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新法速递 NEW LAWS AND REGULATIONS WATCH

财政部 国税总局颁布《关于对城市公交站场道路客运站场免征城镇土地使用税的通知》

MOF and SAT Promulgate the Circular on Exemption of the Tax on Using Urban Land for Urban Public Transportation Station Yards and Road Passenger Station Yards

3 月 20 日，财政部、国家税务总局颁布《关于对城市公交站场道路客运站场免征城镇土地使用税的通知》（财税〔2013〕20 号），执行期限为 2013 年 1 月 1 日至 2015 年 12 月 31 日。

《通知》规定，对城市公交站场、道路客运站场的运营用地，免征城镇土地使用税。

On March 20, the Ministry of Finance (MOF) and the State Administration of Taxation (SAT) issued the Circular on Exemption of the Tax on Using Urban Land for Urban Public Transportation Station Yards and Road Passenger Station Yards (Cai Shui [2013] No. 20) (the "Circular"), the implementation period of which shall be from January 1, 2013 to December 31, 2015.

The Circular provides that the land for operation of urban public transportation station yards and road passenger station yards is exempted from the tax on using urban land.

(Source: www.mof.gov.cn/)

国家邮政局发布《关于贯彻实施〈快递市场管理办法〉加强快递业务经营活动管理的通知》

SPB Promulgates the Circular on Implementing the "Administrative Measures for the Express Delivery Market" and Strengthening the Administration of Express Delivery Service Operations

近日，国家邮政局发布《关于贯彻实施〈快递市场管理办法〉加强快递业务经营活动管理的通知》（《通知》）。

《快递市场管理办法》已自 2013 年 3 月 1 日起施行。《通知》要求自 2013 年 3 月 1 日至 6 月 30 日，邮政管理部门要指导依法取得快递业务经营许可的企业，对照《快递业务经营许可证》所载明的业务范围和地域范围进行自查。凡违反《办法》规定，超越业务范围或地域范围经营快递业务的，要如实上报并及时整改；符合条件的，申请办理许可事项变更手续。2013 年 6 月 30 日后，邮政管理部门对仍然超越许可范围经营快递业务的企业，依法予以处罚。

Recently, the State Post Bureau ("SPB") promulgated the Circular on Implementing the Administrative Measures for the Express Delivery Market and Strengthening the Administration of Express Delivery Operations (the "Circular").

The Administrative Measures for the Express Delivery Market (the "Measures") became effective on March 1, 2013. According to the Circular, the postal administrative authorities shall guide the enterprises that have legally obtained business licenses for express delivery services to conduct self-inspection within the business scope and service boundaries as stated in their respective Business License for Express Delivery Services. Any enterprise that operates express delivery services beyond the business scope or service boundaries in violation of the Measures shall

report such fact to the authorities truthfully and make rectifications promptly; however, eligible enterprises may also apply to alter their licensing terms. After June 30, 2013, postal administrative authorities shall penalize enterprises that still operate express delivery services beyond the scope of their licenses.

(Source: <http://www.spb.gov.cn/>)

海关总署发布《关于海关执行国家发改委第 21 号令有关问题的公告》

GAC Promulgates the Announcement on Issues Concerning the Implementation by the Customs of the Order of the National Development and Reform Commission No. 21

2013 年 2 月 16 日，国家发展改革委第 21 号令公布了《产业结构调整指导目录（2011 年本）（修正）》，自 2013 年 5 月 1 日起施行。海关总署发布 2013 年第 18 号公告，明确海关执行中的有关问题。

《公告》明确，自 2013 年 5 月 1 日起，对属于《产业结构调整指导目录（2011 年本）（修正）》鼓励类范围的国内投资项目，在投资总额内进口的自用设备，除《国内投资项目不予免税的进口商品目录》和《进口不予免税的重大技术装备和产品目录》所列商品外，按照《国务院关于调整进口设备税收政策的通知》（国发〔1997〕37 号）、海关总署公告 2008 年第 103 号及其他相关规定免征关税，照章征收进口环节增值税。

On February 16, 2013, the Catalogue for Guiding the Adjustment of the Industrial Structure (Version 2011) (Amendment) was promulgated under the Order of the National Development and Reform Commission No. 21, effective as of May 1, 2013.

The General Administration of Customs (GAC) promulgated its Announcement No. 18 of 2013 (the "Announcement"), clarifying relevant issues in its implementation by the customs.

According to the Announcement, from May 1, 2013, with regard to domestic investment projects that fall within the scope of encouraged projects specified in the Catalogue for Guiding the Adjustment of the Industrial Structure (Version 2011) (Amendment), equipment imported for self-use that is within the project's total investment amount, excluding the commodities listed in the Catalogue of Non-Tax-Exempted Imported Commodities of Domestic Investment Projects and the Catalogue of Non-Duty-Free Major Technical Equipment and Products (Revised in 2012), is to be exempted from customs duties pursuant to the Circular of the State Council on the Adjustment to the Tax Policy for Imported Equipment (Guo Fa [1997] No. 37), the Announcement of the General Administration of Customs No. 103 of 2008 and other relevant provisions, and is to be levied import value-added tax in accordance with regulations.

