Expandable Ltd and Others 先例的案情涉及英国债务人（debtor）经济困难时一种名为“Individual Voluntary Arrangement”的安排，做法上是在 75%或以上的债权人（creditors）同意下，债务人会定期把一笔钱交出给监督人（supervisor）。然后监督人就会将这笔钱平均分摊，归还部分债务给所有的债权人。这种做法对债务人的好处是相对由法院宣告破产并委任清盘人（liquidator）或信托人（trustee）接管资产的情况，债务人会对他/她的资产有更好的控制。在该先例，Rubin 先生被委任为监督人，但几年后法院还是颁布了破产令并指定信托人接管剩下的资产。在之后监督人 Rubin 先生与债权人之间的诉讼中，监督人在证人证言中说：“他写信给我指出一些不符点（*he wrote to me … drawing my attention to … discrepancies*）。”于是债权人要求监督人披露这份有关并被“提及”的文件/信函，但被监督人的代表律师拒绝。一审法院判这句话并没有直接提及任何文件，因为所用的措辞/文字很不清楚，例如没有说明到底是一封信函或是一封电邮，也没有提到日期等。所以，这句话只是在解释一个过程，而不是直接提及一份特定文件。

但上诉庭推翻了一审判决，认为这一句话中的“他写给我”是说明了一个制造文件的行为，所以这封信函有在证人证言中被“提及”（mention，CPR 下对“提及”使用的英文单词有所不同，会在下一小段针对）。Rix 大法官说：

“… the expression ‘mentioned’ is as general as could be. This is not to my mind intended to be a difficult test. The document in question does not have to be relied on, or referred to in any particular way or for any particular purpose, in order to be mentioned. … I do not see why there should be need for a strict approach to a request for inspection of a specific document mentioned in one of the qualifying documents. The general ethos of the CPR is for a more cards on the table approach to litigation. It a party thinks it worthwhile to mention a document in his pleadings, witness statements or affidavits, I do not see why, … the court should put difficulties in the way of inspection. I look upon the mention of a document in pleadings etc. as a form

of disclosure …

… in my judgment 'he wrote' is not a mere reference to a transaction otherwise to be inferred as effected by a document, as in 'he conveyed' or 'he guaranteed', but is a direct allusion to the act of making the document itself. Suppose the question was whether there had been a direct allusion to a telephone call in the expression 'I telephoned him that day': in my judgment it would make no difference whether the expression was 'I telephoned him' or 'I made a telephone call to him', in either case there would be a direct allusion to the telephone call. Suppose the expression was 'I recorded and transcribed our telephone call that day': there would be a direct allusion to the transcript in question… In all these expressions, the making of the document itself is the direct subject matter of the reference and amounts in my judgment to the document being 'mentioned'. 'Document' is defined as 'anything in which information of any description is recorded'. If one then asks whether the expression 'he wrote me … drawing my attention to the discrepancies' makes mention of 'anything in which information of any description is recorded', I would find it hard to explain why it does not."

笔者可总结如下：

（一）RSC 延续下来的区分还是没有变。"直接提及"就是明示说到一份文件或简略/略及的一些文件，而不是"由提及的事件可推断存在一份文件"（a reference permitting an inference of a document）。最后笔者以自己的理解多举一个更容易理解的日常生活的例子：如果说的是"我今天去了公众图书馆并花了半天时间查阅了一些记录并写下了一些笔记"，这就是提及了一些文件，包括查阅了什么记录与写下了什么笔记。但如果稍微改一下说法变为"我今天在公众图书馆花了半天时间查阅"。虽然根据这句话中提到的事情或行为肯定可以合理默示与推断我看了一些记录或文件，并很可能会写下了一些笔记，但这不属于直接提及了任何文件。

（二）Rix 大法官也在判词中说明，由于 CPR 的大精神就是增加诉讼透明度，以及要求双方当事人在开庭审理前要把所有自己的底牌摊开在桌面上（all cards on table）让大家看到，不允许在开庭中突袭（ambush）对方，以保证公平审理（fair trial）。在这个大精神下，可以说即使所用的有关措辞/文字并不清楚是否是直接提及，也应该倾向命令作出披露并容许对方查阅。

5.4 "提及"在 CPR 下会否文字不同而有所改变?

在上一小段提到，以前的 RSC 与现在的 CPR 对"提及"使用的英文单词不同。前者是"referred to"，后者是"mentioned"。这就在 CPR 生效后带来了一个疑问，即两者是否有不同的解释？否则，立法为什么要把已经有悠久历史与明确先例的"referred to"一词改变为另一个新词。在《Documentary Evidence》（2018 年，第 13 版）一书之 2-02 段就批评说：

"What is meant by a document 'mentioned'? The former wording was 'referred to' under RSC Ord.24 r.10. A document was referred to only where there was a 'direct allusion' to the document. There was no right to production where there was no specific reference and the existence of the document could merely be inferred[38]*, although there could still be room for argument as to what was a direct allusion; references to a 'guarantee' or 'secured by mortgage' might be direct allusions to documents*[39]*. Is 'mentioned' a different test? Why was a different word used?（在原书中以下部分是脚注）This is one of the weaknesses of the drafting of CPR; a word is used in the RSC which has a well-established meaning. A different word but essentially a synonym, is used in the CPR. Is one to assume the draftsman wanted to convey the same or a different meaning? The title of CPR r.31.14 supports the view that there is no material difference between the old and new rule: Documents referred to in Statements of Case."*

在今天已经明确了两种不同的英文单词的实质意思没有分别，文字改变可能是因为 Slade 大法官在重要的 Dubai Bank v. Galadari (No. 3)先例中，在说到"直接提及"（direct allusion）的时候，还用了"特定提到"（specifically mention）的说法。Rix 大法官在 Rubin v. Expandable Ltd and Others 先例就说到在 RSC 与 CPR 中使用的两个不同的英文单词是没有本质分别：

"I am content to assume that there is no effective or substantive difference in the meaning of the previous and the present rule. I am content to adopt the test of direct allusion as an elucidation of the present rule's language which speaks of 'mentioned'…"

