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MOT Promulgates the Letter on Seeking Comments for the Freight Record Filing for the Container Liners Operating across the Taiwan Straits

10 月 9 日，交通运输部发布《关于台湾海峡两岸间集装箱班轮运价备案实施的公告（征求意见稿)》，现征求业内意见，截止日期是 10 月 16 日。

根据意见稿，两岸集装箱班轮运价属于市场调节价，由集装箱班轮经营者自主制定。但是，班轮经营者应遵循依法经营、诚实守信的原则，根据运输经营成本和航运市场供求状况，以正常、合理的运价提供运输服务。运价包括海运费和附加费(含码头操作费)，其中，海运费不得为零或负值；以包干运价计收的，包干运价扣除正常、合理收取的附加费不得为零或负值；班轮经营者不得变相降低附加费，也不得在会计账簿之外暗中给予托运人回扣承揽货物。

The Ministry of Transport ("MOT") promulgated the Announcement on the Freight Record Filing for the Container Liners Operating across the Taiwan Straits (Draft for Comments). The MOT is seeking comments within the industry, and the closing date is on October 16.

According to the Draft for Comments, the freight of container liners operating across the Taiwan Straits is regulated by the market price in nature, and shall be determined at the sole discretion of container liner operators, provided that the liner operators shall provide transport services at a normal and reasonable freight rates 阿 are according to the law and in good faith, and in line with the transport operation costs as well as the supply and demand of the shipping market.

财政部国税总局发布《关于免征部分鲜活肉蛋产品流通环节增值税政策的通知》

MOF and SAT Promulgate the Circular on the Policy of Exempting Value-added Tax on Certain Fresh Meat and Egg Products during Circulation

9 月 27 日，财政部、国家税务总局发布《关于免征部分鲜活肉蛋产品流通环节增值税政策的通知》(《通知》)，决定自 2012 年 10 月 1 日起，对从事农产品批发、零售的纳税人销售的部分鲜活肉蛋产品免征增值税。

《通知》规定，免征的鲜活肉产品，是指猪、牛、羊、鸡、鸭、鹅及其整块或者分割的鲜肉、冷藏或者冷冻肉，内脏、头、尾、骨、蹄、翅、爪等组织。

On September 27, the Ministry of Finance ("MOF") and the State Administration of Taxation ("SAT") jointly promulgated the Circular on the Policy of Exempting Value-added Tax on Certain Fresh Meat and Egg Products during Circulation (the "Circular"), to exempt the value-added tax on certain fresh meat and egg products sold by the taxpayers engaging in the retail or wholesale of agricultural products as of October 1, 2012.

国家税务总局贯彻落实《国务院办公厅关于促进外贸稳定增长的若干意见》

SAT Implements the Several Opinions of the General Office of the State Council on Promoting the Steady Growth in Foreign Trade

9 月 17 日，国税总局发布了《国家税务总局关于贯彻落实<国务院办公厅关于促进外贸稳定增长的若干意见>的通知》(《通知》)。

《通知》要求各地市国税局要进一步提高工作效率，加快出口退税进度，认真落实好近期发布的各项出口退税政策和管理规定。

The State Administration of Taxation promulgated the Circular of the SAT on the

Implementation of the Several Opinions of the General Office of the State Council on Promoting the Steady Growth in Foreign Trade (the "Circular").

The Circular requires all the prefectural state taxation bureaus to improve their working efficiency, accelerate the progress of export tax refunds and carefully implement all the policies and regulations that are recently promulgated with regard to the export tax refunds.

财政部国家发改委联合发布《关于取消和免收进出口环节有关行政事业性收费的通知》

MOF and NDRC Jointly Promulgate the Circular on the Cancellation and Exemption of Administrative Fees Related to Import and Export

9 月 18 日，财政部、国家发展改革委联合发布《关于取消和免收进出口环节有关行政事业性收费的通知》(《通知》)。

《通知》自 2012 年 10 月 1 日起，取消海关监管手续费。自 2012 年 10 月 1 日起至 2012 年 12 月 31 日，对所有出入境货物、运输工具、集装箱及其他法定检验检疫物免收出入境检验检疫费(不包括对出入境人员预防接种和体检收取的费用，以及企事业单位承担与出入境检验检疫有关的商业性自愿委托检测和鉴定、出入境检疫处理、动物免疫接种工作收取的费用)。

According to the Circular, the customs supervision processing fee will be exempted from October 1, 2012. The entry-exit inspection and quarantine fees charged on all the merchandise, transport vehicles and containers upon entry and exit and other objects subject to statutory inspection and quarantine (excluding the expenses charged for the vaccination and physical examination for entry-exit officers, as well as the expenses borne by enterprises and public institutions and charged for voluntary and commercial entrustment of inspection, test, entry-exit inspection and

quarantine treatment, and animal vaccination) will be exempted from October 1, 2012 to December 31, 2012.

