ISSN 2709-3948
ISSN 2710-1738（online）

海洋法律与政策
Marine Law and Policy

2021 年第 3 期 总第 3 期 （季刊）

Volume 2021 Number 3（Quarterly）

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编者言

21 世纪是海洋的世纪，世界各国的目光大多聚焦在海洋资源开发、海洋经济发展和海洋技术实施上。我国不断开展海洋法治工作，以海洋发展的全局视野，提升海洋战略价值认识，加强对海洋领域的开发建设，一次次地吹响“海洋强国”的号角。在 21 世纪海上丝绸之路建设及海 南自由贸易港建设不断推进的背景下，创办《海洋法律与政策》（Marine Law and Policy），ISSN 2709-3948，ISSN 2710-1738（online），以期达到交流成果，启迪智慧，紧跟学术思潮，为广大读者服务的目的。

本期《海洋法律与政策》刊发的论文涵盖了“长赐”号事件、美国联邦海事委员会“第 29 号事实调查”、《北京公约》之修订、海事判决的承认与执行中的法律等热点问题。

2021 年 3 月 23 日，网红明星“长赐”号集装箱船在苏伊士运河搁浅，其所致的运河受阻引发了对全球航运业等国际贸易的蝴蝶效应。在这个摆在全球班轮公司和跨国供应链管理者面前的典型案例中，“长赐”号被苏伊士运河管理局高额索赔，并被埃及法院扣押 3 个月，从而导致作为善意第三方的众多货主不仅要承担船上货物的直接损失，还要承担因供应链断裂造成的诸多间接损失。为解决这一问题，上海交通大学赵一飞副教授梳理了此案相关当事人的法律关系，提出需要在法律上赋予班轮公司“公众承运人”的地位，以减少甚至避免类似扣船事件的发生，从而保护上万货主利益，减少类似事件对国际贸易的冲击。

疫情的袭来导致美国国际远洋航运面临劳动力短缺、港口拥堵等问题，利益相关人对承运人和海运码头运营商收取的免箱和免堆的滞期费的情况更是抱怨连连。由于费用数额巨大以及问题的严重，美国联邦海事委员会发布了第 29 号事实调查和补充命令，专门调查其中是否存在违法行为并寻找商业解决方案。上海海事大学法学院博士生栾宇通过对第 29 号事实调查的起因、经过和结果进行研究，判断和分析世界主要经济体后续航运政策调整的倾向，以期站在中国的角度，在航运企业竞争法律制度实践中存在的问题、市场份额等问题上探索相应的解决方案。

船舶司法出售由于缺乏统一、专门、有效的国际立法，已经遇到了很多问题，最突出的是船舶司法出售的国际承认问题，而该问题的核心在于各国对司法出售后船舶清洁物权的理解差异。中国政法大学国际法学院张丽英教授及她的硕士研究生胥佳靓在比较分析各法系国家有关清洁物权的规范的基础上，通过分析《北京草案》三次修订中关于清洁物权部分的变化，对《北京草案》有关清洁物权的规范可能面临的挑战及化解进行了较为深入的研究。其认为《北京公约》的三次修订将清洁物权的内涵逐步扩张，在 2021 年的第三次修订中更是将“清洁物权”的范围扩张为“任何对船权的物权”，随之而来的挑战是过于前沿的观念是否会导致《北京草案》难以被接受导致缔约国数量太少，继而限缩公约最终的实际影响力。

海事判决的承认与执行是外国法院民商事判决承认与执行机制中的重要组成部分，其承认与执行机制却仍主要依赖各国国内法，缺少统一的国际规则对其加以调整。上海海事大学法学院院长王国华及上海海事大学法学院博士研究生罗雅馨就海事判决的承认与执行问题进行了细致研究。文章针对目前海事判决的承认与执行过程中存在的诸多问题，通过分析国际公约中海事判决承认与执行机制的相关规定，提出以开放、包容的心态探索外国海事判决承认与执行的国际统一机制的构建进路。

本期《海洋法律与政策》还在“涉海案例”的栏位介绍了五个涉海案例评述，其中包括大连海事法院海事庭王敏法官所编写的大连旅顺滨海船舶修造有限公司与中国人民财产保险股份有限公司大连市分公司营业部、中国人民财产保险股份有限公司大连市分公司船舶修理合同纠纷案的案例评析；孙光先生和闫婧茹女士合写的关于新鑫海航运有限公司与深圳市鑫联升国际物流有限公司、大连凯斯克有限公司海上货物运输合同纠纷案的案例评述；陈晨所写的大连真源海洋新能源科技有限公司与大连九头山水产品开发有限公司海域使用权纠纷案的案件分析；刘丽萍女士与郑琳琳女士合写的石勇与嘉德海运有限公司船员劳务合

同纠纷案的案例评析；以及大连海事法院海事庭庭长信鑫与大连海事法院海事庭法官助理郝志鹏共同编写的威海润佳服饰有限公司诉大连裕铭航运代理有限公司海上货运代理合同纠纷及海上货物运输合同纠纷案的案例评述。

本期在“新发展与新文献”栏目提供了五部法律的内容，分别是《海南自由贸易港法》、《海上交通安全法》、《中华人民共和国海关办理行政处罚案件程序规定》、《海南自由贸易港国际船舶条例》、《农业农村部关于实施 2021 年公海自主休渔措施的通知》，供广大读者阅读及思考。

作为海洋法律与政策领域内的新刊物，我们诚挚欢迎各位专家、读者的批评指教与惠赐大作。您的来稿，无论是以学术或非学术论文的形态，或者是以案例评析的形式撰成的，也不论是涉及海洋、船舶、航线、港口、海洋环境与海事管辖权等任何主题的作品，都将为我刊高度重视，并以中英两种语言刊发。

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EDITOR's NOTE

The 21st century can be seen as the century of the ocean. All the countries in the world are focusing on exploiting marine resources, developing marine economy and applying marine technology. We have continuously promoted law-based governance of the ocean, deepened our understanding of the strategic value of the ocean and explored the maritime field in the overall interests of the sustainable development of the ocean, constantly answering the call of "building a strong maritime country". This journal, ***Marine Law and Policy*** [ISSN 2709-3948, ISSN 2710-1738(online)], which aims to provide a platform for all practitioners and academics to exchange ideas, to inspire each other, and to keep up with the trending academic views, came into being in an effort to add momentum to the building of the 21st Century Maritime Silk Road and Hainan Free Trade Port.

This Issue covers a number of hot topics, including the "Ever Given" incident, the "Fact Finding Investigation No. 29" released by the US Federal Maritime Commission, the revisions of the Beijing Convention, the legal issues involved in the recognition and enforcement of maritime judgments, etc.

The well-known container ship "Ever Given" ran aground in the Suez Canal on 23 March 2021, blocking navigation in the vital waterway and triggering a butterfly effect on the international trade such as the global shipping industry. How to handle the incident involving global liner companies and multinational supply chain managers can shed some light on future cases. In this case, the ship "Ever Given" was claimed by the Suez Canal Authority for a high amount and was detained by the Egyptian court for three months. Many cargo owners who were bona fide third parties, therefore, had to bear not only the direct loss of the cargo on board, but also the indirect losses caused by delays to their supply chains. To solve such problems, Associate Professor ZHAO Yifei from Shanghai Jiao Tong University analyzes the legal relationship between the relevant parties and proposes that liner companies should be granted the legal status of "Public Carriers" to reduce or, if possible, eliminate the occurrence of similar ship arrests, thereby reducing negative impact on international trade and protecting the interests of tens of thousands of cargo owners.

The outbreak of COVID-19 has led to problems such as labor shortages and port congestion in US international shipping industry. What follows are complaints from stakeholders about detention and demurrage fees charged by carriers and marine terminal operators. Considering the huge amount of the charges and the seriousness of the problem, the US Federal Maritime Commission issued Fact Finding Investigation No. 29 and the Supplemental Order, which aims to investigate if there are illegal charging activities and find commercial solutions. Ms LUAN Yu, a PhD student from the School of Law of Shanghai Maritime University, studies the causes and consequences of the Fact Finding Investigation No. 29, and analyzes subsequent shipping policy adjustments made by major economies in the world so that she could

find solutions for China to problems existing in the practice of the legal system, market share, etc.

The international maritime industry, due to the absence of uniform, specialized and effective international legislation in this realm, has encountered many problems, the most prominent of which is the international recognition of such sales. This problem is, in essence, caused by the divergent understanding among countries on the clean title to a ship sold at a judicial sale. Professor ZHANG Liying and her graduate student XU Jialiang from China University of Political Science and Law first make a comparative analysis of the provisions relating to clean title under the laws of countries bearing in the mind the various different legal systems. They then examine the changes on the pertinent provisions under the three revisions of the Beijing Draft. Based on these, they study the potential challenges facing such provisions and the possible solutions to address them. They hold that the definition of "clean title" was being expanded gradually during the three revisions. The 2021 revision, which marks the beginning of a third revision of the Beijing Draft, even further expands the term to mean a title free and clear of any right in the ship. However, the accompanying challenge is whether or not this seemingly edgy term could create hinderances to the adoption of the Beijing Draft and as a result might see just a handful of State parties, thereby limiting the actual impact of the convention.

Recognition and enforcement of maritime judgments forms an important part of the recognition and enforcement mechanisms followed for civil and commercial judgments in foreign courts. Their recognition and enforcement across jurisdictions, however, is determined by the domestic law of the executing country as a result of lacking uniform international rules to adjust them. Professor WANG Guohua, dean of Shanghai Maritime University Law School, and her Ph.D. student LUO Yaxin conduct detailed research on the recognition and enforcement of maritime judgments. Focusing on the problems existing in the recognition and enforcement of maritime judgments, they further analyze relevant provisions stipulated in international conventions and consider that it is paramount to adopt an inclusive and flexible position allowing exploration of an international unified mechanism for recognition and enforcement of foreign maritime judgments.

This Issue also includes five maritime case reviews. Judge WANG Min from Dalian Maritime Court reviews a case concerning disputes over contract for ship repair (*Dalian Lvshun Binhai Shipping Building and Repairing Co., Ltd. v PICC Property and Casualty Company Limited Dalian Branch Business Office & PICC Property and Casualty Company Limited Dalian Branch*). Mr SUN Guang and Ms YAN Jingru also comment on a case concerning disputes over contract for carriage of goods by sea (*New Golden Sea Shipping Pte. Ltd. v Advance Union International Logistics Company Ltd.*). CHEN Chen writes a case review concerning disputes over maritime right of use (*Dalian Zhenyuan Marine New Energy Technology Co., Ltd. v Dalian Jiutoushan Aquatic Product Development Co., Ltd.*). Ms LIU Liping and Ms ZHENG Linlin discuss a case involving the crew labor contract (*Shi Yong v Jia De Marine Shipping Co., Ltd.*). Judge XIN Xin and assistant judge HAO Zhipeng from Dalian Maritime Court review a case concerning marine freight forwarders and the carriage of goods by sea (*Weihai Runjia Garments Co., Ltd. v Dalian Yuming*

Shipping Agency Co., Ltd.).

This Issue also provides readers with an easy access to five laws and regulations in the "Recent Developments and Documents" column, namely Law of the People's Republic of China on the Hainan Free Trade Port; Maritime Traffic Safety Law of the People's Republic of China; Provisions of the Customs of the People's Republic of China on the Procedures for Handing Administrative Penalty Cases; Hainan Free Trade Port International Shipping Regulations; and Notice of the Ministry of Agriculture and Rural Affairs on the Implementation of the 2021 Independent Fishing Motivation Measures on the High Seas.

As a new journal in the field of marine law and policy, we sincerely welcome your comments and contributions. Any contributions from you in the form of academic, non-academic articles or case reviews, and on any subjects concerning the sea, the vessel, the route, the port, the marine environment, and maritime jurisdiction, will be highly appreciated for publication in our journal in both Chinese and English.