(Source: www.customs.gov.cn)

交通运输部印发《公路建设项目施工招标投标管理办法》等 4 个文件征求意见

MOF Prints and Distributes the Draft for Comments for Four Documents Including the Administrative Measures for Bid Invitation and Bidding for the Construction of Highway Construction Projects

2013 年 3 月 29 日，交通运输部办公厅印发《公路建设项目施工招标投标管理办法》、《公路建设项目施工监理招标投标管理办法》、《公路建设项目勘察设计招标投标管理办法》、《经营性公路建设项目投资人招标投标管理规定》4 个文件

征求意见，截至日期是 2013 年 4 月 19 日。

On March 29, 2013, the Ministry of Transport (MOF) printed and distributed the draft for comments for four documents, namely, the Administrative Measures for Bid Invitation and Bidding for the Construction of Highway Construction Projects, the Administrative Measures for Bid Invitation and Bidding for Construction Supervision of Highway Construction Projects, the Administrative Measures for Bid Invitation and Bidding for Survey and Design of Highway Construction Projects, and the Administrative Provisions on Bid Invitation and Bidding for Investment in Profit-Making Highway Construction Projects, and is now requesting for public comments with a closing date on April 19, 2013.

(Source: www.moc.gov.cn)

国家外汇管理局修订《银行间外汇市场做市商指引》

SAFE Revises Guidelines for Inter-bank Foreign Exchange Market Makers

2013 年 4 月 12 日，国家外汇管理局发布修订后的《银行间外汇市场做市商指引》(《指引》)。

《指引》规定，2011 年 1 月 1 日以前经外汇局备案核准取得银行间外汇市场做市商资格的银行自动承继即期做市商资格。远期掉期做市商和综合做市商资格须另行申请。

On April 12, 2013, the State Administration of Foreign Exchange (SAFE) promulgated the revised Guidelines for Inter-bank Foreign Exchange Market Makers (the "Guidelines").

According to the Guidelines, any bank that has, upon filing a record at and obtaining the approval from a foreign exchange office, obtained the qualification of an inter-bank foreign exchange market maker before January 1, 2011 will automatically inherit the qualification of a spot market maker. Applications for the qualification of a forward swap market maker or general market maker shall be made separately.

(Source: www.safe.gov.cn)

国家质检总局发布《关于实施〈进出口乳品检验检疫监督管理办法〉有关要求的公告》

AQSIQ Promulgates Announcement on Implementing the Administrative Measures for the Inspection and Quarantine Supervision of Imported and Exported Dairy Products

国家质检总局 2013 年 1 月 24 日公布了《进出口乳品检验检疫监督管理办法》(《办法》), 将于 2013 年 5 月 1 日起实施。为进一步明确《办法》的相关内容, 保证《办法》顺利实施, 国家质检总局发布了《关于实施〈进出口乳品检验检疫监督管理办法〉有关要求的公告》(《公告》)。

根据《公告》, 国家质检总局对向中国出口乳品的境外食品生产企业实施注册制度。国家质检总局将公布境外乳品生产企业注册的相关规定, 并给予企业一定的过渡期以完成注册工作。在过渡期内, 未完成注册的境外乳品生产企业仍可以按《办法》要求继续向我国出口乳品。

On January 24, 2013, the General Administration of Quality Supervision, Inspection

and Quarantine (AQSIQ) promulgated the Administrative Measures for the Inspection and Quarantine Supervision of Imported and Exported Dairy Products (the "Measures"), effective as of May 1, 2013. In order to further clarify the relevant contents of the Measures, and guarantee the smooth implementation of the Measures, the AQSIQ promulgated the Announcement on Implementing the Administrative Measures for the Inspection and Quarantine Supervision of Imported and Exported Dairy Products (the "Announcement").

According to the Announcement, the AQSIQ shall implement a registration system on overseas food manufacturers that export dairy products to China. The AQSIQ will promulgate regulations on the registration of overseas manufacturers of dairy products and set a transition period for the manufacturers to complete their registrations. During the transition period, overseas manufacturers of dairy products that have not completed their registrations may continue to export dairy products to China in accordance with the requirements in the Measures.

(Source: www.aqsiq.gov.cn)

商务部发布《商品现货市场交易管理办法（试行）（征求意见稿）》

MOFCOM Promulgates the Administrative Measures for Commodity Spot Market Trading (for Trial Implementation) (Draft for Comments)

4 月 18 日,商务部发布《商品现货市场交易管理办法(试行)(征求意见稿)》,现公开征求意见,截止日期为 2013 年 5 月 17 日。

根据意见稿,商品现货市场交易对象既可以是实物商品,也包括以实物商品为标的的仓单、可转让提单等提货凭证,但不得开展法律法规禁止的交易活动。

意见稿同时明确,商品现货市场应当建立完善信息管理制度,公布交易商品

的名称、数量、质量、规格、产地等相关信息，保证信息的真实、准确，不得发布虚假信息。

On April 18, 2013, the Ministry of Commerce (MOFCOM) promulgated the Administrative Measures for Commodity Spot Market Trading (for Trial Implementation) (Draft for Comments), and is requesting for public comments, to be submitted by May 17, 2013.

According to the Draft, trading objects of the commodity spot market may be physical commodities or delivery documents such as warehouse receipts or negotiable bills of lading that contain the subject matter of a physical commodity. However, trading activities prohibited by law are not allowed.

The draft for comments also specify that the commodity spot market shall establish a sound information management system and publicize the names, quantities, quality, specifications, places of origin and other relevant information of traded commodities, ensure the authenticity and accuracy of the information, and shall not release false information.