广东省国家税务局发布《关于广东省开展交通运输业和部分现代服务业营业税改征增值税试点的公告》

Guangdong Provincial Office of SAT Promulgates the Announcement on Launching the Pilot Collection of Value Added Tax in lieu of Business Tax in Transportation and Certain Areas of Modern Services Industries

9 月 18 日，广东省国家税务局发布了《关于广东省开展交通运输业和部分现代服务业营业税改征增值税试点的公告》(《公告》)。

《公告》称，从 2012 年 11 月 1 日（税款所属时期）起，我省从事交通运输业和部分现代服务业的单位和个人，应当按规定缴纳增值税，不再缴纳营业税。

应税服务范围具体包括：交通运输业陆路运输服务、水路运输服务、航空运输服务、管道运输服务)、研发和技术服务、信息技术服务、文化创意服务、物流辅助服务、有形动产租赁服务、鉴证咨询服务。

The Announcement states that organizations and individuals engaging in transportation and certain areas of modern services industries in Guangdong province shall pay the value-added tax (VAT) instead of the business tax from November 1, 2012 (period in which taxable services are provided).

The scope of taxable services include land transportation services, water transportation services, air transportation services and pipeline transportation services of the transportation industry, R&D and technical services, information technology services, cultural creativity services, logistics and auxiliary services, tangible personal property leasing services and visa consulting services.

交通运输部发布《交通运输部关于进一步加强船舶管理市场管理的通知》

MOT Promulgates the Circular on Further Strengthening the Administration on Ship Management Market

9 月 18 日，交通运输部发布《交通运输部关于进一步加强船舶管理市场管理的通知》(《通知》)。

《通知》要求，加强船舶管理公司监管，规范经营行为。对从事船员劳务外派业务的国际船舶管理公司，须取得海事管理机构核发的船员劳务外派经营资格证书。对未取得我国海事管理机构认或其认可的组织机构颁发的《符合证明》文件的国际船舶管理公司，交通运输（港航）管理部门和海事管理机构要按照规定继续对其进行整改。

The Circular requires strengthening the supervision over ship management companies to regulate their operations. International ship management companies engaging in sailor labor dispatch services shall obtain the business qualification certificates of sailor labor dispatch services issued by maritime management organizations. For the international ship management companies which fail to obtain the qualification documents issued by the maritime management organizations of China or their recognized organizations, transport administrative authorities (port and shipping bureaus) and maritime administrative authorities shall proceed to order them to rectify in accordance with the provisions.

海关总署公告内地粮食出口商办理退税相关事宜

GAC Announces the Matters relating to Tax Refund by Domestic Grain Exporters

10 月 10 日，海关总署发布 2012 年第 46 号公告，明确出口至台湾地区自用的非配额管理原粮及制粉办理退税或退还保证金的相关事宜。

内地粮食出口商应在 2012 年 12 月 31 日前通过台湾进口商向台湾相关业务主管部门申请出具进口粮食及缴税证明，并于 2013 年 6 月 1 日前向出口地海关提出退税（保）申请。

The domestic grain exporters shall file applications with the relevant business administration authorities of Taiwan for the issuance of imported grain and tax payment certificates through the importers in Taiwan on or before December 31, 2012 and shall file the applications for tax (deposits) refund with the local customs on or before June 1, 2013.

财政部等三部门发布《关于营业税改征增值税试点有关预算管理问题的通知》

Three Departments including MOF Promulgate the Circular on Budget Management Issues Concerning the Pilot Collection of Value-Added Tax in Lieu of Business Tax

8 月 17 日，财政部、中国人民银行、国家税务总局联合发布了《关于营业税改征增值税试点有关预算管理问题的通知》(《通知》)。

《通知》明确，关于改征增值税的收入划分。试点期间收入归属保持不变，原归属试点地区的营业税收入，改征增值税后仍全部归属试点地区，改征增值税税款滞纳金、罚款收入也全部归属试点地区。改征增值税收入不计入中央对试点地区增值税和消费税税收返还基数。因营业税改征增值税试点发生的财政收入变化，由中央和试点地区按照现行财政体制相关规定分享或分担。

The Circular clarifies the classification of the value-added tax ("VAT") revenue collected in lieu of business tax. The ownership of revenue after the switch of VAT collection remains unchanged during the pilot period. All the business tax revenue originally directed to a pilot region still belongs to the pilot region after the switch of VAT collection, and all the revenue from late VAT payment penalties and fines after the switch of VAT collection also belongs to the pilot region. The VAT revenue after the switch of VAT collection is not included in the base whereupon the central government refunds value-added tax and consumption tax to the pilot region. Financial revenue variation arising from the pilot program of collecting VAT in lieu of business tax shall be shared by both the central government and the pilot region in accordance with the relevant provisions of the existing fiscal system.