在《Documentary Evidence》（2018 年，第 13 版）一书之 2-02 段提到该先例的判决，说：

"The Court of Appeal considered the point in Expandable Ltd v. Rubin. Jacob LJ[40] *said that he was content to assume that there was no effective or substantive difference in the meaning of the previous and the present rule. He said the change in wording confirmed the test of 'direct allusion' or 'specifically mention' used by Slade LJ in Dubai Bank v. Galadari. The reference must be direct or specific: hence 'specifically mention' or 'direct allusion'. However, Jacob LJ then went on to say that this is not intended to be a difficult test to satisfy. Given the 'cards on the table' approach in the CPR, if a party thinks it worthwhile to mention a document in his*

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[38] 见 Dubai Bank v. Galadari (No. 3) (1990) 1 WLR 731 先例，也可见英国根西（Guernsey）上诉庭根据 RSC 的措辞做出多数判决的 Klabin v. Technocom Ltd (unreported, 20 September 2002)先例（少数判决中持不同意见的大法官是 Beloff 大法官, Gloster 大法官与 Sumption 大法官)。

[39] 见 Dubai Bank v. Galadari (No. 3) (1990) 1 WLR 731 先例。

[40] 这看来是笔误，Rubin v. Expandable Ltd and Others (2008) 1 WLR 1099 先例的判决书中显示是由 Rix 大法官作出的主判决，Jacob 大法官只是说了"同意"这一句话。

pleadings, witness statements or affidavits, the court should not (subject to privilege) put difficulties in the way of inspection…"

在 Rubin v. Expandable Ltd and Others 先例中，Rix 大法官说如果在文书请求/案件陈述中提及一份文件，就好像在文书请求结束后双方正常相互披露文件的诉讼程序中把一份文件包括在文件清单（List of Documents）[41]内一样。这两种不同方式都代表了诉讼方自愿披露该份文件，所以在 CPR 必须在开庭审理前把所有的底牌都摊开在桌面上的大精神下，一旦提及就必须准备让该文件被对方查阅。Rix 大法官的判决可节录如下：

"I look upon the mention of a document in pleadings etc. as a form of disclosure. The document in question has not been disclosed by list, or at any rate not yet, but it has been disclosed by mention in what, for the purposes of litigation, is another important and formal category of documents. If so, then the party deploying that document by its mention should in principle be prepared to be required to permit its inspection, and the other party should be entitled to its inspection."

之后的 Wm Morrison Supermarkets Plc v. Mastercard Inc (2013) EWHC 2500 (Comm)等先例也跟从了 Rubin v. Expandable Ltd and Others 先例的判决。

5.5 抗拒对方查阅文件

除了有一些很小的不同之处，合法抗拒对方的提前要求披露与查阅文件基本上与怎么样合法抗拒稍后的正常相互披露与查阅是一样的道理与做法。这里先节录在《Disclosure》（2017 年，第 5 版）一书之 9.04-9.06 段如下：

"DOCUMENTS MENTIONED IN STATEMENTS OF CASE ETC.

This is quite different from inspection of documents disclosed in Lists of Documents. It was said of the equivalent rule under the old RSC that, instead of 'intended to give a party discovery of all documents relating to the case which are in his adversary's possession', the rule applicable here was 'intended to give the opposite party the same advantage as if the document referred to had been fully set out in the pleadings'… The same is true today under the current rule…

… Once it is shown or admitted that a document is mentioned in a statement of case, a witness statement, a witness summons, a witness summary, an affidavit or an expert's report, the onus is on the party against whom the application is made to produce it unless he can show good cause why he should not. As commented in one case, if a party thinks it worthwhile to mention a document in his pleadings, witness

[41] 在本书第七章之 9.3 段有介绍。

statements or affidavits, the court should not put difficulties in the way of inspection, subject to questions of privilege.

Normally a reference to a communication in writing, even in general terms, is sufficient to amount to a document or documents being mentioned within the meaning of the rule.[42] *However, the court's power to order production is subject to the overriding objective in CPR, r.1.1*[43]*, … Where a document has been mentioned, inspection can be resisted not only on grounds of privilege*[44]*, but also on the more general grounds in CPR, r.31.3, such that the document is not within a party's control*[45] *or that it would be disproportionate*[46] *to the issues in the case to permit or order inspection…"*

接下去的段节会分别介绍哪些是合法或可以在法院行使裁量权（discretion）的时候被考虑的抗拒披露与查阅的理由。

5.5.1 抗拒理由之一：特免权（privilege）

以特免权（privilege），特别是重要的法律业务特免权（Legal Profession Privilege 或简称 LPP）抗拒披露文件或资料是属于公共政策（public policy），这个抗拒理由是肯定站得住脚。在 CPR Rule 31.14(1)就明确说明可以这一个理由抗拒披露与检查/查阅。有关特免权这一个非常重要与复杂的课题在本书第九至十三章有详论，不在此重复。

但即使是这一个非常重要的权利，仍是可以被享有特免权的人士自动放弃（waiver）。例如在一个正常与相互披露文件的过程中，其中一方当事人把享有特免权的文件包括在文件清单中并容许对方查阅该份文件，这显然就构成了弃权。该当事人不能事后反悔，不允许对方或法院在审理过程或判决时依据、参阅或考虑该份文件，因为特免权已经失去。

这首先带来了一个问题就是如果他在文书请求、誓章或证人证言中刻意提及（mentioned）这一份文件，是否也是一个典型的弃权行为？

誓章与证人证言的内容必须符合 CPR 的要求，其中针对誓章的规定是在 CPR PD 32 para.4.2。而针对证人证言的规定是在 CPR PD 32 para. 18.2，可节录如下：

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42 即使只是泛泛地提到了文书往来就已经属于提及了一份或几份文件。

43 法院在决定是否允许提前披露时要考虑 CPR Rule 1.1 规定的对双方当事人公正和费用与涉及的工作量是否成比例（权衡利弊比例）的大原则。

44 见本章稍后的 5.5.1 段。

45 见本章稍后的 5.5.3 段。

46 见本章稍后的 5.5.2 段与 Webster v. Ridgeway Foundation School Governors (2009) EWHC 1140 (QB)等先例。

"*A witness statement must indicate:*

(1) which of the statements in it are made from the witness's own knowledge and which are matters of information or belief, and

(2) the source for any matters of information or belief."