(Source: www.mofcom.gov.cn)

海关总署发布公告《关于对海关总署令第 200 号有关条款适用事宜的解释》

GAC Issues Announcement on the Interpretations on Matters Concerning the Application of Relevant Provisions in the Order of the General Administration of Customs No.200

2013 年 4 月 19 日，海关总署发布《海关总署公告 2013 年第 22 号——关于

对海关总署令第 200 号有关条款适用事宜的解释》，就《海峡两岸经济合作框架协议》项下货物经过香港、澳门中转时，有关“第三方海关出具的证明文件”适用事宜解释如下：

货物经过香港、澳门中转时，第三方海关指香港、澳门海关，有关证明文件指香港、澳门海关签发的《香港海关确认书》、《澳门海关确认书》。

On April 19, 2013, the General Administration of Customs ("GAC") issued the Interpretations on Matters Concerning the Application of Relevant Provisions in the Order of the General Administration of Customs No.200 (Announcement of the General Administration of Customs [2013] No.22) to interpret matters concerning the application of "certification documents issued by third-party customs" for cargos transited from Hong Kong or Macau under the Cross-strait Economic Cooperation Framework Agreement:

When the cargos are transited from Hong Kong or Macau, third-party customs refers to the customs of Hong Kong or Macau, and the relevant certification documents refer to the Hong Kong Customs Confirmation Letter or the Macau Customs Confirmation Letter respectively issued by the Hong Kong customs or Macau customs.

(Source: www.customs.gov.cn)

实时资讯 REAL-TIME INFORMATION

国家税务总局印发《2013 年税务系统执法监察和效能监察工作要点》

SAT Prints and Distributes Key Points for the Enforcement Supervisory and Efficiency Supervisory Work within the Tax System for 2013

2013 年 4 月 1 日，国家税务总局印发《2013 年税务系统执法监察和效能监察工作要点》（《工作要点》），要求围绕中央及总局党组重大决策部署在税务系统执行情况进行监督检查。

《工作要点》指出，2013 年 12 月 15 日前，各单位将 2013 年度执法监察和效能监察工作报告及《2013 年税务执法监察情况统计表》通过税务纪检监察管理信息系统报表管理模块上报驻税务总局监察局（监督检查室）。

On April 1, 2013, the State Administration of Taxation (SAT) printed and distributed the Key Points for the Enforcement Supervisory and Efficiency Supervisory Work within the Tax System for 2013 (the "Key Points"), requiring supervision and inspection of the implementation of important decisions and arrangements of the Central Committee of the Communist Party of China and the Leading Party Group of the State Administration of Taxation in the tax system.

According to the Key Points, all entities shall submit the work report on enforcement supervision and efficiency supervision in 2013 and the Statistics Table of Tax Enforcement Supervision in 2013 to the Supervision Bureau of the SAT (Discipline Inspection and Supervision Division) via the report management mould of the management information system for tax discipline inspection and supervision by December 15, 2013.

(Source: www.sat.gov.cn)

国务院常务会议决定进一步扩大营业税改征增值税试点

State Council Decides to Further Expand Scope of Pilot Collection of Value-Added Tax in lieu of Business Tax

国务院总理李克强 10 日主持召开国务院常务会议，决定进一步扩大营业税改征增值税试点，并逐步在全国推行，这有利于解决因局部地区试点导致的政策差异和税收征管风险等问题。

(一) 扩大地区试点，自今年 8 月 1 日起，将交通运输业和部分现代服务业“营改增”试点在全国范围内推开，适当扩大部分现代服务业范围，将广播影视作品的制作、播映、发行等纳入试点。据测算，全部试点地区 2013 年企业将减轻负担约 1200 亿元。

(二) 扩大行业试点，择机将铁路运输和邮电通信等行业纳入“营改增”试点。力争“十二五”期间全面完成“营改增”改革。

The State Council, in an executive meeting convened by the premier of the State Council, Li Keqiang, on April 10, decided to further expand the scope of the pilot collection of value-added tax in lieu of business tax and gradually roll out the pilot project nationwide. This will help solve the problems resulting from local pilot implementations such as policy differences and risks in tax administration and levying.

(1) Expanding the geographical scope of the pilot project. From August 1, 2013, the pilot collection of value-added tax in lieu of business tax in the transportation industry and certain modern services industries will be rolled out nationwide, and the scope of the pilot project for certain modern services industries will be appropriately expanded

to include the production, broadcast, distribution, etc., of radio, film and television works. It is estimated that the tax burden of the enterprises in all pilot areas will reduce by approximately CNY120 billion in 2013.

(2) Expanding the scope of the pilot industries. Industries such as railway transportation and postal and tele-communications will be duly included in the pilot collection of value-added tax in lieu of business tax. The country will strive to complete the reform of the pilot collection of value-added tax in lieu of business tax within the 12th Five-Year Plan period.