实时资讯 REAL-TIME INFORMATION

政府部门改革货物贸易外汇管理制度

Governments Reformed Foreign Exchange Administration System for Trade in Goods

自 2012 年 8 月 1 日起，国家外汇管理局、海关总署和国家税务总局决定在全国实施货物贸易外汇管理制度改革。

根据国家外汇局 6 月 27 日发布的《国家外汇管理局关于印发货物贸易外汇管理法规有关问题的通知》（《通知》），为此，国家外汇管理局制定了《货物贸易外汇管理指引》、《货物贸易外汇管理指引实施细则》、《货物贸易外汇管理指引操作规程（银行企业版）》、《货物贸易外汇收支信息申报管理规定》（以下统称货物贸易外汇管理法规）。

Beginning on August 1 2012, the reform on foreign exchange administration system for trade in goods will be carried out in the whole nation by the State Administration of Foreign Exchange (SAFE), the General Administration of Customs (GAC)and the State Administration of Taxation (SAT).

GAC and SAT, the SAFE has enacted the Guidelines on Foreign Exchange Administration for Trade in Goods, the Implementing Rules of the Guidelines on Foreign Exchange Administration for Trade in Goods, the Operation Rules of the Guidelines on Foreign Exchange Administration for Trade in Goods (for Banking Enterprises) and the Provisions on Information Declaration Administration for the Payment and Revenue of Foreign Exchange for Trade in Goods.

国家税务总局发布《关于规范税务行政裁量权工作的指导意见》

SAT Issues the Guiding Opinions on Regulating the Administrative Discretion of Taxation Authorities

7 月 3 日，国税总局发布了《国家税务总局关于规范税务行政裁量权工作的指导意见 》(《意见》)。

《意见》规定因国家利益、公共利益或者其他法定事由需要撤销或者变更税务决定的，应当依照法定权限和程序进行，对纳税人因此而受到的财产损失依法予以补偿。《意见》明确了规范税务行政裁量权的基本要求，规定税务机关行使行政裁量权应当依照法定权力、条件、范围、幅度和程序进行。

The Opinions provide that if it is necessary to revoke or alter any administrative decision due to consideration of State interests, public interests or any other legally allowable reasons, statutory provisions on the authorization and procedure of such revocation or alteration must be followed, and property loss of taxpayers incurred therefrom should be properly compensated.

The Opinions also clarify fundamental requirements in connection with standardizing taxation administrative discretion, specifying that the taxation authorities shall exercise their administrative discretion according to their legal power and the conditions, scope, extent and procedure of such discretion.

国家发改委对境外投资和外商投资项目核准管理办法征求意见

NDRC Seeks Public Comments on Measures for the Examination and Approval of Overseas Investment and Foreign Investment Projects

国家发展改革委利用外资和境外投资司发布了《境外投资项目核准暂行管理

办法》(征求意见稿)和《外商投资项目核准暂行管理办法》(征求意见稿)，公开征求意见，意见反馈截止日期为 2012 年 9 月 15 日。

外商投资方面，按照《外商投资产业指导目录》分类，总投资 3 亿美元及以上的鼓励类、允许类项目和总投资 5000 万美元及以上的限制类项目，由国家发改委核准项目申请报告。外国投资者并购境内企业项目涉及国家安全的，应当按照国家有关规定进行安全审查。

办法强调，未经核准的外商投资项目，行业管理、国土资源、城乡规划、质量监管、安全生产监管、工商、海关、税务、外汇管理等部门不得办理相关手续。

The Department of Foreign Capital Utilization and Overseas Investment of the National Development and Reform Commission ("NDRC") promulgated the Interim Measures for the Administration of the Examination and Approval of Overseas Investment Projects (Draft for Comments) and the Interim Measures for the Administration of the Examination and Approval of Foreign Investment Projects (Draft for Comments) to seek public comments, and the closing date is on September 15, 2012.

In respect of foreign investment, for an encouraged or permitted project whose total investment amounts to USD300 million or more, or a restricted project whose total investment amounts to USD50 million or more based on the Catalogue for the Guidance of Foreign Investment Industries, the project application report shall be examined and approved by the NDRC. In the event that a project of acquiring domestic enterprise by a foreign investor involves national security, security examination shall be carried out in accordance with the relevant national provisions.