法院以这份文件作为对中间申请的文书证据以决定是否申请成功或抗辩成功，所以需要对内容严格要求，包括所有事实陈述的来源，例如证人所拥有的信息或理解是听回来或通过其他文件看回来的。这就免不了在誓章或证人证言中大量提到其他文件，包括证人是看过一些享有机密或特免权的文件才拥有的信息或理解。例如经常会有证人在誓章或证人证言中说"我听律师说"（I was told by my lawyer），或"根据我的律师告知"（according to my lawyer's advice ...）等类似的话。在本章之 5.3 段介绍的 Marubeni Corporation v. Alafouzos (1986) 11 WLUK 46 先例正是这种案件。如果只要简单提到这一句话就属于放弃了法律业务特免权会变得十分危险，稍不留神就会失去特免权。当然，如果是另一个极端，即誓章或证人证言中大篇幅节录了律师意见的内容，弃权应是明显与无话可说。

另外，对法律业务特免权的弃权是不能部分弃权，即只披露与依赖部分对弃权方有利的律师意见。这一个"挑选樱桃"（cherry-picking）[47]的做法是不被允许的。一旦对律师意见作出了部分弃权，就会可能被法院命令要全部披露该律师意见，这就会导致许多其他见不了光的内容都会曝光让对方看到，例如律师对自己案件的优劣分析，或建议尽快达成和解，或有哪一些不利与有问题的方面等等。

在以前 RSC 的年代，权威性与重要的 Buttes Gas and Oil Co v. Hammer (No. 3) (1981) QB 223 先例的案情涉及原告在文书请求（pleadings）中提及了（referred to）一些文件，被告要求提供查阅，但原告依赖公共利益特免权（Public Interest Privilege）与法律业务特免权抗拒披露与让对方查阅文件。上诉庭判仅仅在文书请求中提及并不构成弃权，但三位大法官有不同的说法。

Denning 勋爵认为在文书请求中提及与依赖就必须披露，但如果不想弃权可以修改（amend）文书请求把所有提及之处删除，说：

"*In general, it is clear that if a party refers in his pleading to a document, the other side are entitled to require it to be produced,… but it is open to the pleader to object to its production,…. Buttes in their amended reply and defence to counterclaim referred to a number of documents.* ***By pleading them, Buttes show that they intend to rely on them. They should make them available for production. If and in so far as they contend that those documents are the subject of a privilege, they should amend their pleading by striking out all reference to them***."（加黑部分是笔者的强

[47] 这个课题在本书第十二章之 4 段有详细介绍。

调）

另 Donaldson 大法官认为只在文书请求中提及并不是弃权，否则也不会有 RSC Order 24, rule 11(1)(b)下抗拒让对方查阅这一步的程序规定了。但如果是另一极端，文书请求中大篇幅节录有关文件内容，令机密性也失去，就不会再有特免权了。但在这两个极端之间的分水线是在哪里是不好说定，要看个别案件中的事实。Donaldson 大法官说：

"It must be right that ***a bare reference to a document in a pleading does not waive any privilege*** *attaching to it as otherwise there would be no scope for taking objection under RSC Ord 24, r 11(i) , when a notice was served under rule 10(1).* ***If, on the other hand, a document is reproduced in full in the pleading, its confidentiality is gone and no question of privilege could arise.*** *Where the line is drawn between these two extremes may be a matter of some nicety…"*（加黑部分是笔者的强调）

最后 Brightman 大法官认为文书请求中提及或是节录部分内容不是对特免权弃权，但同时如果不弃权就不能依赖这份文件与其中的内容。这一来，如果一方坚持既不弃权也不修改文书请求的地位，就有对方在开庭审理时或前后发难的危险，例如申请延迟开庭或撤销部分文书请求。Brightman 大法官说：

"So far as waiver by pleading is concerned, I agree with the judge that ***reference to a document or to its contents in a pleading does not waive any legal professional privilege attached to it****. It is to my mind* ***equally clear that a party cannot rely on a privileged document so pleaded without thereby waiving the privilege****. Therefore sooner or later Buttes will have to decide whether to forego privilege in respect of a privileged document which is pleaded, or to abandon reliance on it. If they sit on the fence until the trial (if any) begins or is in actual progress, they will do so at their own risk. Circumstances might arise in which the other side could properly claim to be entitled to an adjournment at Buttes's expense. Whether Occidental could force Buttes to step down from the fence prior to trial by an application to strike out a pleaded document in respect of which privilege is maintained does not arise for decision on this appeal, but I would think that Occidental might be able to do this."*（加黑部分是笔者的强调）

这是在 RSC 下的法律地位，而针对 CPR 下的法律地位，在 Lucas v. Barking, Havering and Redbridge Hospitals NHS Trust (2004) 1 WLR 220 上诉庭先例曾对在 CPR Rule 31.14 下这种情况是否构成对特免权的弃权有过一个不全面与非结论性的探讨。Waller 大法官说：

"… it is not absolutely clear whether a party is still entitled to refuse inspection on the grounds of privilege. There is a suggestion in Hollander & Adam's Documentary Evidence , 7th ed (2000), paras 13–14 that CPR r 31.14(1) provides an absolute right to inspection. The suggestion is that CPR r 31.21 then acts as a

sanction disallowing the party who has refused inspection from using the document referred to. I have my doubts as to whether that is right. It seems to me unlikely that the CPR would have intended to abolish privilege at a stroke under CPR r 31.14(1) without expressly saying so. ...