(Source: www.gov.cn)

全球最大船级社合并案将于年内完成

The largest classification society merger will be completed in this year

---- DNV 联姻 GL

DNV combines with GL

4 月 18 日，德国劳氏船级社(以下简称 GL)新闻发布会，挪威船级社(以下简称 DNV)与 GL 的合并将于今年第三季度完成，届时新成立的 DNV GL Group 将成为一家超级船级社，全球有相当数量的船舶都将注册在这家船级社名下，业务涉及船舶、能源咨询等领域，在全球 100 多个国家拥有 1.7 万员工，预计年营运收入达 32 亿美元。

去年年底，DNV 与 GL 签署合并协议，对外宣布将进行合并重组，成立新公司 DNV GL Group，DNV 将拥有新公司 63.5%的股份，而 GL 的母公司 Mayfair 将拥有 36.5%的股份，挪威船级社的 CEO 汉瑞克将担任新公司 CEO，但其他人选任命至今尚未确定。

据统计, DNV 和 GL 的注册船舶吨位分别排名第四、第五, 前者有 2.16 亿载重吨, 后者有 1.37 亿载重吨。双方合计的注册船舶吨位将达到 3.53 亿吨, 入级船舶数量超过 12000 艘, 将远超现在注册船舶吨位排名第一、注册船舶吨位为 3.21 亿吨的日本船级社和入级船舶数量排名第一的法国船级社。

作为全球迄今为止最大的船级社合并案, DNV 与 GL 还在接受欧盟反垄断审查, 但据 GL 高层透露, 合并进展顺利, 今年第三季度就能整体完成合并, 届时 DNV GL Group 将注册成为一家总部设在奥斯陆的挪威公司, 而公司主要海事业务的负责部门将设在汉堡。

Germanischer Lloyd (GL) made a Press Conference on 18th April stated that, the combination of Det Norske Veritas (DNV) with GL will be accomplished in the third quarter of this year and then the new DNV GL Group will be established as a super classification society. There would be plenty of vessels are registered in the Group. The service covers shipping, energy consulting and so forth. They have offices in more than 100 countries with 17,000 staffs and, the annual income is expected to 3.2 billion US dollars.

Late last year, DNV and GL signed a merger agreement declared that they would merger and consolidation and a new DNV GL Group will be founded. DNV holds 63.5% shares of the new Group, Mayfair, the parent company of GL, holds 36.5%. Henrik Overgaard Madsen, the CEO of DNV, will be as the new Group's CEO.

According to statistics, the registered tonnage of DNV and GL are respectively ranked fourth and fifth with 216 million DWT and 137 million DWT. The total registered tonnage will be 353 million and quantity of classified ships are 12 thousands which will far more than ClassNK, the top one classification society of the registered tonnage, and Bureau Veritas, the top one quantity of classified ships at present.

案例分析 CASE STUDY

签单代理人对签发提单行为的民事责任

ICEBRIT LIMITED (埃斯布里特公司) 诉大连阿达尼国际船舶代理有限公司海上货物运输合同纠纷案

【提要】 Points to Note

如果代表承运人签发提单的代理人在签发提单过程中没有过错并已尽到合理谨慎义务, 则不应追究其因签发提单行为引起的民事赔偿责任。

In the event that the agent of the carrier has not committed any fault and has already acted with due diligence in respect of signing bills of lading, then the agent shall not be liable in any civil claim made against it arising out of or in connection with its signing of the bills of lading.

【案情】

2006 年 4 月 17 日, 俄罗斯渔业进出口有限公司与拉利马国际水产品公司(以下简称拉利马公司) 签订 AZ-0037 号买卖合同, 约定: 俄罗斯渔业进出口有限公司在 2006 年 4 月卖给拉利马公司 750 公吨新鲜冷冻太平洋鳕鱼, 价格条款 CFR 大连, 每净公吨 3 200 美元, 买方在收到正本提单复印件传真后, 以电汇方式向卖方支付全部价款的 90%。PACIFIC TRAMP LTD 系 2005 年 7 月 5 日在马绍尔群岛共和国注册成立的公司。2006 年 4 月 17 日, 该司向被告大连阿达尼国际船舶代理有限公司(以下简称阿达尼) 提出要求建立代理关系, 并于次日与被告阿达尼传真签订船舶代理协议, 约定被告阿达尼作为 PACIFIC TRAMP LTD 所有的柬埔寨籍冷藏运输船“PACIFIC TRAMP”轮在大连港卸载 750 公吨海产品的船

船代理。PACIFIC TRAMP LTD 向被告阿达尼传真了其营业执照、船舶临时登记证书、船舶吨位证书，吨位证书显示“PACIFIC TRAMP”轮总吨位 1 074 公吨、净吨位 458 公吨。

2006 年 4 月 20 日，拉利马公司与原告 ICEBRIT LIMITED(埃斯布里特公司)(以下简称 ICEBRIT)签订买卖合同，约定：拉利马公司销售给原告 ICEBRIT 俄罗斯堪察加水域东海岸捕捞的净重 748 448 公斤（总重 785 869 公斤）新鲜冷冻太平洋鳕鱼，每净重吨 3 260 美元，CFR 大连，预计到港时间为 2006 年 4 月 26 日至 27 日；原告 ICEBRIT 在收到正本运输单证的传真件后，以电汇方式向卖方支付全部价款的 90%，在支付第一笔货款之前，买方将直接自俄罗斯供应商在大连港的代理人处得到正本提单的复印件，表明合同约定数量的货物已经装船，并以原告 ICEBRIT 为收货人，卖方在收到第一笔电汇款项后，应尽快将正本提单送于收货通知人。2006 年 4 月 21 日，PACIFIC TRAMP LTD 传真通知被告阿达尼，称 2006 年 4 月 19 日签发的 06/01 号提单作废，指示被告阿达尼按 06/01 号提单的内容签发 06/02 号托运人为拉利马公司、收货人为原告 ICEBRIT、通知方为海世捷公司的记名提单，要求提单内容必须与 06/01 号提单相同，要有被告阿达尼的印章，并要求将正本提单的复印件传真给拉利马公司联系人。PACIFIC TRAMP LTD 将其签发的 06/01 号提单和配载图附传给被告。06/01 号提单传真件记载托运人为 EAST MARINE SEAFOOD CO., LTD，收货人凭指示，通知方大连天保绿色食品有限公司，承载船舶“PACIFIC TRAMP”轮，货物装船时间为 2006 年 4 月 15 日，货物为冷冻太平洋鳕鱼 46 778 袋，净重 748 448 公斤、毛重 785 870.4 公斤，提单签发日期为 2006 年 4 月 19 日。同日，拉利马公司致信被告阿达尼，称拉利马公司收到了从“Export-Import Fishing Company LTD”发来