世界上最大的矿砂船首次在菲律宾靠港

The biggest ore carrier of the world arrived on shore in the Philippines for the first time

2012 年 10 月 19 日，一艘名为 Vale Minas Gerais 的 Valemax 型船首次靠泊在位于菲律宾棉兰老岛的维拉努埃瓦港。这艘世界上最大的铁矿石专用运输船可一次运载重达 40 万吨的铁矿石，且运送每吨铁矿石可减少 35%的碳排放量。四月末，该船在巴西马拉尼昂州的马德拉港装货。

这是 Vale Minas Gerais 的首次航行，该船是目前船只数量达到 18 艘的 Valemax 船队的一员。Valemax 是淡水河谷缩短巴西-亚洲（世界上主要的铁矿石消费市场）经济距离战略的一部分。这种超大型矿砂船达到各项安全标准，为降低铁矿石长途运输所产生的碳足迹做出了贡献，同时也为钢厂节省了铁矿石的海运费用。

淡水河谷铁矿石部与战略执行董事马定思称，Valemax 带来了规模优势与效率优势，而 JFE 将是从中受益的众多钢厂中最大的一家。目前为止，伊尔瓦钢铁、蒂森克虏伯钢铁、德国 ROGESA 和新日铁均已接靠这种超大型矿砂船。

目前，Valemax 矿砂船正出入于包括维拉努埃瓦刚在内的 8 个港口。其它 7 个港口分别为巴西图巴朗港和马德拉港、意大利塔兰托港、荷兰鹿特丹港、阿曼苏哈尔港、日本大分港和淡水河谷在菲律宾苏比克湾的海上浮动转运站。2013 年底， 35 艘与 Vale Minas Gerais 相似的 Valemax 型船将全部可以运载淡水河谷的铁矿石——其中 19 艘为淡水河谷所有，16 艘由国际船东租赁给淡水河谷使用。

案例分析 CASE STUDY

伊朗伊斯兰共和国航运公司诉汽船互保协会（百慕大）有限公司油污损失和责任赔偿案

【要点提示】**Points to Note**

英国对伊朗的制裁法令及允许特定商业行为的批准证书对保赔协会油污损害赔偿责任的影响应结合合同条款、政府主管部门的态度予以确定，禁令和批准证书并不当然导致保险费的支付或保险责任赔偿变成非法行为。对于合法的保险合同，保险人应当依约承担赔偿责任。

The impacts of UK’s sanctions on Iran and approval certificate of specific business conduct to P&I Club’s oil pollution damage compensation should be determined by the terms of contract and government attitude; sanctions and approval certificate would not lead to the payment of premium and insurance compensation becoming illegal.

【案情】

2009 年 11 月 1 日，伊朗伊斯兰共和国航运公司（以下简称“伊朗航运”）所属“祖立克”轮（“ZOORIK”）在浙江舟山海域触礁，发生严重漏油事故，中国宁波海事法院审理了由此引起的海事赔偿责任限制、油污索赔等相关案件。该案同时引发“祖立克”轮船东伊朗航运在英国高等法院起诉该船的船舶保赔协会汽船互保协会（百慕大）有限公司（以下简称“汽船互保协会”），该案涉及到英国对伊朗的制裁法令对保赔协会油污损害赔偿责任的影响以及英国法下的合同受

挫等问题。具体案情如下：

多年以来伊朗航运一直是汽船互保协会的忠实会员，2009 年包括“祖立克”轮在内的伊朗航运所属船队的 28 艘船舶加入了汽船互保协会，保赔保险期间从 2009 年 2 月 20 日格林威治时间 12 点生效至 2010 年 2 月 20 日格林威治时间 12 点终止，保赔保险的责任范围包括由于入会船舶排放或泄漏油类或任何其他物质或存在这种威胁所引起的责任和损失，以及为防止入会船舶排放或泄漏油类或可能造成污染的任何物质的紧迫危险而合理地采取任何措施所产生的费用。

2008 年 11 月 21 日生效的《2001 年国际燃油污染损害民事责任公约》（以下简称“公约”） 规定船舶所有人应当对燃油污染损害承担赔偿责任。公约第 7 条强制保险或经济担保条款规定，当事国登记的总吨位大于 1000 吨的船舶的登记所有人，须进行保险或诸如银行或类似金融机构的担保等其他经济担保，以承担登记所有人的污染损害责任，船舶登记国的有关主管当局在确定前述强制保险或经济担保要求得以符合后，须向每艘船舶签发证书，证明按公约规定维持的保险或其它经济担保有效。该条第 10 款还规定了受害人的直接诉讼权，对根据公约产生的费用的任何索赔，可向登记所有人的责任保险人或提供经济担保的其他人直接提出。