MLP Editorial

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从“长赐”号事件看班轮公司法律地位和措施建议

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摘要：“长赐”号被苏伊士运河管理局高额索赔，并被埃及法院扣押 3 个月，从而导致作为善意第三方的众多货主不仅要承担船上货物的直接损失,还要承担因供应链断裂造成的诸多间接损失。为解决这一问题，基于集装箱大型化愈演愈烈的趋势，本文通过对相关当事人法律关系的梳理，提出需要在法律上赋予班轮公司“公众承运人”的地位，以减少甚至避免类似扣船事件的发生，从而保护上万货主利益，减少类似事件对国际贸易的冲击。

关键词：“长赐”号；班轮公司；法律地位；公众承运人

一、问题

一般认为，货主与承运人之间的运输合同关系理应由商法来调整。但是，如果一条船上装有的货物涉及到几十个国家的上万个货主，并关联到更多平民百姓的日常工作和生活，而这条船正面临着重大危险时，仍然将这条船与货主之间的法律关系视为普通的商法关系，这是否合理？

针对这一问题，自今年 3 月 29 日起就在苏伊士运河大苦湖里抛锚的“长赐”号全集装箱船，正是摆在全球班轮公司和跨国供应链管理者面前的一个典型案例。这条船上载有超过 1.8 万 TEU 的重柜。考虑到每一票货物都有发货人和收货人，因此涉及到的直接当事人很可能超过 1 万家企业，这些货物的长时间延迟交付可能真的会直接和/或间接影响到百千万人的工作和生活。

古希腊时代，罗德海法用独有的“共同海损”制度解决了船东与货主之间在遭遇海上风险时的损失分摊问题，并沿用至今。但那时船舶装载能力低，产品链也短，一条船的失事涉及到的货主可能不足百位。今天，随着集装箱船大型化愈演愈烈，一条船的命运往往牵动着上万人的利益，这时候还是仅仅依靠以共同海损制度为基础的海商法及相关制度来调整相互间的法律关系，显然已经不够了。

事实上，目前苏伊士运河管理局的做法，也打破了国际海运界的惯例。埃及法院无视英国船东保赔协会的调解，其坚持扣船的举动，正在撕裂着以“共同海损”制度为基石的现行国际海商法制度。终于在“长赐”号搁浅整整三个月后的 6 月 23 日，从埃及传来了一个令人关注的消息：在保赔协会和保险公司的协助下，船舶所有人与苏伊士运河管理局就赔偿达成了“原则性协议”，被扣留数月的“长赐号”有望在数日内获释启航。事情看来有了转机，但是关于货物三个月的延迟交付造成的货主的损失，没有看到任何相关信息，似乎这艘船上压根就没有装载任何货物一样。众多货主作为此次事件的善意第三方，似乎只有承担损失的义务，却没有就其损失向任何人索赔的权力，这是当今国际贸易法的一个重大缺陷，不能体现公平原则。

二、法律关系分析

自 1950 年代美国泛大西洋轮船公司将铁路集装箱用于海运以来，集装箱运输对于海上件杂货运输效率的提升显而易见。联合国贸易与发展会议（United Nations Conference on Trade and Development，以下简称 UNCTAD）的统计（2020）显示，自 2000 年以来，与超全球化趋势相一致，集装箱运输的货运量

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在全球海运市场中的份额不断提升，成为增长最快的部分。[1] 马克·莱文森（2006）用了大量篇幅介绍了集装箱给世界带来的各种变化，唯独没有给出其对国际海上货物运输带来的法律制度上的变化。[2]集装箱运输服务的主角班轮公司提供的服务不再是“船舷到船舷”，而是出现了更为丰富多彩的运输服务产品：场到场（CY-CY）、站到站（CFS-CFS）和门到门（Door-Door）等等。商业模式的变化理应导致法律关系的变化，集装箱运输的法律关系也理应与传统航次租船运输的法律关系不同。为便于比较，这里将传统航次租船运输下的法律关系与集装箱班轮下的法律关系做一个对比，以便找出问题的症结，并进而提出解决方案。

（一）传统的海上货物运输法律关系

航次租船（程租）运输的合同大多会采用著名的“金康合同”，或以其为范本，根据贸易合同约定和航线港口情况对部分条款加以修改，其中船东可以是实际船舶所有人，也可以是光船租赁（光租）或定期租船（期租）的租家。为与“长赐”号的情形相贴近，这里假设本次程租船的“船东”是期租船的租家，而托运人则是货物销售合同中的卖家，也就是程租的租家，贸易术语为 CIF。由此，相关当事人，即船舶所有人、承运人、程租租家和各自的保险人之间的法律关系如图 1 所示（其中实线为法律关系，虚线为派生关系，以下同）。

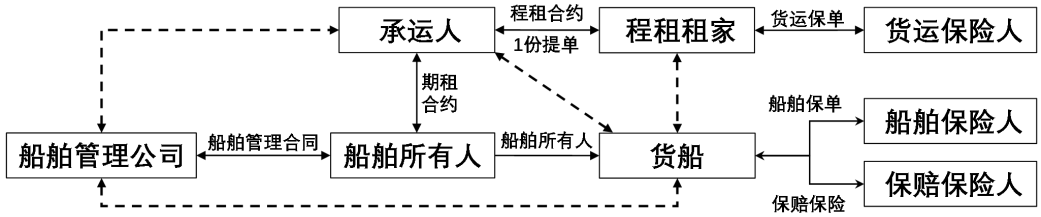

图 1 航次租船当事人的法律关系

图 1 所示的法律关系中，程租合约的租家一般是 1 个贸易公司，也可能是多个贸易公司，但是一般此时承运人签发的提单只有 1 套。对于承运人而言，无论实际货主有多少，程租合约的当事人除自己之外，只有一个人：货物装船之前是程租合约的租家，货物装船之后是提单持有人。

在这一法律关系之下，如果程租合约约定以外的意外事件发生，船舶的航线、航程、停靠港等需要做出变更，则主要由提单持有人决定并支付相关费用，承运人配合执行即可。如果意外事件发生造成了船舶、货物的灭失或损坏，或者造成第三人责任，则无论是船舶所有人、还是承运人，以及程租租家，都可以向各自的保险人提请介入，然后由保险人代位求偿，将相关风险转移给保险人。再有“共同海损”制度的加持，保险人之间也有了合理的风险分摊机制，堪称完美！

因此，这一法律制度历经百年不断淬炼，相关各方的利益和风险得以很好地兼顾，惯例与制度融为一体。但是在集装箱运输出现，并推动经济全球化不断升级的条件下，这一制度正在不断遭受挑战。2021 年春天发生在苏伊士运河中的“长赐”号事件就是众多挑战之一。

（二）集装箱班轮业务的法律关系

集装箱班轮公司一般会使用自有船舶开展运输服务，也有采用期租船的情形。“长赐”号采用的就是后者。在这种情况下，船舶所有人、班轮公司、船舶管理公司和提单持有人（众多货主）以及当事人身后的各类保险人之间的法律关系如图 2 所示。

1 UNCTAD, *Review of Maritime Transport 2020*, United Nations Publications, p. 8.

2 马克·莱文森：《集装箱改变世界》，机械工业出版社 2008 年版。

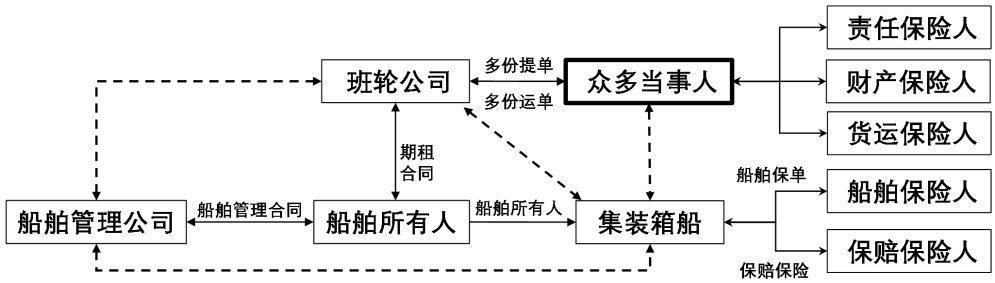

图 2 班轮业务当事人之间的法律关系

在忽略了保险人的情形下，这个法律关系的结构与图 1 极为相似，初看起来几乎没有差别。也正是这种结构的相似性让很多人忽略了集装箱班轮运输的一个重要特点，就是一条船上的货主可能上千甚至达万！在这种情形下，如果只是一个或几个提单持有人对货物的运输服务质量产生质疑，那么该提单持有人可以按照与航次租船一样的模式去寻求法律救济。但如果是全船的上万货主都有同样的述求，那相互间还只是普通的商法关系吗？

例如，如果是风暴、海啸等自然灾害，或者战争、罢工、海盗等人为事件，导致船舶的航线、航程、停靠港等需要做出变更时，由于上千达万的提单持有人各自的需求不同，任何一个提单持有人提出的解决方案一般无法满足全船其它提单持有人的要求，因而无权安排仅适合自己个体需求的运输方案。这样，运输变更方案只能是班轮公司做出，全体提单持有人唯有配合执行，并且还需要承担相应的费用，常见的就有共同海损牺牲、费用和分摊。这就与航次租船合约的情形大相径庭了。

此时众多当事人中，由于贸易方式的差异，各自对于货物的权利差异甚大，其身后的保险人分担的风险也有很多不同。保险人的意见相互间也会有很大差异，严重的可能会导致保单失效，这样提单持有人的损失就被放大了。

（三）集装箱班轮业务中货主法律地位的差异

图 2 中将全体货主归为了“众多当事人”一类，但实际上，这些货主之间法律地位存在显著差异。仍以“长赐”号为例，表面上看，货主们应该对货物能否早日交付都十分关注。但事实上，如果仔细观察，可以发现站在不同立场的货主，其关注程度很不相同，其原因很大程度上取决于贸易方式。

随着全球化进程的不断加剧，贸易方式也日益呈现出多样性。根据当前国际上的主要贸易方式，可以将相关货主分为三大类。第一类就是最为普通的一般贸易下的买方和卖方，以及由买卖双方的交易行为而卷入进来的银行、保险人和贸易代理商等，记为 G 类货主（即 General trader）；第二类则是加工贸易方式下的供应链管理者，记为 S 类货主（即 Supply chain manager），以及由此卷入的供应链上的各级供应商，从原材料、零部件和产成品的加工供应商到销售供应商；第三类则是非贸易下的货主，记为 N 类货主（即 Non-trade cargo owners），他们委托运输的货物并非贸易标的，而是自有物资和设备，例如对外承包工程所需要的工程设备和物资、参加国际展会的展品等。

1. G 类货主

G 类货主有两种：货物销售合同上的买方和卖方，以及由于货物交付给承运人后出现的提单持有人。一般国际货物销售合同上都会有贸易术语条款，尽管 Incoterms® 2010 和 Incoterms® 2020 都主张买卖双方明知货物采用集装箱运输时不要采用 FOB、CFR 或者 CIF 术语,[1]但目前国际贸易中这三个术语的使用比例还是非常高。大多数贸易商习惯在买卖合同中使用它们，并认为货物一旦在装港越过船舷，并且“已装船 On Board”了，货物运输的风险就从卖方转移给了买方。

1 ICC. Incoterms® 2020.ICC Publication:@723E.

在这种情况下，对于被困于“长赐”号上的货物，卖方完全有理由不像买方那样关注其解困的时间，因为卖方已经履行了全部的交货义务，同时其向承运人或者货物运输保险人索赔的权力也已经转移到了提单持有人手中。如果买方或者提单持有人以货物延迟到达或者货物在运输途中损坏拒绝支付货款或者货款的一部分（例如尾款）给卖方，卖方完全可以向法院或者仲裁机构提起违约之诉，以寻求司法救济。

对于 S 类货主和 N 类货主就不能按照上述情况来对待了，其中的关键是：在发货人将货物交给承运人的时候，甚至直到收货人收到货物，货物的物权都不会转移！因而所谓的风险转移并不会发生，且始终都在货物所有人这里。

2. S 类货主

在供应链管理理论的推动下，越来越多的跨国企业不断拓展“供应商管理库存（Vender Managed Inventory，缩写为 VMI）”的业务模式，[1]从而扮演着 S 类货主的角色，且购买的保险产品大多是全球财产险，其中可能并不包含海上货物运输的相应风险；甚至完全没有保险意识，没有购买任何保险。在这样的情形下，一旦遭遇到“长赐”号这样的事件，即使双方签订的订货合同里有着 FOB 或者 CIF 的条款，但是由于实施的是 VMI 管理模式，发货人的“风险随货物‘越过船舷’而转移给买方”的主张能否得到支持，的确存疑。由于 FOB 或者 CIF 只是国际惯例，其规定并不具备强制性，双方当事人可以选择适用，也可以在使用时对货物交付以及物权转移的很多细节，通过特别约定来加以修改。其中关于 VMI 的约定就可以理解为对价格术语的部分修订。