... However the question whether there was an absolute right to inspection under CPR r 31.14(1)(a)-(d) was not fully argued out before us. It is possible that on a proper construction of CPR r 31.14 there is a right to refuse inspection on the grounds of privilege even if documents are referred to in a statement of case, a witness statement, a witness summary or an affidavit.[48] *…"*

另 Laws 大法官说：

"Although, ... the matter has not been fully argued before us, and thus no doubt it would be wrong to express a concluded view, for my part I would have very great difficulty in accepting that CPR r 31.14(1)(a)-(d) confer an absolute right to inspect, thus abrogating privilege otherwise inherent in any document there referred to. Such a construction would require very clear words. The sub-paragraphs are not generally concerned with documents which would attract privilege, and so have ample scope to operate without the assumption of any incursion into the law of privilege. It is inconceivable that they abrogate the impact of public interest immunity, which presumably they would if they created absolute rights.[49] *And it would be quixotic if documents whose privilege is expressly withdrawn (rule 35.10(4)) were subject only to limited rights of disclosure but those (rule 35.14(1)) whose privilege is only impliedly withdrawn were liable to be inspected without restriction."*

但到了 Rubin v. Expandable Ltd and Others (2008) 1 WLR 1099 先例，上诉庭明确判决在该先例的证人证言中提及的一封信函并没有自动与绝对地放弃了特免权，所以没有丧失权利。

最后可节录《Disclosure》（2017 年，第 5 版）一书之 16.23 段对目前针对这一课题的英国法律地位的总结，如下：

"... The general rule is that:

'Where a person is deploying in court material which would otherwise be privileged, the opposite party and the court must have the opportunity of satisfying

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[48] Waller 大法官说在该先例由于这个问题不是争议重点，双方大律师没有全面作出争辩，所以法院不能作出权威性决定。但 Waller 大法官提到对 CPR 立法条文的解释，不像是一旦特免权文件被提及就会失去特免权。

[49] Laws 大法官与 Waller 大法官的看法一致，即特免权是绝对权利与公共政策，所以不能轻易剥夺。虽然可以通过立法剥夺，但立法文字必须清楚无误。而 CPR 并没有明确说明提及（mentioned）的文件就绝对地失去了特免权，所以不应有此后果。

themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood.'[50]

The key word here is 'deploying'. A mere reference to a privileged document in an affidavit does not of itself amount to a waiver of privilege[51] *and this is so even if the document referred to is being relied on for some purpose, for reliance in itself is not the test*[52]*. Instead, the test is whether the contents of the document are being relied on, rather than its effect.*[53] *The problem is acute in cases where the maker of an affidavit or witness statement has to give details of the source of his information and belief, in order to comply with the rules of admissibility of such affidavit or witness statement*[54]*. In such a case, provided that the maker does not quote the contents, or summarise them, but simply refers to the document's effect, the older cases hold that there is no waiver of privilege*[55]*. Perhaps if the maker goes too far, he can be put to his election as to whether to leave in the reference and produce the document or to take it out and retain privilege*[56]*. At all events there is no automatic waiver."*

5.5.2 抗拒理由之二：不成比例（disproportionality）

英国法院在行使裁量权决定是否允许披露与查阅对方的文件时，权衡双方的利弊是否成比例是一个很重要的考虑。成比例（proportionality）是 CPR 的大原

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[50] 见 Nea Karteria Maritime Co Ltd v. Atlantic & Great Lakes Steamship Corporation (No.2) (1981) Com LR 138 先例中 Mustill 大法官的判决。

[51] 仅仅提及一份享有特免权的文件并不是弃权：见 Rubin v. Expandable Ltd and Others (2008) 1 WLR 1099; Brennan v. Sunderland City Council (2009) ICR 479; Digicel (St Lucia) Ltd v. Cable & Wireless Plc (2009) EWHC 1437 (Ch); D (A Child), Re (2011) EWCA Civ 684 等先例。

[52] 即使诉讼方提及该享有特免权的文件是想依赖该文件（例如显示自己的理解不是乱来而是来自一个可靠的渠道或来源），但只要不是依赖该文件的内容，仍不算弃权：见 Marubeni Corporation v. Alafouzos (1986) 11 WLUK 46 上诉庭先例中 Lloyd 大法官的判决。

[53] 关键是证人在誓章或证人证言中提及文件时依赖的是文件内容或只是它起的作用（例如证人只是说"根据律师建议，我向对方回应说……"）：见 Orr v. Crowe (2009) NIQB 17; Donaldson Judicial Review, Re (2010) NIQB 47; 也可见 AXA China Region Insurance Co Ltd v. Pacific Century Insurance Co Ltd (No.2)(2005) 3 HKC 359; Urban Renewal Authority v. Agrila Ltd (2009) HKCFI 229; Equiticorp Industries Group Ltd v. Hawkins (1990) 2 NZLR 175; Burkle Holdings Ltd v. Laing (No.2)(2005) EWHC 2022 (TCC); United Capital Corporation v. Bender (2005) JRC 144 等先例。

[54] 见 CPR PD 32 paras.4.2(2)与 18.2A(2)。之前的 RSC 要求证人提供一份确信理由陈述（statement of grounds of belief），在 CPR 后不再有这方面的要求，但 CPR PD 32 paras.4.2(2)与 18.2A(2)起同样的作用。

[55] 见 Government Trading Corporation v. Tate & Lyle (The Times, 24 October 1984); Marubeni Corporation v. Alafouzos (1986) 11 WLUK 46; R v. IRC Ex p Taylor (1989) 1 All ER 906 等先例。

[56] 当然，如果证人走得太远，如节录或总结了文件内容，就会被法院要求作出选择，是在文书请求、誓章或证人证言中把提及的部分删除，还是披露该文件：见 Marubeni Corporation v. Alafouzos; Government Trading Corporation v. Tate & Lyle; Bourns Inc v. Raychem Corp (1999) 3 All ER 154 等先例。在 Goldstone v. Williams (1899) 1 Ch 47 先例，在之前的关联诉讼中，证人被提供了一份特免权文件并承认了文件内容正确，但这份文件只是作为口供书的附件，内容没有记录在口供书中之后也没有被双方依赖，所以法院判文件没有丧失机密性。该先例的判决也在之后被 United Capital Corporation v. Bender 先例跟从。

则之一，在 CPR Part 1 就有说明。当然 Part 1 中规定的成比例的大原则是适用在整个法院诉讼过程，包括当事人正常相互作出披露的程序。特别是在现在电子文件披露（e-discovery）[57]越来越重要与披露越来越昂贵的情况下，是否成比例是法院在行使裁量权时的一个主要考虑。