2009 年 3 月 16 日，汽船互保协会为“祖立克”轮签发了蓝卡，证明“祖立克”轮已经取得符合公约要求的强制保险，蓝卡签发给了公约燃油海事和海岸警卫代理处。3 月 19 日，根据英国政府的授权，海事和海岸警卫代理处依据公约第 7 条为“祖立克”轮签发了保险证书，证明“祖立克”轮按公约规定维持的保险是有效的。

2009 年 10 月 8 日，根据 2008 年反恐法案授予的权力，英国财政部签发了第

SI 2009/2725 号对伊朗金融限制令 2009（以下简称“限制令”），该限制令于 2009 年 10 月 12 日生效，用以禁止金融领域人士与两家伊朗公司—伊朗航运和麦拉特银行之间进行交易和商业往来，同时英国财政部有权签发批准证书准许某些行为可以不受该限制令的约束。英国财政部为汽船互保协会签发了两张批准证书，准许该协会根据与伊朗航运之间订立的现行有效的合同在一定时期内继续为伊朗航运提供保险责任保障，其中第二张批准证书准许的保险责任到期日为 2009 年 10 月 30 日。10 月 30 日，英国财政部又为汽船互保协会与伊朗航运之间的保险安排签发了第三张批准证书，但是该批准证书的措辞与之前的批准证书不同，该第三张证书规定汽船互保协会可以根据签发给伊朗航运的蓝卡继续为伊朗航运提供保险责任保障，保险责任的期间从 2009 年 10 月 30 日起为期三个月或者一直到签发蓝卡的成员国主管机关解除了汽船互保协会的责任，以早发生者为准。

汽船互保协会认为英国财政部在 10 月 30 日签发的批准证书的措辞意味着其不再被允许为伊朗航运提供保险保障，于是在 10 月 30 日当天终止了对伊朗航运的保险责任，终止生效日期为 10 月 30 日 24 点。不巧的是，10 月 31 日，“祖立克”轮在中国浙江舟山海域发生触礁重大事故，燃油泄漏，船舶被推定全损，但汽船互保协会拒绝对伊朗航运因油污事故所导致的损失和对第三方的赔偿承担赔偿责任，理由是对第三张批准证书的正确解释应当是其不再被允许对伊朗航运提供保险保障，据此亦不再被允许对伊朗航运因油污事故而遭受第三方索赔导致的损失和责任进行赔偿，同时“祖立克”轮保赔保险合同由于受挫和/或事后的非法性而被终止；第三张批准证书的作用仅仅是汽船互保协会不得不满足发生在保险责任终止前的第三方索赔。伊朗航运反驳认为第三张批准证书的措辞非常清楚的表明根据公约所规定的义务有关油污损害事故所导致损失的保险赔偿责任

条款是合法的。

英国高等法院认为本案有两个争议焦点：一是根据对限制令和第三张批准证书的真实、合法解释，如果可以的话，汽船互保协会被允许继续为伊朗航运提供何种保险责任保障；二是限制令和第三张批准证书的作用是否能够导致保赔保险合同因受挫而终止。

【审判】

一、汽船互保协会被允许继续为伊朗航运提供何种保险责任保障

法院认为，对第三张批准证书的总体作用进行适当的解释，应当认为该批准证书允许汽船互保协会继续为伊朗航运提供与公约所要求必须进行强制保险的风险相关的保险责任保障，同时亦允许汽船互保协会满足因公约所要求必须进行强制保险的风险所引起的所有索赔，而不仅仅是满足第三方根据公约直接诉讼条款所提起的索赔。

1、第三张批准证书使用的措辞是汽船互保协会可以“继续”提供“保险责任”保障，此处的“继续”和“保险责任”是非常重要的表述。在 10 月 30 日前，英国财政部允许汽船互保协会对伊朗航运提供的保险责任范围涵盖了包括油污损失和责任在内的协会保险条款列明的 25 种风险，除了限制和伊朗航运有关的收付款行为外并没有其他限制。从第三张批准证书的措辞看，显然，财政部的意图仅仅是缩窄 10 月 30 日后可以被允许的行为或履行，在保险责任的性质和保险范围方面并没有任何根本性的改变，也没有说可以对某些风险不予赔偿。如果财政部的意图是仅仅允许汽船互保协会满足第三方根据公约直接诉讼条款所提起的索赔，其应当在批准证书中做出明确的表述，但事实是没有这种表述，因此汽船互保协会的说法不能成立。