同样在全球供应链管理理论下，即使没有实施 VMI 模式，也有很多 OEM 工厂采用来料加工模式组织生产。这种情形下，原材料、零部件供应商如果采用集装箱运输向 OEM 工厂送货，表面上看起来，发货人是供应商、收货人是 OEM 工厂，与一般贸易的模式没有差别，但实际上此时的 OEM 工厂即使持有提单，也不一定是物权所有人（通常此时的提单应当都是记名提单或者海运单，不应该是指示提单）。要甄别真正的物权所有人，就要看供应链的核心企业对整个供应链的组织方式了。

3. N 类货主

对 N 类货主而言，由于发货人和收货人一般都是同一集团下属的不同子公司，或者是收发货代理人，因而表面上分别处于起运港的发货人和处于目的港的收货人实际是同一人。这样，发货人即使将货物交给承运人并取得提单或海运单而成为提单持有人，也不意味着物权转移，更不意味着货物运输风险的转移。对于他们而言，物资、设备、展品等货物在运输途中的损失，以及造成的对第三人的损失，如果没有事先购买货物运输保险的话，就只能自己承担了。

4. 小结

在国际货物运输集装箱化的推动下，集装箱船的载箱量正在向 25000TEU 进发，并且还有着超越的趋势。但同时，由上述分析可见，集装箱运输中的法律关系已经随着经济全球化和贸易方式多样化而发生着重要的改变。货物所有权人与托运人和收货人可能完全分离，托运人和收货人之间可能完全不是买卖合同的双方当事人，甚至根本不存在买卖合同；班轮公司也很可能不是船舶所有权人，船舶所有权人可能对船上装载货物的情况、以及有哪些货主完全不知情。这是海牙规则订立时期的 1920 年代的各方无法想像的，也不是 1960 年代订立的维斯比规则的“接收货物到交付货物”所能约束的。国际海运界需要建立一种新的规范体系，来帮助班轮公司和全球供应链管理者在公正公平的法律环境下经营，才能取得长足稳定的发展。

三、解决措施建议

在全球供应链管理的条件下，有相当一部分“国际贸易货物”已经不具备贸易属性，其运输风险也已经不再是“货物越过船舷，风险转移给买家”。既有的国际贸易和国际运输制度与新型的全球供应链管

1 赵林度、李时伟：《VMI 实现模式研究》，载《中国管理科学》2000 年第 8 期。

理模式之间存在着规则之间的间隙，特别是对于这种突发事件的风险处置，两者之间的间隙更为突出。所以有必要感谢“长赐”号集装箱船和苏伊士运河管理局，这次事件为全球供应链管理揭示了一个重要的难点，激励着全球供应链管理专家们对此进一步开展研究并提出切实可行的解决方案。

本文认为，至少可以从公众承运人、责任保险和保赔保险三方面入手，来明确班轮公司在全球供应链中的地位，并设立相应的风险管理机制。

（一）公众承运人

看到“公众承运人”这个名词，会令不少人想到：是不是打错字了？应该是“公共承运人 Common Carrier”吧？答案是：就是公众承运人。

早在 1852 年，美国人就在讨论 Common Carrier 的问题，《耶鲁法学评论》《哈佛法律评论》中都登载过不少有关 Common Carrier 的研究文章，不仅涉及海运，同样也涉及空运、快递和道路运输等。正是在这种大讨论下，才有了著名的“哈特法案”，也才使得当时傲慢的英国人于 1924 年在海牙召集主要海运国家一同签订了《统一提单的若干法律规定的国际公约》（即“海牙规则”）。中国国内期刊中较早出现“公共承运人”概念的是《世界海运》期刊，王滨（1994）重点介绍了美国 1984 年航运法对 NVOCC 规定的费率登记备案和提供担保金等管理制度, 并建议设立国家登记机构对 NVOCC 的经营活动、偿付能力、登记制度等方面实施有效的管理。[1]唐兵（2002）介绍了英美法和欧洲大陆法对于公共承运人权利规定的差异。[2]冯辉（2004）认为班轮公司作为公共承运人的首要任务是使船舶适航。[3]陈亚（2010）通过对厦门瀛海诉马士基（中国）公司的案例分析，认为班轮公司“封杀”某些国际货运代理企业合理的运输代理服务请求的行为，违背了班轮公司应履行的法定义务以及相关行政法规和国际公约的规定，侵犯了国际货运代理企业的经营自主权。[4]马得懿（2016）经过溯源认为：不同的历史时期，“Common Carrier”在强制缔约义务和严格责任体系两个范畴上互有侧重。[5]

由上述学者研究可见，学界至少有三点共识：一是认为国际班轮公司是公共承运人，但是各自对 Common Carrier 有不同理解；二是认为，作为公共承运人应该负有公共义务，而不能随意引用“契约自由”原则；三是认为国家应该对公共承运人的行为通过立法加以约束。

本文提出两点进一步的看法：

第一，Common Carrier 一词翻译成公共承运人其实并不妥当，准确的翻译应该是普通承运人，类似英美法亦称“普通法 Common Law”，这两个 Common 应该是同义词。按照英美法律，政府部门大多数情况下不会对私营的班轮公司施加强制性义务，但是可以出于公义而要求它做或者禁止它做某些事情。这大概是称之为 Common Carrier 的原因。“哈特法案”就是将“船舶适航”作为船东的强制义务，并取得法律认可的例子。

第二，国际班轮公司其实应该不仅仅是 Common Carrier，还应该是 Public Carrier，尽管这个 Public Carrier 在英文文献中还很少见。中文因为“公共承运人”一词已经被用掉了，所以这里姑且用“公众承运人”来表示它的特别之处，特别是当班轮公司用期租来的船舶在一个航次里承运了上万 TEU 的集装箱货物的时候。国际社会应当对班轮公司的社会责任做出强制性规定，才能彰显其“公众承运人”的身份。

当班轮公司作为“公众承运人 Public Carrier”在市场上运营时，它就不能仅仅以自身盈利为目标，同时还要考虑其社会责任，也就是对全球经济和国际贸易顺利发展的责任。这次“长赐”号事件，作为班轮公司的长荣海运利用现行的国际海运规则，巧妙地将船舶所有人正荣公司作为挡箭牌，规避了公众对其的指责和大部分的经营风险，其结果对长荣海运是好事，但是却损害了全船货主以及处在这些货物的供应链上所

1 王滨、曲波：《关于无船舶公共承运人的航运作法》，载《世界海运》1994 年第 2 期。
2 唐兵：《两大法系的公共承运人制度浅析》，载《水运管理》2002 年第 2 期。
3 冯辉：《论公共承运人的首要义务》，载《国际商务》2004 年第 5 期。
4 陈亚：《国际班轮公司作为公共承运人的强制缔约义务》，载《人民司法》2011 年第 14 期。
5 马得懿：《普通承运人、公共承运人与“从事公共运输的承运人”：渊源、流变与立法探究》，载《社会科学》2016 年第 8 期。

有企业的利益，对亚欧贸易造成了严重的后果。

同时还要为班轮公司作为“公众承运人 Public Carrier”设计一些权益，对照“长赐”号事件，可以为“公众承运人”免除扣船风险。同时对照“韩进破产”事件，应该给“公众承运人”在破产时提供更多保护，以使得正在运输途中的集装箱货物能够按照既有的约定送达目的地。

（二）责任保险

班轮公司应当透过“长赐”号事件清楚地认识到，尽管现行的国际海运规则基本认同海运承运人对货物延迟交付无需承担赔偿责任，但是，从不断发展的全球供应链管理方式来看，准时送达（Just in Time）已经成为现代物流服务的标准配置。如果班轮公司中有某几家率先推出对货物延迟交付承担赔偿责任的服务承诺，这些班轮公司会不会更受全球供应链管理者的青睐？

如果说在 1920 年代，船舶海上航行因为各种原因造成延误是大概率事件，因而将“承运人对货物延迟交付不负责任”明示在“海牙规则”中，那么到了 100 年后的 2020 年代，在国际海事组织 IMO 的强力推进下，船舶航行安全性已经有了极大提高，船舶航行延误正在逐渐成为小概率事件。在大数据分析的帮助下，班轮公司完全可以与保险公司商议设立一个船舶运营附加险：货物延迟交付责任险。一旦货物延迟交付，保险公司就会代为做出赔偿。有关这个险种的细节，显然不是本篇文章需要详细论证的内容。

（三）保赔保险

目前国际海运界，保赔保险主要发生在船东之间，班轮公司之间的互助保险制度目前还没有形成。尽管大多数班轮公司都是拥有自有船舶的公司，但是保赔协会并不是以公司为主体，而是以船舶为主体。因此，像“长赐”号这艘船，其保赔协会资格很可能属于日本正荣公司，而不是作为承运人的长荣海运。由此，需要设立由班轮公司为主体参加的保赔保险，根据经济全球化和全球供应链管理的需要，在商业责任保险的基础上，再设置一个保赔保险，以防止在商业保险不足以承担全部责任时，可以承担起相应的风险分摊责任。如果能够有班轮公司注册国的立法强制，加上商业责任保险的市场运作，再有班轮公司保赔保险的加持，经济全球化和全球供应链管理的发展将会更为稳健，资源配置将会更为合理。

就在这篇文章即将完稿的时候，又收到一则消息：载箱量为 5090TEU 的 ITAL LIBERA 号船因船长疑似感染新冠病毒而被新加坡、马来西亚和印度尼西亚等国拒绝靠港，船长身亡后遗体置于船上冰箱，辗转两个月后只能返回意大利，中间仅在科伦坡港口停靠了一晚。更是觉得赋予班轮公司以“公众承运人”的身份很有必要。衷心希望世界卫生组织、各国政府以及国际贸易界、国际航运界和国际金融界专家能够为此达成一致。

责任编辑：罗月琪

On the Legal Status of Liner Companies and According Suggestions Seen from the Ever Given Incident

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Abstract: The ship Ever Given was heavily claimed by the Suez Canal Authority and was detained by the Egyptian court for three months. As a result, many cargo owners who were bona fide third parties had to bear not only the direct loss of the cargo on board, but also the indirect losses caused by delays to their supply chains. Such incidents are becoming increasingly problematic, especially given that shipping containers are growing in scale. In the interest of solving this problem, this paper will analyze the legal relationship between the relevant parties and propose that liner companies should be granted the legal status of "Public Carriers" to reduce or, if possible, eliminate the occurrence of similar ship arrests, thereby reducing negative impact on international trade and protecting the interests of tens of thousands of cargo owners.

Keywords: Ship "Ever Given"; Liner Companies; Legal Status; Public Carriers

I. Problems

It is generally believed that the contractual relationship of carriage between cargo owners and carriers should be determined by commercial law. However, if the cargoes on a ship involve tens of thousands of cargo owners from dozens of nations, and the cargoes are related to the employment and wellbeing of common citizens, is commercial law still applicable to this relationship at times when such a ship faces great dangers?

There is a typical case involving this issue faced by global liner companies and multinational supply chain managers – namely the loaded container ship Ever Given, which has been anchored in the Great Bitter Lake of the Suez Canal since March 29 this year. This ship carries heavy containers of more than 18,000 Twenty-foot Equivalent Units. Considering that each piece of cargo has its own consignor and a consignee, the direct parties involved are likely to exceed 10,000 companies. As a result, the long-term delay in delivery of these cargoes may affect the work and life of thousands of people in direct and indirect ways.

In the ancient Greek era, Lex Rhodia's unique "general average" system solved the problem of loss sharing between shipowners and cargo owners when encountering maritime risks, and it is still used today. However, at that time, the load capacity of ships was low, and the product chain was short. A shipwreck would typically involve fewer than a hundred cargo owners, but today, as container ships are becoming increasingly larger in scale, the fate of a ship and its cargoes often involves the interests of tens of thousands of people. Due to this fact,

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it is far from sufficient to continue to rely solely on marine law and related systems, which are based on the general average system, to adjust the legal relationship between relevant parties.