CPR Part 1 的大原则下（特别是针对当事人正常相互披露的程序），总体权衡利弊是否成比例要考虑双方争议的金额，例如金额不高就不应该小题大做。另外也要考虑案件是否重要，例如是否是属于对一个新的法律观点的测试案件（test case），在有了这一个先例之后，其他同类的案件可以根据确定了的法律地位和解。另也要考虑双方当事人的经济能力、案件的复杂性与如果不命令披露文件（会是大量）会给对方带来什么影响等等。

在本段所针对决定是否要求诉讼方提前披露与允许对方查阅在文书请求或誓章/证人证言中提及的文件，也需要权衡利弊是否成比例：见 Danisco A/S v. Novozymes A/S (No.2) (2012) EWHC 389 (Pat)先例。但不同的是法院在权衡利弊是否成比例时的考虑只应局限在该文件所涉及的方面或有关争端。例如一方当事人在一份证人证言中提到了一句“根据公司的电脑记录”，而涉及的方面对整体的争议或诉讼看起来也不重要，就不应该下令要求提供这份证人证言的当事人披露过去几年所有与争议有关的公司电脑记录并允许对方查阅，这种所谓的电子披露可以非常昂贵与耗时。法院在这种情况也不应该因为整个诉讼涉及很大金额，就宽松对待。也可以另外一个常见的例子来说明这方面的考虑。例如一个争议金额很大的一个仲裁只涉及一个纯法律的争议（如合约几条相互矛盾的条文怎么样综合解释），当事人要求仲裁庭做出一个宣示裁决（Declaratory Award）。原告希望“速战速决”并且案件本身在时间上也很紧急，所以申请只以文件处理。但被告持相反意见，而仲裁庭感觉被告只是想拖延。根据英国《Arbitration Act 1996》之 Section 34 (2)(h)，在这种双方无法同意的情况下，就由仲裁庭决定是否开庭。仲裁庭不应该觉得反正涉及金额很大，花得起这个开庭的高昂费用，并以此作为主要甚至唯一考虑命令需要开庭审理。仲裁庭对个别案件的考虑不应该是这么大的案件，是一个“可多收费的案件”（juicy case）与花得起钱的案件。仲裁庭决定是否开庭时主要的考虑应是开庭是否是案件本身最适当的程序，如仲裁庭是否很快在几天或几周内就可以安排时间，有关的成员都在仲裁地不需要飞来飞去，仲裁开庭时间只要半天等等。至于以前笔者常听说是仲裁庭希望听双方代表大律师亲自在他面前争辩，笔者认为今天这种说法也已经不太会被接受。因为任何高水平的代表大律师能说得出来，也自然能够同样用文书表达出来。毕竟在今天的仲裁，即使需要开庭审理，主要目的还是为了证据，即为了盘问事实证人与/或专家证人。双方当事人代表大律师的开庭陈词（Opening Submissions）与结案陈词（Closing Submissions）通常也只是以书面文件的形式相互交换，不涉及口头争辩。

以上所讲可节录《Disclosure》（2017 年，第 5 版）一书之 15.25 段如下：

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[57] 本书第八章对电子文件披露有详细介绍。

"The CPR have introduced a new ground of objection to inspection of documents, namely that it would be disproportionate to the issues in the case to permit inspection of them… There is no definition of 'disproportionate' for the purpose of this rule[58], but it is plainly related to the concept of proportionality used in the overriding objective contained in CPR, Pt 1. However, the overriding objective uses proportionality in relation to the value, importance, and complexity of the case, and the financial positions of the parties, whereas the disclosure rule requires disproportionality only to 'the issues in the case'. Nonetheless, the court will take account of all the circumstances, and indeed is bound in exercising its powers under the rules seek to give effect to the overriding objective.[59]Proportionality can also be used by a party who complains that his opponent is swamping him with excessive disclosure."

5.5.3 抗拒理由之三：提及文件的一方其实不拥有或掌控该份文件

已经在本书第七章提到在文书请求/案件陈述（Statements of Case）终结后的诉讼程序是双方的正常与相互披露文件。在这一个程序中，其中一个很重要的考虑就是要求披露的文件是否在披露方的手中，被他拥有（possession）或是掌控（control，例如可从代理人处取得）。如果不是，那就不存在可以作出披露了。而被要求披露的一方如果没有一个可强制执行的法律权利（enforceable legal right）从其他人手中拿到这份文件，仍是没有作出披露的责任。在 Dubai Bank v. Galadari (No. 6) (The Times, 14 October 1992) 先例，一审的 Morritt 大法官下令披露方必须尽一切合理办法取得一些特定的文件并披露（*to use all lawful means available to them to obtain possession, custody or power of specific documents*）。但这一个命令被上诉庭否定与推翻，判披露责任不必走到这么远的地步。

这一来在正常相互的披露过程中就会有漏洞，例如商事案件经常会涉及跨国公司，该公司或集团的一家分公司（法律上是一个独立的法人）需要在诉讼中披露一些十分关键的文件，但这些文件由外国母公司拥有。这一来如该分公司不想披露这些文件，就有一个技术性的借口说它不拥有或掌控这些文件，也没有取得这些文件的可强制执行的法律权利。但明眼人都知道，如果该分公司向母公司要求这些文件应该是拿得到。这方面的复杂问题会在本书第七章之 8.6 段有详细讨论，在此只是一提。

但在本段所涉及的提前披露与查阅对方在文书请求、誓章与证人证言提及的文件，就会有比较苛刻的要求。这里有分别的原因也可以理解，正常的相互披露是法院强制程序，对自己不利的文件也要披露，这一来如果有一方当事人说某些文件不在他手中或掌控范围内，就不应该强加太大的责任让他设法获得。但在本

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[58] 见 Real Estate Opportunities Ltd v. Aberdeen Asset Management Jersey Ltd (2007) EWCA Civ 197 先例。
[59] 见 Simba-Tola (Abena) v. Elizabeth Fry Hostel (Trustees)(2001) EWCA Civ 1371; University of Western Australia v. Gray (No.8)(2007) FCA 89 等先例。