的关于要求被告阿达尼提供载货为净重 748.448 吨太平洋鲑鱼的运输文件的通知, 请被告阿达尼将提单传真并以电子邮件发送到拉利马公司, 并强调在拉利马公司或原告 ICEBRIT 告知已支付了 90% 货款后, 被告阿达尼尽快将正本文件发给海世捷公司。被告阿达尼即回信拉利马公司, 声明其是船东 PACIFIC TRAMP LTD 的代理, 只能按船东的指示和书面通知的前提下采取行动, 并发送了注明其作为承运人的代理人签发的 06/02 号提单复印件。06/02 号提单记载的托运人为拉利马公司, 收货人为原告, 通知方为海世捷公司, 提单中货物的品名、质量和数量、签发日期、装船日期等内容与 06/01 号提单均相同。2006 年 4 月 25 日, 被告阿达尼将 06/02 号提单复印件发送给原告 ICEBRIT, 并告知船舶将于 2006 年 4 月 26 日抵达大连港。2006 年 4 月 28 日, 拉利马公司将商业发票、装箱单、原产地证书、卫生健康证书等文件交给了原告 ICEBRIT, 上述证书所记载的受载船舶、货物品名、数量等内容与提单复印件的记载完全相符。原告 ICEBRIT 通过海世捷公司确认了被告阿达尼执有 06/02 号正本提单。2006 年 4 月 29 日, 海世捷公司致信原告 ICEBRIT 和被告阿达尼, 表示其代表原告 ICEBRIT 迫切需要拉利马公司和船东对被告阿达尼释放正本提单的指示。2006 年 4 月 30 日, 被告阿达尼经 PACIFIC TRAMP LTD 指示, 将 06/02 号全套正本提单交给了海世捷公司, 海世捷公司将提单寄交原告 ICEBRIT。2006 年 5 月 4 日, PACIFIC TRAMP LTD 传真给被告阿达尼, 告知船舶预计到港时间为 2006 年 5 月 5 日, 此后再未从 PACIFIC TRAMP LTD 和船长处获得任何有关信息。原告 ICEBRIT 取得 06/02 号正本提单后, 因“PACIFIC TRAMP”轮一直未到大连港未能提取货物。

【争议】

原告 ICEBRIT 观点: 被告阿达尼在签发提单时, 既没有核实船东的真实身

份，也没有核实大副收据，更没有核实货物是否受载，便擅自签发了虚假提单，存在重大过错，其伪造提单的行为给原告造成了巨额经济损失，应当承担全部赔偿责任。请求大连海事法院判令被告阿达尼赔偿原告的货款损失 2 195 946.3 美元及利息。

被告阿达尼观点：被告阿达尼不是本案运输合同的主体，其法律地位应是承运人 PACIFIC TRAMP LTD 的代理人，原告 ICEBRIT 也清楚知道被告阿达尼的代理人身份。原告 ICEBRIT 要求被告阿达尼作为提单签发人承担货款损失没有事实和法律依据。根据《中华人民共和国海商法》和《中华人民共和国民事诉讼法通则》关于代理制度的法律规定，原告 ICEBRIT 只能向承运人主张权利，而不能向承运人的代理人主张，除非能够证明被告阿达尼作为代理人存在违法行为。被告在签提单已尽到了谨慎处理的义务。原告 ICEBRIT 的损失是承运人欺诈造成的，与被告阿达尼的行为没有必然的因果关系，其诉讼请求应予驳回。

【审判】

一审结果：

大连海事法院认为：原告 ICEBRIT 通过其卖方拉利马公司提供的装箱单、商业发票、原产地证书和卫生健康证书等文件可知其购买的货物受载于“PACIFIC TRAMP”轮。被告阿达尼在与海世捷、拉利马公司的往来函件中已表明其是船东在大连港的代理人。原告 ICEBRIT 通过海世捷公司可以识别承运人应为“PACIFIC TRAMP”轮船东 PACIFIC TRAMP LTD。在原告 ICEBRIT 不能证明被告阿达尼明知或应当知道船东欺诈或与船东有共同故意的情况下，被告阿达尼与船东 PACIFIC TRAMP LTD 之间的代理关系应为有效。被告阿达尼签发并给付 06/02 号提单的行为均是代理行为，其法律后果应由被代理人 PACIFIC