In fact, the current practice of the Suez Canal Authority has also broken the conventions of the international maritime community. The Egyptian court ignored the mediation of the British Shipowners' Protection and Indemnity Association (hereinafter referred to as the P&I Association), and its insistence on arresting the ship is tearing apart the current international maritime law system that is based on the "general average" system. Finally, on June 23, three full months after the ship Ever Given was stuck in the Suez Canal, concerning news came from Egypt. It was reported that, with the assistance of the P&I Association and the insurance company, the shipowner and the Suez Canal Authority had arrived at a "principled agreement", so Ever Given, after having been detained for several months, was expected to be released and set sail within a few days. Although things seem to have turned around, there is no relevant information regarding the losses of the cargo owners engendered by the three-month delay in delivery. It would almost seem that the ship had not been loaded with any cargoes at all. As the bona fide third parties in this incident, many cargo owners seem obligated to bear losses, but they have no right to claim compensation for their losses. This is a major flaw in the current international trade law, which cannot embody the principle of fairness.

II. Analysis of the Legal Relationship

Ever since the Transatlantic Shipping Company of the United States used rail containers for sea transportation, beginning in the 1950s, it has been obvious that container transportation has significantly improved the efficiency of cargo transportation. Statistics from the *Review of Maritime Transport 2020* released by the United Nations Conference on Trade and Development (hereinafter referred to as UNCTAD) show that since 2000, consistent with the trend of hyper-globalization, the share of container transportation in the global shipping market has continuously increased and has become the fastest-growing segment.[1] Marc Levinson (2006) has made great efforts to introduce the various changes that containers have brought to the world, but he failed to cover changes in the legal system regarding international cargo transportation.[2] The service provided by liner companies, who are typical representatives of container transportation service providers, is no longer shipside-to-shipside, but rather of various other forms, such as CY-CY, CFS-CFS, door-door, and so on. Changes in business models should lead to changes in the legal relationship, and the legal relationship of container transportation should also be distinct from that of traditional voyage charter transportation. For the sake of convenience, here is a comparison between the legal relationship under traditional voyage charter transportation and the legal relationship under container liners so as to identify where the problems lie and to propose relevant solutions.

A. Traditional Legal Relationship of Carriage of Goods by SEA

Voyage charter transportation contracts will mostly adopt the well-known "UNIFORM GENERAL

1. UNCTAD, *Review of Maritime Transport 2020*, United Nations Publications, p. 8.
2 Marc Levinson：*The Box: How the Shipping Container Made the World Smaller and the World Economy Bigger*, China Machine Press, 2008.

CHARTER" or use it as a model. Some clauses will be modified according to the trade contract and the route and port conditions. The shipowner can be the actual owner of the ship or the charterers of bareboat charter or time charter. In order to compare to the situation of the ship Ever Given, it is assumed here that, in the contract for the sale of goods, the "owner" of the voyage charter is the charterer of time charter, and the shipper is the seller; that is, the shipper is the charterer of the voyage charter, and the standard trade term is Cost Insurance and Freight (insert named port of destination). Therefore, the legal relationship between the relevant parties – namely the shipowner, carrier, voyage charterer, and their respective insurers – is shown in Figure 1 (the solid line is the legal relationship, and the dashed line is the derivative relationship, the same below).

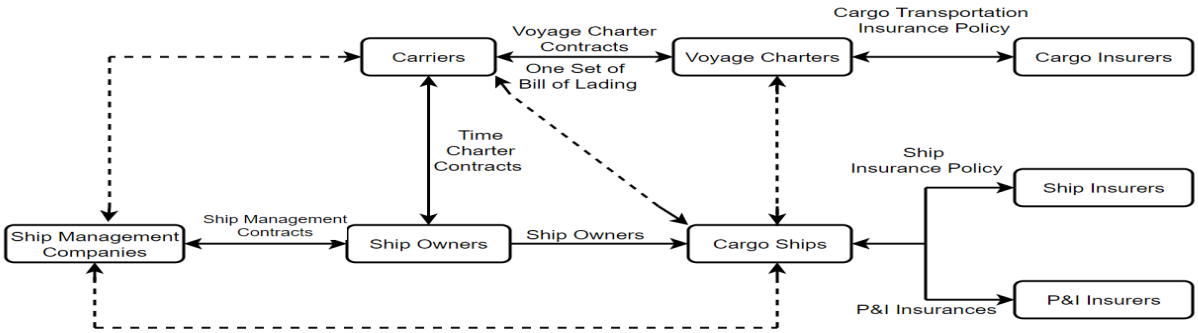

Figure 1. The Legal Relationship between the Parties in Voyage Charter

In the legal relationship shown in Figure 1, the charterer(s) of the voyage charter contract is generally one trading company or are multiple trading companies, but generally, in either case, there is only one set of bills of lading issued by the carrier. As far as the carrier is concerned, no matter how many actual cargo owners there are, there is only one party to the voyage charter contract aside from himself: the charterer of the voyage charter contract before the cargo is loaded, and the bill of lading holder after the cargo is loaded.

Under this legal relationship, if unexpected events other than those stipulated in the voyage charter contract occur, leading to necessary changes in the ship's route, voyage, port of call, etc., the bill of lading holder will make the decision and pay the relevant expenses, and the carrier only needs to cooperate in the implementation. However, if an accident occurs and causes the loss or damage of the ship or the cargo, or causes a third party to be liable – no matter whether it is the ship owner, the carrier, or the voyage charterer – they can all apply to their respective insurers for intervention. The insurers will seek compensation by subrogation and the related risks are, therefore, transferred to the insurers. With the added support of the "general average" system, there will also be a reasonable risk-sharing mechanism for insurers, which is a perfect solution.

Therefore, this legal system has been continuously refined throughout the past century, the interests and risks of all parties concerned have been well-balanced, and practices and systems have been integrated. However, with the emergence of container transportation and the continuous escalation of economic globalization, this system is constantly being challenged. One of the many challenges is the "Ever Given" incident, which happened in the Suez Canal in the spring of 2021.

B. Legal Relationship of Container Linear Business

Container liner companies generally use their own ships to carry out transportation services, but sometimes they also use time charter ships. The latter is adopted by the ship Ever Given. In this case, the legal relationship

among shipowners, liner companies, ship management companies, bill of lading holders (numerous cargo owners) and various insurers behind the parties is shown in Figure 2.

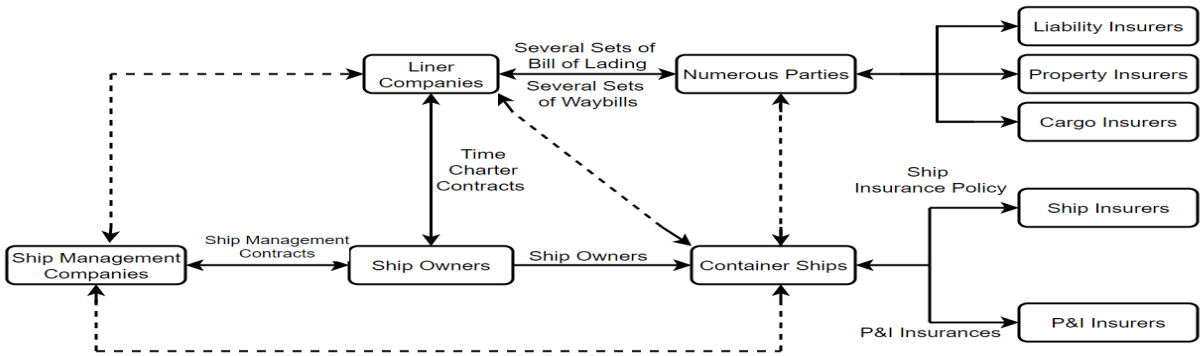

Figure 2. The Legal Relationship between the Parties to the Liner Business

When ignoring the insurers, the structure of the legal relationship depicted in Figure 2 is very similar to that of Figure 1, with almost no difference at first glance. It is the similarity between these structures that causes many people overlook an important feature of container liner transportation, which is that there may be thousands or even tens of thousands of cargo owners on only one ship! In this case, if only one or a few bill of lading holders doubt the quality of the cargo transportation services, then the bill of lading holder(s) can seek legal remedies in the same way that they would seek under a voyage charter. However, if tens of thousands of cargo owners have the same requirements, is it still appropriate to simply apply the commercial law?

Hypothetically, for example, it is natural disasters like storms and tsunamis, or man-made events like wars, strikes, and piracy, that typically necessitate changes to ships' routes, voyages, ports of call, etc. Due to the different needs of the hundreds of thousands of bill of lading holders, a solution proposed by a single holder of the bill of lading generally cannot meet the requirements of all the other bill of lading holders as well. Therefore, not a single holder of the bill of lading has the right to arrange a transportation plan that serves only his own needs. In this way, the transportation change plan can only be determined by the liner company, and all the holders of the bill of lading can only cooperate in its implementation. They also need to bear the corresponding expenses, which typically include general average sacrifice, general average expenditure, and contribution in general average. This is very different from the situation of a voyage charter contract.

Under this circumstance, due to the differences in trade modes, the numerous parties' rights to the cargoes differ greatly, leading to different risks shared by their insurers. The opinions of the insurers can also be very different, and in serious cases, the insurance policy may become invalid and the losses incurred by bill of lading holder will be extended.

C. Differences in the Legal Status of Cargo Owners in Container Liner Business

In Figure 2, all cargo owners are classified as one of the "numerous parties", but in fact, there are significant differences in the legal status of these cargo owners. Taking the "Ever Given" as an example, it seems that cargo owners should be very concerned about whether the cargoes can be delivered as soon as possible. However, if you look closely, you can find that cargo owners who stand in different positions have very different levels of attention, and the reason for this depends largely on the way of trade.

As the process of globalization continues to intensify, trade methods are becoming increasingly diversified. According to the current major international trade methods, relevant cargo owners can be divided into three major categories. The first category, known as G-type cargo owners (General trader), includes the most common buyers and sellers in general trades, as well as banks, insurers, and trading agents involved in the transactions of both buyers and sellers; the second category includes the supply chain managers under the processing trade mode, as well as the suppliers at all levels in the supply chains, from the processing suppliers of raw materials, parts, and finished products to sale suppliers, and they are recorded as the S-type cargo owners (Supply chain manager); the third category is non-trade cargo owners, who are recorded as N-type cargo owners. The cargoes entrusted to N-type cargo owners for transport are not the subjects of trade, but rather their own materials and equipment, such as engineering equipment and materials needed for contracted foreign projects, exhibitions needed for international exhibitions, etc.

1. General Traders

There are two variations of G-type cargo owners: the buyers and the sellers on the cargo sales contracts, and the bill of lading holders who appear after the cargoes are delivered to the carriers. Generally, there will be trade term clauses on international sales contracts. Although Incoterms® 2010 and Incoterms® both advocate buyers and sellers not to use FOB, CFR or CIF terms when they know that cargoes are transported in containers,[1] the use of these three terms in international trade is still very frequent. Most traders are accustomed to using them in sales contracts, and they believe that once the cargoes have crossed the ship's rail at the loading port and are "on board", the risk of cargo transportation is transferred from the seller's side to the buyer's side.

In this case, for the cargoes trapped on the "Ever Given", the sellers have every reason to be less concerned than the buyers regarding the timeliness of the cargoes' release, because the sellers have fulfilled all of their delivery obligations; at the same time, their right to claim compensation has transferred from the carriers or cargo transportation insurers to the holders of the bill of lading. If the buyers or the holders of the bill of lading partly or entirely refuse to pay (such as refusing to provide the balance payment) the sellers, based on the reason that the cargoes arrive too late or the cargoes are damaged during the transportation, then the sellers have every reason to seek judicial remedy through litigation of breach of contract to the court or arbitration institution.

S-type cargo owners and N-type cargo owners, however, cannot be treated according to the above circumstances. The key is: when the shippers deliver the cargoes to the carriers, even up until the consignees receive the cargoes, the property rights of the cargoes will not be transferred! Therefore, the so-called risk-transferring will not happen, and the property rights of the cargoes will always belong to the owners of the cargoes.