段所讲的情况不同，一方当事人在文书请求、誓章或证人证言中刻意提及（mentioned）与依赖（relied）一份或多份文件，就应该有更大的责任披露这份文件并提供给对方查阅。而且既然被要求披露的一方可以在文书请求、誓章或证人证言中提及这份或这些文件，就表示他/她可以获得（甚至轻易就可以获得）这些文件。这一来法院行使他的裁量权时，就倾向于命令提及文件的一方尽更大的努力取得这些特定的文件，例如向母公司要求取得文件。

以上所讲可见上诉庭的 Nourse 大法官在 Rafidain Bank v. Agom Universal Sugar Trading Co Ltd (1987) 1 WLR 1606 先例所说，如下：

"... I find it impossible to hold that rule 10(1)[60] applies only to documents which are in the possession, custody or power of the party concerned. It seems to me, both as a matter of construction and as one of common sense, that the omission of such a requirement is deliberate. The party who refers to the documents does so by choice, usually because they are either an essential part of his cause of action or defence or of significant probative value to him. Neither of those functions presupposes that they will be in his possession, custody or power. ..., the material provisions were evidently intended to give the other party the same advantage as if the documents referred to had been fully set out in the pleadings. Why should that advantage be automatically denied to him because the documents are not in the possession, custody or power of the party who refers to them? Moreover, under rule 11(1)[61] ***the court is not bound to make an order for production. It has a discretion to do so or not as it sees fit.*** *The authorities establish that an order will not be made if good cause to the contrary is shown. Doubtless the absence of possession, custody or power will sometimes amount to a good cause. But why should it invariably do so?* ***Suppose a case where there was a technical absence of possession, custody or power but nevertheless evidence that the third party who had possession of the document would very likely make it available if only he was asked to do so.*** *I can see no reason for thinking that it was intended that the court should be powerless to make an order whose practical effect would be to require the request to be made to the third party."*

以上加黑部分是说针对在文书请求、誓章或证人证言中提及的文件，是否作出披露命令是法院的裁量权。当一些被提及的文件虽然技术上不为当事人所拥有或掌控，但实际上拥有该文件的第三方很可能在该当事人的要求下就会提供时，法院就没有理由无权下令该当事人向第三方要求取得文件。

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[60] RSC Order 24, rule.10(1)规定："*Any party to a cause or matter shall be entitled at any time to serve a notice on any other party in whose pleadings or affidavits reference is made to any document requiring him to produce that document for the inspection of the party giving the notice and to permit him to take copies thereof.*"

[61] RSC Order 24, rule.11(1)的最后一段规定："*… the court may, on the application of the party entitled to inspection, make an order for production of the documents in question for inspection at such time and place, and in such manner, as it thinks fit.*"

5.5.4 抗拒理由之四：文件无关、有机密资料

与 RSC 不同，在 CPR 的标准披露（standard disclosure）[62]下文件是否有关（relevant）已经不再是披露与否的准则了。但在 Barr v. Biffa Waste Services Ltd (2009) EWHC 1033 (TCC)先例，法院仍认为假设被要求披露的文件是无关，CPR Rule 31.14 就不适用。但由于 CPR 已经没有有关与无关的说法，所以对该先例更好的解释是在成比例的大原则下，下令披露与提供查阅一些无关的文件肯定是不过关的。

在 Wm Morrison Supermarkets Plc v. Mastercard Inc (2013) EWHC 2500 (Comm)先例，原告声称被告违反竞争法并向原告索赔损失，被告向英国法院申请中止（stay）诉讼程序等待欧洲法院（European Court of Justice）的上诉结果，但该申请被法院拒绝。这时还没有进行正常的双方相互交换文件的标准披露程序，原告要求被告提前披露被告为了支持中止诉讼程序的申请而递交的证人证言中提到的一份文件。Popplewell 大法官拒绝作出提前披露的命令，部分原因是在证人证言中提及这些文件并非是为了依赖文件内容，而只是为了说明事件的历史背景（*the documents had been mentioned not for the purpose of relying on them, but for setting out the history of events*）。更重要的是该证人证言是为了支持中止诉讼程序的一个中间申请（interlocutory application to stay），而这一个申请已经被法院拒绝，所以与双方仍有争议的事项无关（*the witness statement had been prepared for an application that had been dispensed with and was no longer relevant to an issue or dispute between the parties*）。

至于文件内容包括机密性资料（如一些业务/生产的数据），这通常不是一个重要的考虑。毕竟，机密性（confidentiality）并不代表是特免权（privilege）[63]，法院也有其他办法可以作出保障。例如在文件中删除、涂黑或遮盖（redaction/blanked out/sealing up）其他无关但有机密性的内容或资料。而如果机密性内容或资料是有关，对方需要查阅，法院就可以命令有关文件只允许对方的代表律师或专家证人查阅，但不允许对方当事人查阅。这种保障或保护性命令，在个别类别的争议（例如是专利权的争议）是经常会出现。[64]

有关机密在这方面的法律地位，Tomlinson 大法官在 Three Rivers DC v. Bank of England (2002) EWHC 2309 (Comm)先例总结说：

"So far as concerns those few instances where confidentiality issues are raised, I have directed myself by reference to the decisions in Science Research Council v. Nasse (1980) AC 1028 and Wallace Smith Trust v. Deloitte Haskins Sells (1997) 1 WLR 267. Those authorities established:-

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[62] 见本书第七章之 7 段。
[63] 见本书第九章之 1 段。
[64] 这方面可见本书第四章之 1.7.7 段与 1.7.8 段。

(i) Where confidentiality is raised, it is not a ground for PII (public interest immunity) in itself, although it may be an ingredient of or relevant to a claim for PII;

(ii) If the disclosure of the documents in question is shown to be necessary in the interests of the litigation, then that need overrides confidentiality;

(iii) However, in such a case, the court will be concerned to see whether the needs of the litigation can otherwise be satisfied, eg, by considering redactions, disclosure from other sources or other appropriate means.