TRAMP LTD 承担。原告 ICEBRIT 认为被告阿达尼是提单签发人，应承担承运人责任的主张没有事实依据，不予支持。

被告阿达尼依据与船东的代理协议的约定按指示签发提单属于正常的船舶代理业务。原告 ICEBRIT 如果认为被告阿达尼在签发提单中有过错，或违反了《中华人民共和国海商法》第七十五条的规定，其应承担相应的举证责任。对于被告阿达尼而言，PACIFIC TRAMP LTD 提交的 06/01 号提单和配载图可以初步证明其已实际接收货物。如果被告阿达尼对货物是否装船仍应存有合理怀疑的话，在托运人拉利马公司及原告 ICEBRIT 通过其代理海世捷公司相继要求被告阿达尼出具正本提单的函件后，可以使被告阿达尼再没有必要和额外的理由去质疑货物是否装船。因为，对于海上货物运输而言，对货运状况最了解的托运人、收货人和承运人均向被告阿达尼做出了货物处于运输途中的相同表意。原告 ICEBRIT 在没有其他证据证明被告阿达尼有过错的情况下，认为被告阿达尼应当在确切审查货物是否存在并装船运输后再签发提单的主张，超出了处于本案实际情况下一个谨慎的船舶代理人应当尽到的合理谨慎义务范畴，不能认定被告阿达尼在本案中有过错。综上，依照《中华人民共和国海商法》第七十二条第二款，《中华人民共和国民事诉讼法》第一百零六条第二款，《中华人民共和国民事诉讼法》第六十四条第一款的规定，一审判决：驳回原告 ICEBRIT 对被告阿达尼的诉讼请求。

一审判决后，原告 ICEBRIT 向辽宁省高级人民法院提出上诉。上诉理由：1、06/02 号提单中没有承运人的信息；2、本案船舶代理协议不具有真实性，不能证明存在有效的代理关系；3、即使代理协议有效，被告阿达尼也没有披露承运人的真实信息；即使做出了披露，原告 ICEBRIT 亦有权选择被告阿达尼作为相对

人主张权利；4、被告阿达尼签发提单的行为没有经过船东的授权或追认，应承担相应的责任；5、被告阿达尼在签发提单时没有履行审查义务。

二审结果：

辽宁省高级人民法院认为：原告 ICEBRIT 没有证明其损失客观存在，其提交的支付 90% 货款的电汇凭证未能证明真实性，应承担举证不能的后果。海世捷公司的信函可以说明原告 ICEBRIT 明知船东另有其人且被告阿达尼为其代理人，原告 ICEBRIT 提出本案不存在代理关系的上诉理由不能成立。PACIFIC TRAMP LTD 是在马绍尔群岛共和国注册成立，公司合法存在。虽然代理协议为传真件，但在原告 ICEBRIT 明知被告阿达尼为承运人 PACIFIC TRAMP LTD 的代理人情况下，原告 ICEBRIT 没有相反的证据否定代理协议的真实性，其要求被告阿达尼承担签发虚假提单责任的上诉理由亦不能成立。因原告 ICEBRIT 未能证明货物损失存在，其要求获得赔偿的请求不能被支持。二审判决：驳回原告 ICEBRIT 的上诉，维持原判。

【评析】

一、被告阿达尼在本案中的身份

根据《中华人民共和国海商法》第七十二条的规定，应托运人的要求，提单可以由承运人或由承运人授权的人签发。本案对于被告阿达尼身份的确认涉及对承运人的识别和对代理关系的确认两方面。对于承运人的识别，虽然 06/02 号提单中没有直接以文字的形式体现出承运人是船东 PACIFIC TRAMP LTD，但原告 ICEBRIT 通过与拉利马公司的联系和文件交接、并经其代理人海世捷公司了解，可以证明原告 ICEBRIT 在签发提单前已经知道承运人为“PACIFIC TRAMP”轮船东，提单被要求在目的港签发。对于代理关系的确认，被告阿达尼早在签发提

单前就已经向托运人拉利马公司和海世捷公司表明了其是承运人在目的港的代理人，被要求在目的港代表承运人签发提单，对此原告 ICEBRIT 应当知悉。原告 ICEBRIT 签发提单前对代理关系的真实性没有提出异议，事后虽有异议，但未提供相应的证据否认代理协议的真实性，故应当确认被告阿达尼是经承运人授权的在目的港签发提单的代理人。

二、被告阿达尼在签发提单行为中是否有过错

在《中华人民共和国海商法》第七十五条的规定中，对于签发提单的要求体现在应“如实记载”，对于知道或有合理的根据怀疑记载的货物与实际不符，或者无法核对的可以做出批注。同时，提单的签发应当符合《中华人民共和国海商法》第七十二条规定的两个条件，一是经托运人要求、二是得到承运人的授权。本案的实际情况是，被告阿达尼仅是目的港的代理，在实务中对货物是否装船的审查更多应是承运人在装货地的义务，客观上要求目的港的代理人去必须了解货物在装货地的装船情况不切合实际。恰恰在本案托运人拉利马公司及收货人原告 ICEBRIT 未对货物实际装船提出质疑，并要求被告阿达尼出具正本提单的情况下，对于被告阿达尼而言，承运人提供给目的港代理人的提单、配载图足可使被告阿达尼相信货物已经如 06/01 号提单所记载的那样装船运输。另外，本案正本提单的签发完全符合应托运人要求，并得到承运人授权的条件，故被告阿达尼签发提单的行为没有任何过错。原告 ICEBRIT 在没有证明有被被告阿达尼知道或应当知道对提单记载事项存在合理怀疑根据的情况下，其称被告阿达尼未尽到合理谨慎义务的主张没有事实依据，不应得到法院的支持。