2. Supply Chain Managers

Driven by the theory of supply chain management, more and more multinational companies continue to expand the business model of "Vender Managed Inventory (hereinafter referred to as VMI)",[2] so they can be categorized as the S-type cargo owners. Besides, most of the insurance products purchased by these companies

[1] ICC. Incoterms® 2020. ICC Publication:@723E.
[2] ZHAO Lindu & LI Shiwei, Research on VMI Implementation Mode, Chinese Journal of Management Science, No.8, 2000.

are global property insurances, which may not cover risks of sea cargo transportation. In other cases, companies lack the foresight to purchase any insurances at all. Under circumstances such as those surrounding the "Ever Given" incident, it is doubtful whether sufficient support exists for the claim that risks are transferred to the buyers as of the moment when the cargoes have crossed the ship's rail, even if there are FOB or CIF clauses in the order contracts that were signed by both parties; this results from the fact that the VMI management model has been utilized. Also, since FOB or CIF clauses are only international practices and are not mandatory, both parties can choose to use them as they please, or they can modify various details of the delivery of the cargoes and the transfer of property rights when they use them. For example, the agreement on VMI can be understood as a partial revision of the price terms.

Also, under the theory of global supply chain management, even if the VMI model is not implemented, there are still many OEM factories that accept customers' materials for processing. In this case, if the suppliers of raw materials and parts use container transportation to deliver cargoes to the OEM factories, it seems that the shippers are the suppliers and the consignees are the OEM factories, which is not different from the general trade model; however, even if the OEM factories hold the bill of lading at that time, it is not necessary that they own the property rights (the bill of lading at that time should usually be a straight bill of lading or sea waybill, but not an order bill of lading). To identify the real property owners, it is necessary to determine how the core companies of the supply chains organize their entire supply chains.

3. Non-trade Cargo Owners

For N-type cargo owners, since the shipper and the consignee are generally different subsidiaries of the same group, or are consigning and shipping agents, it would seem they are the shipper at the port of loading and the consignee at the port of destination, but they are actually the same. In this way, even if the shipper delivers the cargoes to the carrier and obtains the bill of lading or sea waybill to become the holder of the bill of lading, it does not necessarily indicate a transfer of property rights, let alone a transfer of cargo transportation risks. In this case, the loss of materials, equipment, exhibitions, and other cargoes in the process of transportation, as well as any losses incurred by a third party, can only be borne by N-type cargo owners themselves in the event that they fail to purchase any cargo transportation insurance in advance.

4. Summary

Driven by the containerization of international cargo transportation, the carrying capacity of container ships is hitting 25,000 Twenty-feet Equivalent Units, and there is a trend of surpassing that amount. However, at the same time, the analysis above indicates that the legal relationship in container transportation has undergone important changes along with economic globalization and the diversification of trade modes. The owners of the cargoes may be entirely separate from the shippers and the consignees. Also, the shippers and the consignees may not be the parties to the sales contract at all, or there may not even be a sales contract; the liner companies are also unlikely to be the shipowners. Therefore, the likelihood is high that the shipowners may be unaware of the conditions of the cargoes loaded or the conditions of the cargo owners. This was unimaginable by all parties in the 1920s, when the *International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading* (or the "Hague Rules") was signed. Nor can it be regulated by the provision "from receiving to

delivering" in the *Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading* (or the "Visby Rules"), which was established in the 1960s. In order to achieve long-term, stable development, the international shipping industry needs to establish a new regulatory system to help liner companies and global supply chain managers operate in a fair and equitable way.

III. Suggested Solutions

Under the conditions of global supply chain management, a considerable part of "international trade cargoes" no longer have trade attributes, and the transportation risk is no longer transferred to the buyer "when the cargoes cross the ship's rail." There is a gap in the rules between the existing international trade, the international transportation systems, and the new global supply chain management model. This gap is even more evident when it comes to the handling of such emergency risks. Therefore, it is necessary to thank the container ship "Ever Given" and the Suez Canal Authority, because this incident has revealed a troublesome yet important issue for global supply chain management, and it has inspired worldwide experts in this field to conduct further research on this topic and to propose practical and feasible solutions.

This paper supports that the status of liner companies in the global supply chain and the establishment of a relevant risk management mechanism can be clarified from at least three aspects – namely, public carriers, liability insurance, and protection and indemnity insurance.

A. Public Carriers

Many people may regard it as a typo when they see the term "Public Carrier" and believe that the correct term is "Common Carrier", but it is the "Public Carrier" that will be discussed here.

As early as 1852, Americans were discussing the issues of Common Carrier. Many research papers on Common Carrier have been published in Yale Law Review and Harvard Law Review – not only involving shipping, but also air transportation, express delivery, and road transportation. It was under this kind of discussion that the famous "Hatch Act" came into being, and the British convened the major shipping states in Hague to sign the "Hague Rules". The earliest appearance of the concept of "Common Carrier" in Chinese domestic journals is in a journal titled World Shipping. WANG Bin (1994) focused on the management systems, such as rate registration and filing, as well as provision of guarantees stipulated by the United States' law of navigation in 1984 on the NVOCC. It was also recommended that a national registration agency should be established to implement effective management of NVOCC's business activities, solvency, registration systems, etc.[1] TANG Bing (2002) introduced the differences between the rights of common carriers in Common Law and European continental law.[2] FENG Hui (2004) believed that the primary task of liner companies as common carriers was to make ships seaworthy.[3] CHEN Ya (2010), by the case analysis of the lawsuit of Xiamen Yinghai Industrial Development Co., Ltd. against Maersk (China) Shipping Co., Ltd., determined that the liner companies' act of "blocking" the reasonable requests of transportation agency services provided by some international cargo agency

[1] WANG Bin & QU Bo, On the Shipping Operations Law of Non-vessel Public Carriers, World Shipping, No. 2, 1994.

[2] TANG Bing, Analysis on the Common Carrier System of the Two Legal Systems, Shipping Management, No. 2, 2002.

[3] FENG Hui, On the Primary Duties of Common Carriers, International Business, No. 5, 2004.

companies violates the liner companies' statutory obligations as well as relevant administrative regulations and international regulations. Also, this act violates the operational autonomy of international cargo agency companies.[1] MA Deyi (2016), having traced back to the source, believed that in different historical periods, "Common Carrier" focused differently on mandatory contracting obligations and strict liability systems.[2]

According to the research mentioned above, there are at least three points of consensus in the academic community: the first is that the international liner companies are common carriers, but the understandings of common carriers are different; the second is that common carriers should have public obligations and that the principle of "freedom of contract" cannot be used at will; the third is that the United States should pass legislation to restrict the behaviors of public carriers.

This paper proposes two further points.

First, it is not appropriate to translate the term Common Carrier into "公共承运人" in Chinese. The accurate translation should be "普通承运人". As "Common Law" is translated into "普通法", the "Common" should be translated into "普通". According to Anglo-American law, in most cases, government agencies will not impose mandatory obligations on private liner companies, but they can require the liner companies to do or to prohibit them from doing certain things out of righteousness. This is probably the reason why they are called Common Carriers. The Hatch Act is an example of "making ships seaworthy" a compulsory obligation for ship owners and obtaining legal recognition.

Second, the international liner companies should not only be Common Carriers (公共承运人), but also Public Carriers (公众承运人), although the term "Public Carrier" is still rare in English literature. In Chinese, the term "公共承运人 (Common Carriers)" has been adopted, so here we use "公众承运人 (Public Carriers)" to express its special features, especially when a liner company uses time chartered ships to transport more than 10,000 Twenty-feet Equivalent Units of container cargoes on a voyage. The international community should make mandatory regulations regarding the social responsibilities of liner companies in order to demonstrate their status as "Public Carriers".

When liner companies operate as "Public Carriers" in the market, they should not only target their own profitability, but also consider their social responsibilities – that is, their responsibilities for the stable development of the global economy and international trade. In the "Ever Given" incident, the Evergreen Marine Corp., as a liner company, took advantage of the current international shipping rules by making use of the owner of the ship – Japan's Shoei Kisen – as a shield to avoid public criticism and most of the business risks. The result was good for the Evergreen Marine Corp., but it harmed the interests of all cargo owners and all companies in the supply chains of these cargoes and caused serious consequences for Asian-European trade.

Meanwhile, it is time to grant some rights and interests to the liner companies as the "Public Carriers". In contrast to the "Ever Given" incident, the "Public Carriers" should be exempted from the risks of being arrested in time to come. Furthermore, the "Public Carriers", in contrast to the "Hanjin Shipping Bankruptcy" incident,

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1 CHEN Ya, Compulsory Contracting Obligations of International Liner Companies as Public Carriers, The People's Judicature, No. 14, 2011.

2 MA Deyi, A Study on Common Carrier, Public Carrier and Carrier Engaged in Public Transportation: Theirs Origin, Evolution and Legislation, Journal of Social Sciences, No. 8, 2016.

should be provided with more protection in the event of bankruptcy to ensure that container cargoes still in transport can be delivered to their destinations in accordance with the existing agreement.

B. Liability Insurance

Through the "Ever Given" incident, liner companies should clearly recognize that from the perspective of the ever-developing global supply chain management approaches, Just-in-Time has become the standard configuration of modern logistics services, although the current international shipping regulations essentially agree that carriers are not liable for compensation for delayed delivery of cargoes. If some liner companies take the lead in launching a commitment to assume liability for delayed delivery of cargoes, will these liner companies be more favored by global supply chain managers?

In the 1920s, it was highly probable that ships at sea would be delayed due to various reasons, and therefore the clause "carriers are not responsible for the delayed delivery of cargoes" was clearly stated in the "Hague Rules"; however, 100 years later, in the 2020s, amidst strong promotion of the International Maritime Organization (IMO), the safety of ship navigation has improved significantly, and ship navigation delays are gradually becoming less frequent. With the assistance of big data analysis, the liner companies can negotiate with the insurance companies to establish an additional ship operation insurance: liability insurance for delayed delivery of cargoes. Once the delivery of the cargoes is delayed, the insurance company will provide compensation. However, the details of this type of insurance are obviously not the only contents that need to be discussed in this paper.

C. Protection and Indemnity Insurance

At present, in the international maritime industry, P&I insurance mainly occurs between shipowners, and the mutual insurance system between liner companies has not yet been formed. Although most liner companies are companies that have their own ships, the P&I association is not based on companies, but rather on ships. Thus, for a ship like the "Ever Given", its P&I association qualification is likely to belong to Japan's Shoei Kisen, rather than to the Evergreen Marine Corp. Therefore, it is necessary to establish a P&I insurance based on liner companies. To cater to the needs of economic globalization and global supply chain management, another P&I insurance shall be set up on the basis of commercial liability insurance in event that the latter cannot cover all compensation, so the corresponding risk-sharing responsibilities can be fulfilled with the assistance of the former. If there were legislative enforcement of the United States' registration of liner companies, coupled with the market operation of commercial liability insurance and the added support from liner company P&I insurance, development of economic globalization and global supply chain management would be more stable, and resource allocation would be more reasonable.

Upon completion of this paper, further news has been released regarding the ship ITAL LIBERA, which has a capacity of 5,090 Twenty-feet Equivalent Units and was refused entry to ports in Singapore, Malaysia, Indonesia, and other states, simply because the captain was suspected of being infected with COVID-19. When the captain died, his body was placed in the ship's refrigerator and could only be returned to Italy after two months, on one specific night, at the port of Colombo. With that in mind, it is even more necessary to give the liner companies the status of "Public Carrier". Clearly, it would be of great benefit for the World Health

Organization, governments, and experts from the international trade, international shipping, and international financial industries to reach an agreement regarding this topic.