2、关于蓝卡的性质和作用，汽船互保协会主张根据蓝卡确定的保险责任仅仅是指对第三方根据公约直接诉讼条款所提起的索赔给予保险责任保障，而并非指对伊朗航运提供保险责任保障，其理由是，第一，蓝卡签发给了海事和海岸警卫代理处而非船东；第二，代理处签发的保险凭证使第三方能够识别保险人进而直接对保险人提起诉讼，因此蓝卡的作用是识别保险人；第三，根据蓝卡确定的保险责任并不能够保障船东，也不是协会油污损失和责任条款下的保险，协会油污损失和责任条款不是指蓝卡，该条款提供的保险责任更为广泛，包括了燃油之外的其他物质泄漏所引起的损害，换句话说，给予伊朗航运的保险责任保障依据的是协会油污损失和责任条款而并非蓝卡；第四，船东应当根据保赔保险合同向汽船互保协会提出索赔，而不能根据公约或者蓝卡。对于汽船互保协会的上述观点，法院认为：首先，“根据蓝卡确定的保险责任”这一措辞表明允许的保险责任是符合公约第 7 条要求的，蓝卡是为了向公约的成员国证明具有满足公约第 7 条要求的有效保险，公约要求的保险责任包括采取防污染措施和恢复原状产生的费用，而不论该费用是船东承担还是第三方承担。事实上，在船东采取防污染措施的情况下，船东满足提供保险或其他财务担保这一义务的唯一途径是订立一个能够确保赔偿船东的协议。汽船互保协会认为 10 月 30 日的第三张证书不同于公约中关于采取预防措施、恢复原状等条款内容，而是在船东的权利和第三方的权利之间做了一个明显的区分，尽管第三张证书并没有如此明确的表述。汽船互保协会的这种观点显然是站不住脚的。其次，汽船互保协会似乎认为第三方有权依据蓝卡提出索赔，但事实上是公约成员国或代表公约成员国签发的保险证书才是第三方赖以索赔的依据。第三，不能将保险合同终止后发生的事件所产生的对第三方的责任视为与因成员国法律以及成员国所签发的保险证书而导致的潜在直

接责任相反的保险合同项下的责任，如果等同的话，其推论应当是公约第 7 条所规定的第三方直接诉讼的风险（汽船互保协会认为是第三张批准证书所允许的）不属于该条通常含义内的保险责任，继而可以认为：既然汽船互保协会被允许提供的是保险责任，第三方索赔的风险就应当不属于被允许的范围之内。另外，汽船互保协会还提出，第三张批准证书说的是“提供保险责任”，而并没有说“对伊朗航运提供保险责任”，也没有用“伊朗航运的损失”这种表述，这种用词上的差别表明 10 月 30 日前为伊朗航运提供保险责任保障，10 月 30 日后不再提供保险责任保障。法院认为，“提供保险责任”一词前面少了“对伊朗航运”或者“伊朗航运的损失”并没有什么实质影响，不能认为第三张批准证书中的“保险责任”一词超出了其通常含义。虽然很难对保险责任给出一个满意的定义，但是该词有其通常含义，即保险人对被保险人所承保的风险，就本案的伊朗航运而言，是指对被保险人的损失承担赔偿责任，无论这种损失是否来自与对第三方的责任或是对损害的赔偿。

3、通过审查汽船互保协会与英国财政部之间 10 月 30 日前的往来通讯可以看出，英国财政部并没有表明根据蓝卡确定的保险责任仅是指向因蓝卡所担保的油污损害责任而对协会主张直接诉讼权的人所给予的赔偿。

二、限制令和第三张批准证书的作用是否能够导致保赔保险合同因受挫而终止

法院认为，限制令和第三张批准证书不能够导致保赔保险合同因受挫而终止，理由如下：

1、适用合同受挫原则时应当考虑很多因素，包括订立合同签的因素和订立

合同后的因素。订立合同前的因素包括：合同的措辞、合同整体和上下文语境、当事人的知识、期望、假设和意图，尤其是双方当事人订合同时存在的共同的、客观的风险。同时，订立合同后的因素也需要考虑：意外事件的性质以及当事人对于新情势下合同将来履行的可能性所做的合理地的、客观的、可确定的计算。关于风险，RIX 勋爵说：风险的分配和承担不简单是明示或默示条款的问题，而是也需要依据“当事人的意图”这些难以定义的问题来确定，因此合同受挫原则的适用不是一件容易的事。情势发生了“根本不同”这一判断标准告诉我们合同受挫原则不能轻易适用，诸如费用、迟延或者复杂事件的出现并非是适用该原则的足够条件，正如同对最高权威的反复确认一样，本质上它没有告诉我们该原则是一种公平。RIX 勋爵认为公平之要求不应当被过度描述或者被用以赋予法院以广泛的赦免权，公平之要求应当被视为一个作为所有因素的基础并为该原则提供最终的基本原理的相关因素。