三、损失与签单行为之间的因果关系及责任

原告 ICEBRIT 虽称其货款损失是由于被告阿达尼签发了虚假提单，因相信

提单的效力付款造成的，估且不论其货款损失是否真实存在，以及是否存在贸易风险，究其根本原因应是承运人 PACIFIC TRAMP LTD 及货物的最初卖方有欺诈行为。被告阿达尼签发正本提单仅是原告 ICEBRIT 付款的条件，如果本案船货运输实际存在则不会导致所谓的货款损失。在被告阿达尼不存在过错或共同故意的情况下，其签单行为对所谓的货款损失不具有原因力，不应对其签单行为承担相应的赔偿责任。

来源：<http://www.ccmt.org.cn/shownews.php?id=12738>

资讯选编 INFORMATION SELECTION

Charterparties

by Paul Bugden (Bugden & Co Solicitors)

In our previous article we took a brief look at some of the fundamental commercial and economic distinctions between voyage, time and bareboat charterers and how these differences heavily impinge on the various legal aspects of the law relating to charterparties; especially that as to the critical issue of allocation risk as between owner and charterer.

We now turn to look in a little more detail at time and demise charterparties.

Demise charters

In a demise (bareboat) charter the charterer takes possession of the ship and any cargo carried therein and provides her master and crew and all stores. As such the ship is 'his' and he, and not the owner, is responsible for damage caused by the ship to third parties (e.g. other ships or port facilities) as well as damage to any of her cargo. The role of the owner is perforce extremely limited. Many such charters are in the form of the BIMCO BARECON 2001 form with appropriate amendments to suit the circumstances of the case.

In practice some demise charters are, in effect, finance arrangements of the lease/purchase (i.e. HP) type in which the charterer is, the borrower and the owner no more than a bank or other lender. Such arrangements often contemplate that the charterer will acquire the ship at the end of the lease by a final capital payment, or at least have the option to do so.

On other cases the owners may sometimes be a group of investors looking for a return on capital through operation of a ship without the risks of operating the ship or as a route by an owner to eventual outright disposal of the ship. Yet other forms of bareboat charter equate more to an ordinary commercial charter arrangement. The demise charter is often linked in either case to a ship management agreement between the same or related parties and may often also be associated with a new building or a sale and purchase transaction.

The charterer will invariably be responsible for routine repairs and maintenance but an important aspect of the terms of the charter may be the issue of who bears responsibility for the cost of more drastic structural changes, upgrading through new equipment and other improvements (as may be required by class, or otherwise thought desirable) from time to time necessary in the course of the charter and who may authorise such work.

Another critical provision of any demise charter is that as to in whose name or names, and at whose expense and by whom, hull, war and P&I insurances will be effected.

The necessary element of possession afforded to the charterer gives him the possibility of claiming relief against forfeiture in an appropriate case but on the whole the typical form of demise charter rarely in practice gives rise to many legal disputes. That this is so must be because almost the almost the entire risk of the charter is assumed by the charterer and there is little room for any difference, as there often is with time charters, as to whom as between the two parties to the charter should bear any particular liability, cost or expense.

It is also a reflection of the fact that the owner, in contrast to his position under a time charter, is generally not much exposed directly in any event to claims from third parties through the trading of his ship by his demise charterer. Yet further in a demise

charter the owner will typically exclude most, if not all of his liability for defects in respect to the condition of the ship. At most perhaps his liability will be expressed to be restricted to assuming responsibility for latent defects notified within the first 12 months of the charter.

Time charters

By contrast with demise charterers the question of ultimate allocation of risk between the two parties in any particular scenario in a time charter is a perennial source of dispute between owner and charterer; especially as the owner will have possession of the cargo and as such be exposed to direct cargo claims as a bailee; quite irrespective of whether in fact his charterer is in fact the contracting carrier under any bill of lading. In fact of course, as we have seen from previous articles, in many cases there may be real doubt as to who, on a proper construction of the bill of lading, as between owner and charterer, the contracting bill of lading carrier.

Time charters also create certain legal difficulties in that there is always an inherent and potential for conflict between the role of the master, with his overriding responsibility for the navigation and safe passage of the ship and her crew and cargo, and the role of the charterers in not only finding the cargo or cargoes for the vessel, but also arranging their loading and stowage discharge and giving orders as to the employment and routing of the vessel. The extreme volatility of the time charter market with very marked fluctuations in hire rates is also a ready recipe for legal disputes.

The number of different standard forms of time charter in common use tends to be rather more restricted than is the case with voyage charters; where the different forms in use are multifarious. For the deep sea bulk trades the New York Produce Exchange NYPE 1946 and 1993 forms have long commanded very wide acceptance.

In the bulk oil trade the SHELLTIME 4 form is widely used and the BIMCO BALTIME 1939 form commands some acceptance in the short sea trades. In practice the forms, of whatever type, are often very heavily amended by numerous superimposed bespoke clauses negotiated between the parties shipbrokers in any individual transaction. These are often poorly or inaptly drafted or even contradictory and in many cases serve to introduce a good deal of complexity and uncertainty into what would otherwise be on the standard form alone a fairly clearly drawn (albeit perhaps not equable) charter.