Translator: XU Yangdan

Editor (English): John Karl Martin

《北京草案》三次修订对清洁物权内涵的扩张及挑战*

张丽英** 胥佳靓***

摘要：船舶司法出售的国际承认涉及“清洁物权”这一焦点问题，其中《北京草案》2019 年第一次修订本删去了原草案中“若非由任何购买人承担”的表述，开始小幅度扩大《北京草案》下清洁物权的范围；2020 年第二次修订本一改之前将“清洁物权”限于“抵押权和担保权”的做法，首次将“清洁物权”的范围由“抵押权和担保权”扩展到“各类对船舶的权利的所有权”；而《北京草案》2021 年第三次修订本在保留此扩张趋势的基础上，进一步将“清洁物权”的范围扩大为“任何对船权的物权”，这实质性地提升了船舶司法出售国际承认对买受人利益的保障效果。而随之而来的挑战是，过于前沿的观念是否会导致《北京草案》难以被接受而缔约国数量太少，继而限缩公约最终的实际影响力。本文在比较分析各法系国家有关清洁物权的规范的基础上，通过分析《北京草案》三次修订本中关于清洁物权部分的变化，对《北京草案》有关清洁物权的规范可能面临的挑战及化解进行研判。

关键词：船舶司法出售；北京草案；清洁物权；承认与执行

2021 年 4 月 19 日到 23 日，联合国国际贸易法委员会下船舶司法拍卖第六工作组（简称“第六工作组”）在纽约召开第三十八次会议，这次大会的主要议题之一是对《船舶司法出售的国际承认公约》（简称“《北京公约》”）进行第三次修订。[1]由于缺乏统一、专门、有效的国际立法，涉及多方利益的船舶司法出售已经出现了很多现实问题，最突出的莫过于船舶司法出售的国际承认问题。此问题的核心在于各国对司法出售后买受人对船舶所享有的清洁物权的范围存在理解差异,其中有些国家认为司法出售后，船舶上所有附着的权利[2] 都自动消灭（例如，加拿大和英国），但有些国家只承认司法出售后船舶上部分物权归于消灭，新的买受人仍需继续承担附着在船舶上的部分权利（例如，日本法下新的买受人需要继续负担船舶上享有优先顺位的留置权）。[3]《关于外国司法出售船舶及其承认的国际公约草案》（简称“《北京草案》”）是国际海事委员会历经数载的成果，第六工作组于 2019 年正式开启《北京草案》的讨论等相关事宜，为其公约化以及司法出售的国际承认作出更多的努力。[4]本文将以第六工作组会议以公约的三次修订意见为研究对象，以清洁物权为切入点，研判推动船舶司法出售国际承认公约化的路径及如何应对第三

* 本论文是国家社科专项课题项目：“一带一路”国际合作框架机制设计（项目号：18VSJ050）的成果。

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[1] United Nations Commission on International Trade Law，Annotated provisional agenda，A/CN.9/WG.VI/WP.89 (2021)，p. 2，also see United Nations Treaty Collection, https://undocs.org/en/A/CN.9/WG.VI/WP.89.

[2] 包括船舶所有权、附在船舶之上船舶优先权、船舶抵押权或其他类似性质的权利以及其他任何形式的担保物权、根据租船合同或者船舶使用或租用合同而产生的任何权利或负担，或者任何形式的使用船舶并获取利益的各种船舶用益物权登记在原船东名下船舶国籍登记和船舶所有权登记、船舶抵押权或类似权利的登记以及船舶光船租赁登记，有关的船舶登记机关，经买船人要求，应办理相关的注销登记。

[3] United Nations Commission on International Trade Law, Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-seventh session, A/CN.9/1047/Rev.1(2020), para.39, also see United Nations Treaty Collection, https://undocs.org/en/A/CN.9/1047/Rev.1.

[4] United Nations Commission on International Trade Law, Proposals of the Comité Maritime International (CMI) and of Switzerland for possible future work on cross-border issues related to the judicial sale of ships, A/CN.9/WG.VI/WP.81(2019), also see United Nations Treaty Collection, https://undocs.org/en/A/CN.9/WG.VI/WP.81.

十八次会议拟定的“完全清洁物权”所带来的挑战。

一、《北京草案》制定必要性的回溯

（一）船舶司法出售缺乏他国承认有阻船舶贸易的发展

由于国际贸易活动对资金流动性有着极高的要求，船舶债权人往往希望能尽快受偿。船舶造价高昂，司法拍卖船舶不仅能保护债权人实现债权，还能最大可能发挥船只的价值，解决难以流通的问题，使固定的“船舶”变成流动易于交易的“资产”。但船舶司法拍卖时，对原船舶享有各种抵押权的物权人可能并不知晓，此时以船舶为权利标的的物权是否继续依附在船上就成为了至关重要的问题。而船舶的司法出售和承认很可能会发生在两个不同的国家，例如船舶的所在国和登记国不在一个国家，船舶有效拍卖后，新的买受人要想使用船舶，必须首先在船舶原登记国进行船舶注销，然后才能去新的国家登记，那么如果登记国不承认原拍卖地的裁判，买受人就无法顺利占有“干净的船舶”。

船舶司法出售的国际承认问题最早出现在 1960 年“Acrux”船案中。[1]该船在英国被扣并被诉，由于船东未应诉，法院判决拍卖该船，拍卖期间该船的抵押权人出现并向法院登记，通知法院其享有 6 万多英镑的抵押权并申请优先受偿。该船最终以 45500 英镑的价格拍卖给新船东，拍卖所得价款不足以清偿抵押贷款。1961 年 2 月海事司法人员获知该船的新船东无法在意大利船舶登记机关取得注销登记证明，因此无法办理新的登记，原因是意大利法律不承认英国法院拍卖的该船享有清洁物权。该案由于司法出售得不到登记国的承认，无法有效转移所有权，买船人无法在其他国家登记并仍承受依附于该船抵押权。

我国法院也曾面临过同样的问题。1999 年“P”轮在圣文森特和格林纳丁斯办理了抵押登记，2004 年在朝鲜法院被拍卖，买船人于 2005 年出售该船给现有人，并在原登记国完成登记，但未注销抵押。同年，巴黎的抵押权人向天津海事法院申请扣押该船。法院判决，该船在朝鲜被法院出售后，以该船为客体的所有权利，包括法国银行在该船上设立的船舶抵押权，均被消灭，即使该船在圣文森特和格林纳丁斯的船舶登记及船舶抵押权登记均未被注销；法院确认“P”轮已被朝鲜法院强制拍卖，属于对法律事实的认定，而不是对朝鲜法院判决的承认；该拍卖行为的合法性应通过朝鲜司法机关解决。中国法院只对朝鲜法院的判决进行确认。[2]

司法拍卖的最终目的是通过将船舶折现偿还原有债权，保障新船舶所有人可以登记使用，发挥其航运功能。如原登记国否认船舶拍卖后的清洁物权，或者各国之间关于可“获得完全清洁物权”的前提条件不同，继而拒绝承认其他司法辖区做出的拍卖决定，买受人将面临极不稳定的风险，抑制买受人参与船舶司法拍卖的积极性，继而不利于国际船舶贸易的发展。因此，制定单独、成体系化的船舶司法出售公约有利于提升船舶司法出售的信用。

（二）现行公约无法解决船舶司法出售承认的问题

在船舶司法出售领域，目前国际社会尚未形成直接的公约文件，但与之相关的船舶优先权等问题部分国家达成了一定的共识，形成了下列公约：1.《1926 年关于统一船舶优先权及船舶抵押权若干法律规定

[1] The “*Acrux*” (1961) 1 Lloyd’s Rep.405.

[2] 北欧商业银行-欧洲银行（Bcen-Euro Bank）诉佛他贸易有限公司（Ferta Trade Ltd. S.A.）船舶抵押权纠纷案，天津海事法院（2005）津海法商初字第 401 号民事判决书。

的国际公约》，[1]其内容为船舶司法拍卖正当程序，目前缔约国只有 3 个，丹麦、法国和卢森堡；2.《1967 年关于统一船舶优先权和船舶抵押权若干法律规定的国际公约》[2]，规定了船舶司法拍卖正当程序，包括通知、拍卖价款分配、证明书、注销登记等，该公约比 1926 年公约更加具体和明确，缔约国有 5 个，即丹麦、挪威、叙利亚、瑞典和芬兰；3.《1993 年船舶优先权和抵押权国际公约》，[3]规定为执行船舶优先权、船舶抵押权而强制出售船舶时，船舶司法拍卖通知的对象、内容及形式、拍卖价款分配、拍卖程序分配，签署国（signatories）11 个、缔约国（parties）19 个；4.《1999 年关于扣押海运船舶的国际公约》，[4]规定可通过司法强制变卖执行依扣船请求地国法律作出的有效判决，签署国 6 个，缔约国 12 个（土耳其于 2019 年新加入）。

上述公约的显著特点有三个，其一，在内容上，大部分公约的内容更偏重于程序要求，且主要是标准指引类的建议，并无针对船舶司法出售相互承认和执行的特定内容，尤其是无法解决船舶在一国司法拍卖后，由于在另一国无法注销致使买受人无法登记的问题；其二，在缔约国上，上述公约的缔约国都很少，且不包括英、美、日、德等主要海运大国，因此即使生效，其对国际航运的整体影响也有限；其三，在磋商过程中，一些国家表示，不签订此类公约是因为公约的“统一性”会与国家各自的利益相互冲突。各国承认规则的统一确实会增加许多便利和可预测性，但是这些优势无法弥补各国国内法因此遭到的损失，[5]例如关于适用法的问题，1926 年公约明确规定关于船舶优先权和抵押权的适用法为船旗国法，而非缔约所在地国或者法院所在地国法。虽然最后这项规则获得了一些非缔约国的认可，但往往是在后续发展中作为一般原则，或者在国内立法过程中予以参考，非缔约国通常并不愿意在初期就直接通过公约的方式确定适用法。[6]综上，制订新的、更有针对性的公约，是有效解决船舶司法拍卖的国际承认与执行问题的重要途径。

（三）清洁物权在《北京草案》制订中的重要作用

首先，清洁物权（clean title）概念的厘定决定着公约的适用范围及影响力。船舶司法出售作为一种特殊的变更船舶所有权的手段，是指由法院指引或控制出售程序进行的船舶处分行为。经司法出售的船舶将不负担其他物权性权利，可使买受人获得一个“清洁的物权”，成为新船东，此种效力的产生源于出售国当地法院的法律认可。由于船舶司法出售往往具有跨国性，船只的拍卖地和新的登记地常常位于不同国家，这就需要相关国对船舶司法出售整个程序的认可。如果清洁物权的概念无法获得国际共识或者无法找到协调的方式，只由极少数国家签署公约，则会限缩其影响，即只有缔约国之间的司法拍卖裁判被执行，那么长远来看公约对司法拍卖领域国际承认规则的影响将微乎其微。

其次，清洁物权是否存在会决定司法出售船舶证书的效力。[7]司法出售船舶证书是为了证明司法拍卖

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[1] International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages (1926 also see United Nations Treaty Collection, https://treaties.un.org/pages/showDetails.aspx?objid=080000028016775a.

[2] International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages (1967)， also seen The Admiralty and Maritime Law Guide, http://www.admiraltylawguide.com/conven/liens1967.html.

[3] International Convention on Maritime Liens and Mortgages (1993)， also see United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-D-4&chapter=11&clang=_en.

[4] International Convention on Arrest Of Ships (1999), also see United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XII-8&chapter=12&clang=_en.

[5] Comment, *The Difficult Quest for a Uniform Maritime Law*, 64 Yale Law Journal 878, 899-900 (1955).

[6] John M. Kluz, *Ship Mortgages, Maritime Liens, and Their Enforcement: The Brussels Conventions of 1926 and 1952*, 1963 Duke Law Journal 671, 676 (1963).

[7] United Nations Commission on International Trade Law, Judicial Sale of Ships: Proposed Draft Instrument Prepared by the Comité Maritime International, A/CN.9/WG.VI/WP.82 (2019), p.2, also see https://undocs.org/en/A/CN.9/WG.VI/WP.82.