I do not consider that Article 8 of the European Convention on Human Rights calls for separate treatment. Subject to specific instances where it is agreed that, for example, the identity of informants is irrelevant to the issues in the trial and that their anonymity should be preserved, my conclusions thus far on relevance and necessary demonstrate that any incursion into piracy which may here be involved is necessary for the protection of the rights and freedoms of the parties to the litigation."

5.6 附件（Exhibits）中提及的文件

CPR Rule 31.14 没有规定在文书请求、誓章或证人证言的附件中所提及的文件是否要披露与提供查阅。这里的困难也可以想得到，今天经常见到誓章或证人证言会有好几十份或上百份的附件。毕竟会有情况是一方当事人用来支持一个单方面（*ex parte*/without notice）的申请，如禁令（injunction），所以有一个作出全面与坦率披露的责任。加上有关的案件也可能是特别复杂，需要的披露也变得特别多。这一来如果要提供附件所提及的其他文件，会是一件很麻烦、沉重与昂贵的事情。申请人也不一定做得到，因为附件不一定是来自他自己，甚至会确定不了来源。

在 Nissho Iwai Corporation v. Golf Fisheries Company (unreported, 12 July 1988)先例，Hirst 大法官认为在附件中提及的文件与誓章或证人证言中提及的文件不一样。但法院还是有权可下令披露附件提及的文件与提供给对方查阅。换言之，这仍是属于法院的裁量权。而行使裁量权的一个重要的考虑会是该附件提及的文件是否可说是属于誓章或证人证言的部分内容，非要让对方查阅后才能去全面理解。当然，也要考虑申请人能否取得这些附件所提及的文件，例如会否源自申请人。

6. 誓章与证人证言

誓章（affidavit）或证人证言（witness statement）是经常被使用的文书证据。例如为了节省开庭时间与要求双方在案件最后开庭审理前亮出所有底牌，现在通常都是以提前互相交换的书面证人证言替代以前口头主证据（evidence-in-chief）或主讯问（examination-in-chief）的做法。另是誓章与证人证言使用得最多的是在诉讼过程中的中间程序/措施申请（interlocutory/interim application），例如在本

章之 4.3 段提到的简易判决或是各种各样的禁令或指令。无论是申请或抗拒这种简易判决或禁令/指令，双方都要通过誓章或证人证言（加上附件）向法院提供文书证据来支持自己的立场（无论是否开庭），不能只是凭空争辩。

笔者不会详细针对 CPR 下对誓章与证人证言的所有规定，只简单一提 CPR Rule 32.6(1)规定一般的中间程序开庭，除非另有规定或法院有特别要求，否则都以证人证言向法院提供证据。CPR Rule 32.6(2)(a)规定当事人可以加上一份案件陈述（Statement of Case）。在一些比较复杂的案件中，这可以帮助法官更好地理解证人证言的文书证据是怎样支持双方的争辩与立场。CPR Rule 32.15(2)规定当事人可提供一份誓章证据以替代证人证言。但这一来，他/她可能无法向对方取回额外的费用。在某些中间措施的申请中是强制使用誓章，例如是申请一个冻结令（Freezing Order）或搜查令（Search Order）等：见 CPR PD 32 para.1.4(2)。

在拟定证人证言时要注意以下几个方面：

（一）在 Askin v. Absa Bank (The Times, 23 February 1999)先例，Tuckey 大法官说到证据要针对要点：“*... applications of this kind evidence should be focused on the essential points. As was accepted in argument before us the court is concerned with the big picture, not a multitude of issues of detail.*”

（二）申请或抗拒法院命令的目的与要求法院做什么必须要清楚明了。

（三）所有的事实证据都是要按照时间表排列。

（四）最重要的是必须保证证人证言中声称的事实或任何的承认（admission）与立场正确与一致。这些文件会将来会被对方用来反击，如在证人证言中承认了责任，对方随机就会向法院申请一个对他造成损失的中间支付令（interim payments）：见 CPR Rule 25.7 与 Revenue & Customs Commissioners v. GKN Group (2012) EWCA Civ 57 等先例。而如果在证人证言声称的事实或立场与后来的开庭审理的说法产生矛盾，就免不了被对方利用来丑化证人或质疑为何出尔反尔。

（五）不要在誓章或证人证言节录律师意见，这会导致对法律业务特免权（Legal Professional Privilege）弃权[65]。节录的内容越多，弃权危险就越大。当然总是会有例外的情况，例如在抗拒一个简易判决的申请时，被告就会需要在证人证言中写明他的律师告知他在最后开庭审理时会有一个很好与强而有力的抗辩。

（六）附件必须与证人证言的内容有直接的关系，而且必须清楚明了。

[65] 可见本章之 5.5.1 段。

7. 按合约关系/条文有权要求披露

这种做法的道理是很容易理解，如果在一份合约明示说明甲方有权要求乙方披露一些特定文件并允许甲方查阅，乙方就没有任何理由拒绝。毕竟，合约承诺的履行是严格或绝对责任。所以如果乙方拒绝或是延误披露以供查阅，甲方就可以马上以违约（breach of contract）为由向法院（或如果合约有仲裁条文的话就向仲裁庭）申请救济。由于这种违约是不能以金钱赔偿（损失无法或很难计算）作为补救，所以法院或仲裁庭一般都很愿意去作出履约指令（Specific Performance Order），命令违约的乙方马上披露或允许甲方查阅在合约中规定的文件。

在本章之 1.2 段提到海上保险有历史悠久的提前披露做法，在早期无法让保险人去外国调查意外事故与损失程度等的困境下，英国法院的这种做法是很有道理。但随着时代发展，这种困难已经不再存在。现在保险人在收到受保人发生意外事故的通知后，很容易马上通过各种渠道进行调查取证。这一来早期法院命令受保人（船东或货主）提前披露大量文件以供查阅后，保险人才需要递交抗辩书，而期间船东或货方的索赔请求就要暂时中止（stay）的做法，由于披露与保险人的查阅会需要很长的时间，就会对受保人的船东或货方带来压迫（oppressive）与不公平，因为蒙受损失的受保人需要尽快获得理赔。所以后来就有先例对这种做法作出批评，例如在 Leon v. Casey (1932) 2 KB 576 先例中，Greer 大法官说：

"The order for ship's papers was invented at a time when it was necessary in order to do justice to the case of the insurer: it has now become an unfair and unjust weapon in the hands of the insurer."