2、本案中可以考虑的各种因素包括：（A）当事人没有为限制令和 10 月 30 日批准证书这些发生的事件做好准备，2009 年 2 月当伊朗航运的船舶加入汽船互保协会时并没有考虑到在 2008 年反恐法案下可以对伊朗公司采取措施；（B）通过签发蓝卡，汽船互保协会没有放弃在三个月内终止合同的权利，签发蓝卡是为了使英国政府能够根据公约的要求签发保险证书，蓝卡不能证明保险人接受公约下对第三人的责任，蓝卡根本没有提到第三人，第三人不可能得到蓝卡，是成员国签发的保险证书而不是蓝卡应当随船携带；（C）没有什么表明合同由于限制令或在 2009 年 10 月 30 日前受挫，因为 2009 年 10 月 8 日限制令公布时，汽船互保协会被允许继续在现有生效合同下为伊朗航运提供保险责任保障，先是通过总的批准证书允许了七天，然后通过 10 月 19 日的临时批准证书允许到 10 月 30 日；

（D）10 月 30 日的批准证书允许汽船互保协会根据签发给伊朗航运的蓝卡继续为伊朗航运提供为期三个月的保险责任保障或者一直到签发蓝卡的成员国主管机关解除了汽船互保协会的责任，以早发生者为准。该批准证书并没有使汽船互保协会的义务出现根本不同以至于保险合同受挫—尽管有所缩窄，但汽船互保协会提供保险责任保障的义务没有任何变化。理由是，根据蓝卡提供保险责任保障这一义务的履行仍然是合法的，也就是说公约项下的相关责任没有任何改变。根据权威观点，在考虑适用合同受挫原则时，应当从合同整体进行考虑。本案中从整体看该合同是一个保险合同，其合同目的是在互保基础上为加入协会的船舶提供保险赔偿。虽然第三张批准证书允许的保险责任范围比 10 月 30 日前有所缩窄，但保险责任性质并没有什么不同，仍然是保险赔偿，

3、即使合同部分条款的履行被禁止，其他条款的履行义务仍然是合法的。限制令和批准证书没有使伊朗航运向汽船互保协会的付费行为变得非法，同理，汽船互保协会向伊朗航运进行保险赔偿支付也没有变得非法。而且，既然伊朗航运已经向汽船互保协会支付了保费且有关损失没有得到赔偿，那么根据仍然合法的保险责任，其损失就应当得到赔偿，履行保险合同的合法条款也是商业社会应有之义，因此没有理由让可以履行的保险合同合法条款失去效力。

（作者：王中华 田琨）

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Liability Delivery under Dutch Law and the CMR

The Stainalloy/ Tele Tegelen case

bySebastiaan H. Barten (Van SteenderenMainportLawyers B.V.)

The Stainalloy/Tele Tegelen case

It regularly occurs that a road carrier is unable to deliver the goods. This may be due to an actual impossibility to unload the goods or due to a rejection of the goods by the addressee. In these cases, the question comes up as of which moment the goods should be regarded as being delivered in the legal sense. In other words, when does the period of responsibility of the carrier for the goods under the contract of carriage come to an end?

Recently, the Supreme Court of the Netherlands handed down a judgment (Stainalloy/Tele Tegelen) in which this subject of "delivery was revisited and clarified. Although this judgment was rendered under Dutch national law (art. 8:1095 Dutch Civil Code), the judgment is also relevant for the concept of delivery under the CMR, as the Supreme Court in its judgment refers to its previous judgment of 24 March 1995 (S&S 1995, 74), in which the delivery concept of Article 17 (1) CMR was centered on. The Dutch national concept of delivery apparently does not differ from the concept under the CMR according to the Supreme Court.

Supreme Court decision of 24 March 1995 (NJ 1996/317)

In its judgment of 24 March 1995 the Supreme Court had already dealt with the concept of delivery under the CMR. The Supreme Court held in the Mars case that delivery as in Article 17(1) CMR does not necessarily require an actual handing over or unloading of the goods. According to the Supreme Court this would be unreasonable in cases in which the addressee is responsible for the unloading of the goods. In these cases, the moment of factual control is considered decisive. As of the moment the addressee obtains the actual control of the goods the goods are delivered and the period of responsibility ends. It is furthermore possible that the goods continue to be in possession of the carrier after delivery based on another contract than the contract of carriage.

Supreme Court decision 17 February 2012 (NJ 2012/289) - the facts

The shipper, Stainalloy, instructed Tele Tegelen, the carrier, to transport stainless steel pipes from Geleen, the Netherlands to Stainalloy's premises in Sliedrecht, the Netherlands. Two waybills were issued, as two trucks and trailers were used to transport the pipes to Sliedrecht.