A typical time charter will follow a well recognised pattern starting with a description of the vessel by reference in particular to her name, class, deadweight and hold capacity, service speed and bunker consumption and any other particular features in which the charterer has a special interest, such as her cargo handling gear or any special attributes.

Given that the charterer will be responsible for paying for all bunkers consumed by the vessel during the period of the charterparty and will pay for use of the vessel on the basis of a daily hire rate it is self-evident that attainment of any warranted rate of bunker consumption is a critical factor; as is the ability of the vessel to maintain, weather and sea conditions permitting, her warranted service speed.

It may be necessary to carefully examine the terms of any warranties given by the owner in this connection to ascertain whether it is one as to the vessel's performance or bunker consumption only on delivery at the outset of the charterparty or is rather one rather to be construed as properly applicable throughout the term of the charterparty and to what extent any warranties are qualified by use of the term 'about' and if so what is meant by such term. There is no fixed meaning to this term and its construction is all a matter of context.

The place and time of delivery and redelivery, along with the duration of the charter

will also be very important provisions in the charter and many disputes over the years have turned on the issue as to whether the charterer is entitled to make an early or late redelivery as the case may be (or give final orders for a voyage likely to extend beyond the redelivery date) without being in breach of contract and if not so what damages on the part of the owner flow from such a breach.

Generally speaking where an excessively early or late delivery (underlap or overlap as it is sometimes referred to) amounts to a breach of contract the charterer will only be liable for any losses incurred by the owner in this respect by reference to the difference between the charter rates and the market rates; rather by reference to any special arrangements entered into by him with any third-party; at least where these were not made known to the charterer at the outset of the charter in the course of negotiations.

The charterparty will usually confer an express right of cancellation on the charterer should delivery not be made with within a certain period from the stipulated delivery date.

The charterparty will typically impose limits on the type of cargo that may be carried and impose at least some geographical trading limits on the vessel's employment. It will also usually make provision as to in whose name bills of lading shall be issued and on what terms and impose a duty on the charterers to arrange and pay for all cargo handling and all port and dock dues and ship agency fees.

The owner will be remunerated primarily, or in most case solely, through payment of hire though he may, especially in times when the market is strong, bargain for a ballast bonus in addition to the hire to allow for the cost of any positioning or post-positioning voyage in those cases where the port of delivery or redelivery is out of trade.

A right to withdraw the ship may be conferred on the owner for non-payment of hire in circumstances where otherwise the owner would not be entitled to terminate the contract for repudiated breach on the part of the charterer. This right may however in turn be expressly made subject to an anti-technicality clause restricting withdrawal except in accordance with certain procedures so as give the opportunity to the charterer to remedy any non-payment.

As a matter of general law (in contrast with the common law position as to payment of freight under a bill of lading or voyage charter) a time charterer is entitled to make deductions from hire payable by him in respect of any claim which is so closely connected with the claim for hire so as to give rise to an equitable set-off. However the terms of the charterparty itself may be found in many cases to expressly restrict such common law rights of set-off or in some cases indeed expressly expand or clarify such rights by e.g. expressly permitting certain types of deduction but at the same time prohibiting other types.

Clearly no charterer will wish to pay for a vessel which is not capable of fully performing the required service, through e.g. breakdown of her main engine at sea or her cargo handling gear in port, and the time charter will therefore invariably include an off-hire clause; although the exact extent and effect of such clause in any case may require careful consideration. An off-hire clause is not usually dependent upon proof by the charterer of any breach on the part of the owner though a breach on his part may also often be engaged. The causal effect of the linkage between the off-hire event and the loss of partial or complete ability to work the vessel in port or sea may be an important consideration.

In a time charter the master will be generally under the charterers' instructions and orders as to the cargo is to be loaded throughout the duration of the charter and the route to be followed by the vessel subject always to the master's right to decline such orders on the grounds of good seamanship. The corollary of this right is that the

charterers may have to indemnify the owner against any liabilities incurred in his complying with such orders and it will often be a nice question as to whether any liability incurred by the owner is considered to arise out of the orders, and therefore to be ultimately borne by the charterers; or is rather one within the owner's sphere of risk.

Both the owner and charterer may be exposed to cargo claims; especially where the bills of lading issued are owner's bills. Such claims may arise in some cases through bad stowage or other forms usually attributable to the charterer but in other cases the claim may arise through some lack of seaworthiness on the part of the vessel or some default by the master and crew in the navigation of the ship or in the care of the cargo or in yet other cases through the fault of no one; e.g. inherent vice.

The standard forms of charterparty often do not deal with these issues comprehensively and the widely applied NYPE Interclub Agreement has been in use for many years to fill this gap by setting out a scheme for apportionment of these liabilities (on a fairly rough and ready "knock for knock" basis) in those cases where the charter is on the NYPE or BIMCO ASBATIME form.

Typically the charter will provide that the bill of lading freights will be collected by the charterers but that the owners will have a so-called lien on such freights in the case of non-payment of hire.

Most demise and time charters contain an arbitration clause; in contra-distinction to the position with bills of lading where such a clause is only rarely to be found; unless that is the bill of lading is one issued under a charterparty and expressly incorporates the charterparty and its arbitration clause.

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