的有效性，最终目的是执行生效的裁判以保障各类权利人的合法权益，而买受人在司法拍卖结束后，最大的诉求则是消灭船舶上原有的所有权益，进行登记成为“全新”的船舶（即获得完全的清洁物权），而不愿意也不应当一直为船舶上所附着的各种未知物权负责。这种过大的未知负担既不符合买受人购买司法拍卖船舶的初衷，也不符合各国希望促进船舶价值流动的倾向。清洁物权范围的界定属于各国国内法的范围，而船舶的流动性决定了该问题需要相关国家的共识，否则，“不承认完全清洁物权的国家”可以否认“承认完全清洁物权国家”做出的有效裁决或者判决，继而使得裁决或者判决无法执行，司法出售船舶证书在他国也变得无效，所拍卖船舶的注销和再登记会遭遇阻碍。因此，清洁物权的界定成为了船舶司法拍卖国际承认的核心争议点。

二、船舶司法拍卖中的“清洁物权”理论及各国规制的比较

第六工作组在其公布的《北京草案》修订讨论文件中均未直接说明某个特定国家对《北京草案》下清洁物权内涵有何不同观点及理由，仅概括言之“有与会者建议”。因此，为探求各国在公约修订时对清洁物权内涵采不同态度的潜在理由，以及《北京公约》接下来需要如何对清洁物权的内涵进行修订，有必要回溯目前各国立法中关于司法出售后“清洁物权”的相关规则及配套制度。下文将通过对比德国、日本、英国及中国目前关于清洁物权的法律规定，试探究各国采用不同清洁物权规范背后的利益平衡。

（一）船舶清洁物权内涵的界定及目前主要的三类学说

“清洁物权”的概念是在讨论《北京草案》的过程中提出的，目前尚未直接在各国国内法中出现，通常是用来描述司法出售对被售船舶所附着各类权利的效力影响。[1]在第三次修订本中，联合国贸易法委员会对“清洁物权”的内涵进行了界定：“清洁物权系指不附带任何抵押权或对船权的物权”。[2]此定义聚焦船舶司法出售后最理想的效果，即买受人可以买到“完全干净的船舶”，但该定义并不能体现绝大多数国家对此问题的实际态度。

虽然各国立法没有直接出现“清洁物权”的表述，但关于司法拍卖后，船舶上附着的抵押权或者其他权利的效力问题，学界目前主要分为承受主义、消灭主义和剩余主义三类。[3]

承受主义是指拍卖船舶上有优先于执行债权人的担保物权或用益物权等负担时，该种负担不因拍卖而消灭，而是继续存在于船舶上由拍定人承受。该模式的特点在于：首先，有利于保护优先于执行债权的担保物权、用益物权等各项权利；其次，由于需要继续承受部分优先的担保物权或用益物权，承受主义下的买受人通常可以以低于市场价的数额（最终成交价会扣除需要承受权利负担部分的价金）购买到船舶，这种较低的资金负担有利于加快船舶出售。该模式下船舶享有是“限制的清洁物权”，即船舶上仍附有之前的权利，更侧重于保护原权利人的利益。此模式有不足在于：其一，变现程序更复杂，因为需在拍卖过程中确定买受人应承受的负担范围及其具体金额；其二，买受人始终处于未知的风险状态，因为其所取得的标的物上可能存在着复杂的法律关系；其三，不利于船舶的自由流通，因为拍卖的效果难以预估，这会大大降低买受人的购买意愿。

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[1] Henry Hai Li, A Brief Discussion on Judicial Sale of Ships, 2008, p.7, also see Comite Maritime International, https://comitemaritime.org/wp-content/uploads/2018/05/A-Brief-Discussion-on-Judicial-Sales-of-Ships.pdf.

[2] United Nations Commission on International Trade Law, Draft Instrument on the Judicial Sale of Ships: Annotated Third Revision of the Beijing Draft, A/CN.9/WG.VI/WP.90 (2021), p.3, also see United Nationshttps://undocs.org/en/A/CN.9/WG.VI/WP.90.

[3] 邓挺：《国际上关于强制拍卖中处理不动产上权利负担的立法原则》，载北京法院网 2011 年 9 月 7 日，http://bjgy.chinacourt.gov.cn/article/detail/2011/09/id/883257.shtml，2021 年 7 月 24 日访问。

消灭主义是指拍卖标的物上存在的优先于执行债权的担保物权或用益物权等权利负担，因强制拍卖而归于消灭。该模式的优点在于：首先，司法出售的买受人能获得完全清洁的物权，不再承受之前的任何权利负担，这能极大促进买受人的交易意愿；其次，此种模式可以避免优先权人（优先于执行债权人的担保物权或用益物权的权利人）对买受人行使权利减少诉累；再次，由于取得了完全的清洁物权，买受人可以自由将船舶再次抵押、担保甚至出售，有利于实现船舶的流通价值。与此同时，消灭主义也存在两项固有缺陷：其一，由于船舶上的权利负担因强制拍卖而全部归于消灭，担保物权人和用益物权人将被迫提前接受清偿，从而丧失预期利益，同时在拍卖价金不足的情况下，可能无法按照原金额清偿债权；其二，由于买受人不承受任何权利负担，因此消灭主义下拍卖的价金往往较高，缩小了可能参与竞拍的对象范围，影响到司法出售的时间。

由于上述的承受主义和消灭主义都存在固有缺陷，所以各国需要融合这两种制度，剩余主义则应运而生。剩余主义是指在后顺位优先权人或普通债权人对船舶申请拍卖时，执行法院须依职权进行估算，只有在拍卖价金大于“清偿或补偿先顺位的优先权及各种执行费用”时，才能进行强制拍卖，而这种模式下买受人也可以享有“完全清洁物权”。剩余主义下对拍卖条件的限制是为了提高对优先权人的保护，防止优先权人的利益因拍卖所得价金不足而受到损害。剩余主义模式的优点在于，既保证了顺序在前的权利人的利益，也不会让买受人承担未知的负担。但与此同时，在剩余主义下，强制拍卖的启动的前提是拍卖所得价金必须在清偿先顺位的优先权后仍然有剩余部分的可能，这种制度设计不利于保护普通债权人的权益。

（二）德国：兼采承受主义和剩余主义

作为大陆法系国家的代表，德国法律将船舶司法出售相关内容专门规定在 1897 年的《强制拍卖与强制管理法》(ZVG)中。总体来看，德国一方面通过严格限缩司法拍卖的船只条件、裁判主体、拍卖程序等提高司法拍卖的门槛，减少不必要的司法拍卖；另一方面，又通过公告、通知等各种方式，提前告知抵押权人等物权利益持有者的利益，如果公告期满无人提出反对，则可以视作对权利的自愿放弃。德国通过对司法拍卖进行严格的程序限制，尽可能弱化其剩余主义规则对船舶原权利人的潜在侵害，同时给予了拍卖后船只完全的清洁物权，使得最终得出的有效判决或者裁决具有可执行性。但是需要注意的是，德国法下的剩余主义并不会影响到船只上优先于执行债权的“担保物权”和“用益物权”，即德国仅承认部分物权在司法出售后归于清洁，而对于优先于执行债权的这部分担保物权及用益物权采用承受主义，买受人仍需对此负责。[1]

具体来看，《强制拍卖与强制管理法》的第 162 条至第 171 条中包含为弱化德国所采用的清洁物权规则所带来的风险而设置的相关配套规则，[2]主要有以下两项:

第一，法院管辖与拍卖的启动条件。在德国法下，“对船舶的执行”这一事项只能由船舶所在地的初级法院进行管辖，而且只有当拍卖的出价额大于优先于执行债权的一切物权以及强制执行程序的各种费用时，经过海事请求权人的申请，法院才能允许进行拍卖（船舶所有人无法启动拍卖程序）。此外，在进行司法拍卖之前，法院应依照其职权自由裁量一个“拍卖最低价”，法院在确定此最低价时需要考虑船舶上现存的权利负担、拍卖程序所需要支出的费用，以及其他需要由买受人通过支付现金的方式清偿的其他优

[1] 郑昊天: 《船舶司法出售之法律问题研究》，大连海事大学 2014 年硕士学位论文，第 14 页。
[2] 杨柳：《德国强制拍卖与强制管理法》，人民法院出版社 2010 年版，第 55 页。

先权利。[1]

第二，船舶司法出售公告。进行船舶司法出售的主管法院有义务发出船舶拍卖公告。根据《强制拍卖与强制管理法》第 41 条的规定，公告必须送达参与主体，该主体包括债权人(权利人)，债务人(船舶所有人)和登记的抵押权人及其他船舶登记簿上有记录的债权人。此外，公告必须发布在特定的航运杂志上以确保行内人员都充分知晓，如德国的“每日港口报告”(TäglicherHafenbericht)和“汉莎国际海事期刊”(Hansa)杂志，这些公告的信息必须包括船名、船舶所有人名称、司法拍卖的时间及地点、抵押情况、未记录在船舶名录上的权利、拍卖将按照强制执行的方式出售的声明等细节。如果任何一方当事人认为司法拍卖存有不公正的情况，应在司法拍卖诉讼结束之前提出抗议。

（三）日本：兼采承受主义、消灭主义和剩余主义

同样作为大陆法系的代表，日本对于“清洁物权”的范围则采取了更为复杂的立法策略，即在剩余主义前提下采用消灭主义，同时兼采承受主义原则。

《日本民事执行法》第 121 条规定，船舶的强制拍卖参照适用不动产的规则。[2]《日本民事执行法》第 59 条对不动产上不同的权利负担规定了不同的处理原则：对于抵押权、不以使用收益为目的的质权以及不能与这些权利相对抗的担保物权、用益物权等都因司法强制出售而归于消灭（即剩余主义前提下的消灭主义，因为在做出强制司法出售的决定前，法院会对享有优先顺位的权利进行审查）。作为例外，《日本民事执行法》对部分权利负担采取承受主义，包括处于最优先顺位的用益物权、留置权、没有不进行使用收益之规定且处于最优先顺位的质权。

为了保障船舶原权利人的利益，《日本民事执行法》也设置了一系列的配套限制措施。例如，《日本民事执行法》第六十条规定了司法出售低价的限制，第六十四条规定了法院在司法出售前需要进行公告的义务。

（四）英国：倾向于采剩余主义

作为航海大国，英国目前对于船舶司法出售也是持有积极但谨慎的态度，虽倾向于赋予船舶司法出售的买受人完全的清洁物权，通过限缩启动条件、通知所有权利人、为各权利人赋予大量请求优先权的程序、指定优先权期间以及估价等方式（但由于仅采取剩余主义，在保护优先权利人方面显然比德国和日本设置了更多的程序性限制），尽最大努力保证船舶在出售之前所附着的权利，平衡买受人和原权利人的利益。但是和德国相比，英国法下船舶司法出售的范围更广，例如执行的期间不限于最终生效判决或裁决做出之后，海事法院在诉讼全程都可以做出强制出售的裁定。

特别的是，英美法系国家的诉讼制度存在对人诉讼和对物诉讼两种模式，在对物诉讼的船舶出售中，船舶作为独立的物参与诉讼，经出售后人格被消灭，买受人原始取得船舶所有权，强制出售被扣押船舶是

[1]《德国强制拍卖与强制管制法》第 44 条第 1 款，载 https://www.chinacourt.org/article/detail/2002/06/id/6329.shtml，2021 年 5 月 7 日访问。

[2]《日本民事执行法》第 121 条，载 https://elaws.e-gov.go.jp/document?law_unique_id=354AC0000000004_20200401_501AC0000000002，2021 年 7 月 23 日访问。

对物诉讼中独有的救济手段。[1]由于《北京草案》下关于清洁物权的争议主要是司法出售后附着于船舶的各种物权是否归于消灭，从而使船舶买受人不再承受未知的负担，以下仅讨论英国法下对物诉讼模式的船舶出售。

英国《1981 年最高法院法》第 49 节对被扣押船舶的司法出售做出了一般性的规定，[2]英国《最高法院规则第 75 号令》具体规定了对被扣押船舶的估价和强制出售以及法院裁定等规则。其中为弱化英国所采用的清洁物权规则所带来的风险而设置相关的配套规则如下：[3]

第一，船舶司法出售的启动条件。英国海事法院可以在对物诉讼中的任一阶段裁定估价并且强制出售被扣押船舶，而不要求必须做出具有最终拘束力的判决或者裁决。申请司法强制出售的启动主体也更加多元化，不限于海事请求权人，而是包括被告在内的任何一方当事人，法院执行官也可以申请强制出售的裁定。

第二，对船舶优先权的规定。《最高法院规则第 75 号令》第 8 条第 2 款规定，在本部分诉讼指引第 8.1 条第 4 款所指期间后的任何时间内，依照判决可以申请对相关财产进行拍卖的当事人，可向海事法院申请确认船舶优先权。申请的通知应向有权提起相关财产诉讼的当事人送达。除海事法院法官另有指令外，对优先权的裁决只能由法官作出。

第三，船舶司法出售的价款分配。《最高法院规则第 75 号令》第 8 条第 3 款规定，拍卖所得价款只向判决生效后的债权人分配，同时根据法院对船舶优先权的确定指令进行分配。另一方面，海事法院在做出裁定的同时也可以附加其它裁定指明确定优先权的期间，并公布强制出售船舶的具体情况以及其他权利人是否能在此期间内提起诉讼。同时，被扣押船舶的强制出售申请必须送达诉讼中的各方当事人和所有申请了“扣船诉讼中止”的各方当事人。海事执行官在强制出售船舶时应该卖出所能够得到的最高价钱，而不能低于确立的底价，以求最大限度的保护申请人的债权担保。[4]

（五）中国目前仅在五类船舶优先权的范围内倾向剩余主义，其他权利司法出售后效力未知

我国没有明确规定清洁物权这个概念，但是在优先权领域有类似于将“五类船舶优先权”认定成清洁物权的条款。我国《海商法》第二十六条规定，船舶优先权不因船舶所有权的转让而消灭。但是，船舶转让时，船舶优先权自法院应受让人申请予以公告之日起满六十日不行使的除外。[5]该条款给予了保护买受人的可能，即当事人申请公告满六十日后，《海商法》第二十二条的规定中列举的五类优先权可以随着船舶所有权的转让而消灭，不再依附在船只上（这部分权利对船舶买受人来说变得清洁）。[6]此外，《最高人民法院关于扣押与拍卖船舶适用法律若干问题的规定》第二十二条中明确规定，船舶优先权、船舶留置权、船舶抵押权以及其他被拍卖、变卖船舶有关的其他海事请求具有优先受偿的权利。[7]该条款在优先权

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[1] 李歆蔚，初北平:《船舶司法出售公约起草中的核心问题》，载《中国海商法研究》2020 年第 1 期，第 95 页。

[2] The Senior Courts Act 1981, Section 49, available at: https://www.legislation.gov.uk/ukpga/1981/54/contents.