The two trailers with pipes did arrive at their destination. The first trailer was unloaded, the goods were delivered and the waybill was accordingly signed by Stainalloy. The second,

however, has never been unloaded by the addressee. The addressee informed the driver that the total weight of the shipment at the second trailer was higher than had been agreed and that there was no space available for the steel pipes to be stored at the Stainalloy premises and therefore the truck could not be unloaded. Consequently, the driver of the second truck agreed to park the trailer outside the premises in the public road in order to unload the shipment at a later date. Stainalloy and the carrier agreed that Stainalloy would pay a daily compensation of EUR 85.- per day for the prolonged use of the trailer until the truck was actually unloaded. It never came that far, since the goods were stolen from where the truck was parked.

No copy of the consignment note had been signed by Stainalloy for the receipt of the goods of the second trailer.

Stainalloy asserted that it had not given any instructions to the carrier to park the trailer at the side in the public road and that therefore the goods had not been delivered and the period of responsibility of the carrier under the contract of carriage had never ended. The carrier asserted that by parking the trailer with the goods outside the premises, the goods were delivered and that the goods continued to be in possession of the carrier under a rental/use contract of the trailer, as the addressee had agreed to rent the trailer and paid a daily fee for the rent.

The District Court and the Court of Appeal

The District Court of Roermond considered the shipment of the second truck to be delivered. The court regarded the moment that the trailer had been parked at the roadside decisive.

The Court of Appeal Den Bosch however required Stainalloy to prove that the trailer was parked at the roadside without any instruction from the addressee. According to the Court of Appeal Stainalloy succeeded in proving this and the goods had accordingly not been delivered by parking the goods outside the premises of the addressee. The goods had not continued to be in the possession of the carrier under a different contract than the contract of carriage, despite the daily amount paid for the use of the truck.

The Supreme Court

In its decision handed down on 24 March 1995 the Supreme Court now makes it for the first time unequivocally clear that the concept of delivery for road transportation must be based on a “consensus between the addressee and the carrier, in the sense that the carrier surrenders control over the goods with the express or tacit approval of the addressee and also provides the opportunity for the addressee to take actual control over the goods.” FN1 It will entirely depend on the contract of carriage and the facts of the case whether the goods have been delivered.

By and large, this judgment seems to be in line with how the concept of delivery in the CMR is viewed outside the Netherlands. FN2

For the case at hand this meant that the judgment of the Court of Appeal was upheld. The steel pipes had not been delivered as the addressee succeeded in proving that no

instructions had been given to the carrier to park the trailer unguarded, outside the premises in the public road. Moreover, the second waybill had not been signed by the addressee, and the receipt of the goods had also not been confirmed by any other means.

Conclusion

This case law places a carrier into a difficult position every time the driver (and thus the carrier) is confronted with an addressee refusing to accept the goods or whenever it is impossible or impractical to unload the goods, as consensus about acceptance of the goods by the addressee seems to be a necessary requirement for delivery.

It will be challenging for a carrier to prove in court that an addressee has consented to accept delivery. This judgment therefore once again emphasizes that it is important for a carrier to require a signature on the consignment note or to require a different form of proof of receipt in order to be able to prove later that the goods were delivered. It can also be agreed in the contract of carriage, what a carrier is allowed to do with the goods should it prove impossible to immediately unload at destination. If all of this is impossible, the carrier should always request instructions from the shipper as provided for in article 14/15 CMR and act accordingly.

It is questionable whether the outcome of this case would have been different should the carrier have parked the trailer simply at the premises of the addressee. The carrier would still have needed some form of proof that the goods were parked at the premises of the addressee in such a way that the addressee willingly took control over the goods. In most Dutch case law in which a road carrier left the goods at the premises of the addressee, because of the impossibility or difficulty to unload, the carrier has been held liable under the contract of carriage for the loss or damage of these goods.

FN1 Free translation of par. 3.5 of the Supreme Court judgment.

FN2 See for instance Clarke, International Carriage of Goods by Road: CMR (London: Informa, 2009), page 102-105.

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联系我们

官方网站：www.dachenglaw.com

北京总部：北京市东直门南大街 3 号国华投资大厦 5、12、15 层

邮编：100007

联系人:文芑

电话：86-10-58137604

传真：86-10-58137788

邮箱:qi.wen@dachenglaw.com

Dacheng Law Offices

www.dachenglaw.com

Address: 5-12-15/F, Guohua Plaza, 3 Dongzhimennan Avenue, Dongcheng District, Beijing China

Postcode:100007

Contact: Vickie Wen

Tel : 86-10-58137604

Fax: 86-10-58137788

E-mail: qi.wen@dachenglaw.com