另是法院是否作出这种提前披露的命令是法院的裁量权（discretion），而可以想得到的是随着时代发展，法院会逐渐倾向于不行使这个裁量权。这一来，对保险人来说就有了很大的不肯定性。而现实是在收到作为受保人的船东的事故通知前，保险人是根本不会知道发生有关的意外事故，所以如果没有提前披露，保险人面对受保人的索赔请求就很难抗辩。已经在本章之 4.2 段提到过在今天的 CPR 下，保险人不能只在抗辩中对受保人提出的索赔与指控一概或纯否认（bare denial）以拖延时间，加上在文书请求结束后很快法院就要开一个案件管理会议（Case Management Conference），作为被告的保险公司的代理律师需要了解情况才可以有效地参加这个会议。这都表示在保险人需要作出抗辩之前，保险人必须通过其他渠道获得提前披露。所以，现在的做法就是保险人在保险合约/保单上加上一条明示条文，要求受保人船东遇上意外事故必须马上通知保险人与协助取证/提供证据，让保险人可以考虑是赔付或是抗辩，而如果抗辩以什么理由抗辩（如船舶不适航或意外事故并非由承保风险所引起等等的法律上站得住脚的原因，这都需要事实证据支持）等。

在《International Hull Clauses》（01/11/03）标准格式中关于对意外事故的赔付部分有一条名为"Duties of the Assured"的非常全面的条文，可节录如下：

"45.1 The Assured shall, upon request and at their own expense, provide the Leading Underwriter(s) with all relevant documents and information that they might reasonably require to consider any claim.

45.2 Upon reasonable request, the Assured shall also assist the Leading Underwriter(s) or their authorised agents in the investigation of any claim, including, but not limited to

45.2.1 interview(s) of any employee, ex-employee or agent of the Assured

45.2.2 interview(s) of any third party whom the Leading Underwriter(s) consider may knowledge of matters relevant to the claim

45.2.3 survey(s) of the subject-matter insured

45.2.4 inspection(s) of the classification records of the vessel.

45.3 It shall be a condition precedent to the liability of the Underwriters that the Assured shall not at any stage prior to the commencement of legal proceedings knowingly or recklessly

45.3.1 mislead or attempt to mislead the Underwriters in the proper consideration of a claim or the settlement thereof by relying on any evidence which is false.

45.3.2 conceal any circumstance or matter from the Underwriters material to the proper consideration of a claim or a defence to such a claim.

45.4 Clause 45.3 does not require the Assured at any stage to disclose to the Underwriters any document or matter which under English law is protected from disclosure by legal advice privilege or by litigation privilege."

在 Yasuda Fire v. Orion (1995) 1 Lloyd's Rep 525 先例，涉及的并非保险合约而是海上保险与航空保险代理合约（agency agreement）。合约中有一条文要求被告（作为原告代理人）详细记载与保留所有承保事项/风险的有关文件与来往账目，并供原告在给予合理通知后随时检查：

"4.2 ORION will maintain or arrange to be maintained all necessary books accounts records and other usual documentation appertaining to the marine insurance business transacted by it under the terms hereof. All such books accounts records and other usual documentation shall be the property of ORION and the duly authorized representatives of YASUDA (EUROPE) including its accountants shall be entitled to inspect the same at any reasonable time following a written request so to do and to make extracts and copies of any entries therein relating to the underwriting conducted hereunder on behalf of YASUDA (EUROPE)."

之后双方产生争议，被告 Orion 声称原告 Yasuda Fire 违约/毁约（repudiation）而被告接受了违约/毁约。于是原告要求在 4.2 条文下检查文件但被被告拒绝，被告的理由是双方的合约已经终止，所以被告不再有履行 4.2 条文的责任。这导致原告向英国法院申请宣示判决，下令被告允许原告检查/查账并随意复印文件。Colman 大法官支持了原告的申请并作出了允许查阅的宣告。

在航运被广泛使用的期租合约（time charter-party）标准格式 NYPE 2013 的 Clause 15 规定：

"… the Master shall keep full and correct deck and engine logs of the voyage or voyages, which are to be patent to the Charterers or their agents, and furnish the Charterers, their agents or supercargo, when required, with a true copy of such deck and engine logs, showing the course of the Vessel, distance run and the consumption of bunkers. Any log extracts required by the Charterers shall be in the English language."

因此，如果承租人（charterer）希望提前获得有关船舶航行记录的文件（特别是在一些涉及货损货差或是航程延误的索赔的案件），可以要求船东披露航行日志与轮机日志（包括了最全面的数据与信息），以查看是否可能存在不适航、速度不符合规定或不合理绕航等问题让承租人可以提起索赔，或反过来在船东要求补偿货损货差的损失或声称错误扣减运费时作出抗辩。因为租约有明示规定，所以无需区分是诉前披露或是审前披露。笔者作为海事仲裁员见过很多租约争议中承租人在作出抗辩前要求检查船舶日志，如果船东不配合尽快提供，仲裁庭也会作出履约指令或有类似效果的宣示（declaration）。

另一个例子是许可人（Licensor）与被许可人（Licensee）之间的许可协议常常包括一条允许许可人检查被许可人的账簿与记录的条文，如：

"The (name of Licensee) shall keep and maintain in accordance with sound accounting practices true and complete and accurate books of account and records of its [transactions and businesses] and its receipts. The [name of Licensor] shall be entitled at its own expense to inspect, examine and make copies of such books and records. Such inspection shall be made at the offices of the {Licensee} during office hours by the [Licensor] itself and/or a qualified accountant and/or an authorized representative of the [Licensor]. 15 (fifteen) day's written notice is required by the [Licensor] to the [Licensee] and shall occur not more than once in any period of 12 (twelve) months during the term of this Agreement."

总结以上所讲，履行时一方蒙在鼓里而另一方可"只手遮天"的合约关系会倾向于在合约中加上一条这种条文，以在一定程度上保障蒙在鼓里的一方，让他可以提前取得证据与了解事实以决定是否开始诉讼或是否作出抗辩。