[3] 张进先：《英国的船舶扣押与强制出售》，载《人民司法》1992 年第 11 期，第 45 页。

[4] Jackson D.C., Enforcement of Maritime Claims (4th ed.), Informa Law from Routledge, 2005, p.ara 25.56.

[5]《中华人民共和国海商法》第 26 条，下载于 http://www.npc.gov.cn/wxzl/wxzl/2000-12/05/content_4575.htm，2021 年 5 月 9 日访问。

[6]（1）船上在编人员的工资、劳动报酬、遣返费用、社会保险；（2）运营中人身伤亡赔偿；（3）船舶吨税、引航费、港务费和其他港口规费；（4）海难救助；（5）运营中侵权产生的财产赔偿。

[7]《最高人民法院关于扣押与拍卖船舶适用法律若干问题的规定》(2015 年)第 22 条

的基础上扩展了其他具有优先受偿性质的权利种类，但是并未规定如若船舶转让或强制出售，这些权利的效力如何。因此，我国只针对五类优先权规定类似清洁物权，而对其他种类的物权在司法出售后效力如何保持缄默态度。

除此之外，我们注意到，我国《海事诉讼特别程序法》第三十三条对于船舶司法出售的程序也有规定，即海事法院应当在拍卖船舶三十日前，向被拍卖船舶登记国的登记机关和已知的船舶优先权人、抵押权人和船舶所有人发出通知。通知内容包括被拍卖船舶的名称、拍卖船舶的时间和地点、拍卖船舶的理由和依据以及债权登记等。通知方式包括书面方式和能够确认收悉的其他适当方式。[1]

与此同时，我国也要求法院在司法出售之前设定最低价，以防止成交价过低，《最高人民法院关于扣押与拍卖船舶适用法律若干问题的规定》第 12 条第 1 款规定：“海事法院拍卖船舶应当依据评估价确定保留价，保留价不得公开”，[2]但是我国目前并没有规定由谁来决定这一保留价，司法实践中也不统一：有些法院由审判委员会确定，有些法院由审理相关案件的合议庭确定，有些法院由负责船舶拍卖的部门会议确定。[3]虽然在实践中关于司法出售的程序还存在一些不确定之处，但我国已经开始通过设置许多程序上的限制（通知）以及设立保留价的制度，尽可能避免因强制司法出售给原权利人带来的可能损失，从而保护原权利人的利益实现，通过此类程序规则平衡买受人和原权利人之间的利益。因此我国目前仅在五类船舶优先权范围内，保持和德国英国相似的剩余主义，明确承认可能的清洁物权，但对于其他各类物权在司法出售之后效力如何仍态度不明。

三、《北京草案》下清洁物权的内涵在三次修订下的演变

(一)原《北京草案》：限定的清洁物权阶段

国际海事委员会《北京草案》第七条第一款(a)项规定，司法出售的买受人在购买船舶之后将会获得清洁物权。在第一次中，第六工作组对“清洁物权”进行了限定的定义，是指若非由任何购买人承担则不附带任何抵押或担保的物权。其中“抵押”是指是指在登记国对船舶进行的获得根据国际私法规则可予适用的司法出售国法律所承认的任何抵押；而“担保”包括任何担保、船舶留置权、留置权、产权负担、赔偿请求、船舶扣押、扣押、保留权或可能对船舶主张的任何各类和任何方式的任何其他权利。[4]

整体而言，在第一个阶段，《北京草案》下的清洁物权仅仅包括“不需要由购买人承担”的抵押或者担保的物权，并不包括除抵押和担保以外其他种类的物权权利；同时，该草案也没有厘清什么是属于“需要由购买人承担”的担保或者抵押，也就是说未阐明的这部分权利仍然可以附着于船只上。《北京草案》这种模棱两可的态度对于担保权和抵押权以外的权利人来说确实是一种充分的保障，但是各国国内法律制度对物权体系规定的不同，会使得具体裁判过程中各法院对于清洁物权以外权利的具体范畴进行不同认

（http://www.court.gov.cn/zixun-xiangqing-13551.html）。

[1] 《中华人民共和国海事诉讼特别程序法》(2000)第 33 条（http://www.npc.gov.cn/wxzl/gongbao/2000-12/05/content_5004761.htm）。

[2] 《最高人民法院关于扣押与拍卖船舶适用法律若干规定》(2015)第 12 条(http://www.court.gov.cn/fabu-xiangqing-13551.html)

[3] 罗东川,王彦君,王淑梅,黄西武：《<关于扣押与拍卖船舶适用法律若干问题的规定>的理解与适用》，载《人民司法》2015 年第 7 期，第 29 页。

[4] United Nations Commission on International Trade Law, Judicial Sale of Ships: Proposed Draft Instrument Prepared by the Comité Maritime International, A/CN.9/WG.VI/WP.82 (2019), p.3, also see United Nationhttps://undocs.org/en/A/CN.9/WG.VI/WP.82.

定，而且法院在进行解释的时候也可以有较大的自由裁量权，这些不可控、不可预测的结论对于买受人来说是一种巨大的未知风险，因此原《草案》的这种规定虽然可能获得更多国家的同意，但是无法实现公约的初始目的，通过降低买受人的风险，给予他们一种充分的可预测信赖，继而提高参与船舶司法拍卖的意愿，充分促进船舶的自由流通。

（二）《北京草案》2019 年第一次修订：扩张了清洁物权的范围

为了确保清洁物权准确地涵盖了最初的《北京草案》所设想的所有效力，在 2019 年 9 月 10 日由第六工作组提出的第一次修改本中，清洁物权的内涵已经开始进行扩张。[1]“清洁物权”的暂定含义是指若非由任何购买人承担则不附带任何抵押权或担保权的物权。[2]其中“抵押权”是指符合以下条件的任何抵押权/质押权：(1)在对该船舶办理登记的船舶登记处所在国对该船舶有效；(2)根据司法出售国的国际私法规则，为适用的法律所承认。而“担保权”是指可对船舶主张的以任何方式产生的任何权利，包括船舶优先权、留置权、抵押权、扣押权、使用权或扣留权。这次修改主要有三项改变：

其一，将抵押和担保的表述变成了抵押权和担保权。原本的“抵押”需要符合两个条件，一方面此种抵押需要在登记国法律有效，另一方面根据司法出售国的国内法可适用的国际私法规则，这种抵押是被承认的。[3]第一次修订本中的“抵押权”与原来的“抵押”相比，最大的区别就是在抵押权之外增加了“质押权”这一大类，同时通过增加“权”这一表述更加明确其“权利”属性。而原来的“担保”包括任何担保、船舶留置权、留置权、产权负担、赔偿请求、船舶扣押、扣押、保留权或可能对船舶主张的任何各类和任何方式的任何其他权利；第一次修订后的“担保权”则将这些具体列举出来的权利类型和形式统一抽象为“可对船舶主张的以任何方式产生的任何权利”，同时列举了几种作为参考，包括船舶优先权、留置权、抵押权、扣押权、使用权或扣留权。根据第六工作组的会议记录，“担保权”一词意在涵盖可以对物强制执行的各种私人权利和利益，[4]但是修订后所有的表述都加了“权”（包括完全新增的船舶优先权[5]），而原本的“产权负担”“赔偿请求”这类本身权利属性较弱的表述都被删去。

其二，在此修订本中，有人建议，在清洁物权的定义中删除“由任何购买人承担”这一表述，[6]一方面可以避免讨论什么是“需要由购买人承担”的抵押权和担保权类别，另一方面，也可以进一步扩大清洁物权的范围，使船舶更加清洁，利于船舶的流通。修订本中的这种建议的考量实质上和公约最初的设置目的是相符的，即被拍卖的船舶原则上不再附着任何种类的权利，使买受人处于稳定的法律关系中，促进船舶的自由流动。

其三，在公约适用范围上，公约从无限制变成了有限制条件的司法出售。根据第一次修订本的第二条第二款，本公约“只适用于船舶上不再附带所有抵押权和担保权[由购买人承担的抵押权和担保权除外]

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[1] United Nations Commission on International Trade Law, Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-sixth session, A/CN.9/1007(2019), para.49, also see United Nations, : https://undocs.org/en/A/CN.9/1007.

[2] United Nations Commission on International Trade Law, Draft Instrument on the Judicial Sale of Ships: Annotated First Revision of the Beijing Draft, A/CN.9/WG.VI/WP.84 (2019), para.6, also see United Nationhttps://undocs.org/en/A/CN.9/WG.VI/WP.84

[3] United Nations Commission on International Trade Law, Draft Instrument on the Judicial Sale of Ships: Annotated First Revision of the Beijing Draft, A/CN.9/WG.VI/WP.84 (2019), p.8, also see United Nations, https://undocs.org/en/A/CN.9/WG.VI/WP.84.

[4] United Nations Commission on International Trade Law, Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-fifth session, A/CN.9/973(2019), para.79, also see united Nations, https://undocs.org/en/A/CN.9/973.

[5] 此第一次修订本中，“船舶优先权”为新增概念，是指根据司法出售国的国际私法规则，为适用的法律承认为对于船舶的船舶优先权或海事优先权的任何索偿权。

[6] United Nations Commission on International Trade Law, Draft Instrument on the Judicial Sale of Ships: Annotated First Revision of the Beijing Draft, A/CN.9/WG.VI/WP.84 (2019), p.9,also see ,https://undocs.org/en/A/CN.9/WG.VI/WP.84.

的船舶司法出售。”拟增这一款会极大限缩公约可适用的船舶司法出售。

整体而言，第一次修改意识到原《草案》限缩清洁物权范围的做法欠妥，无法达到公约促进司法船舶出售及船舶流通的目的。[1]因此在清洁物权的范围上进行了许多突破性的拓展，虽然还是限定在抵押权和担保权范围内，但在这两者范围内新增许多实质内涵，例如质押权以及船舶优先权。

（三）《北京草案》2020 年第二次修订：逐步扩张清洁物权的范围

继第一次修订后，各国更加认识到清洁物权内涵对于公约目的实现的重要性，因此在 2020 年第二次修订时，进一步扩大清洁物权的范围，最终确定，“清洁物权”是指在司法出售之前存在的对船舶的任何所有权及各类权利和利益均已消灭，且该船舶已不再附带任何对船舶的权利或抵押权/系指不附带任何抵押权或对船舶的权利的所有权；而“对船舶的权利”系指以任何方式，无论是扣押、查封或其他方式产生的可对船舶主张的任何种类的权利，并包括船舶优先权、担保性权利、产权负担、使用权或留置权，但不包括抵押权。[2]这种“不附带任何对船舶的权利”的表述参照了 1948 年《关于国际承认对航空器的权利的公约》，该《公约》第八条提到强制出售航空器产生的转移该航空器所有权的效力不附带任何权利。[3]

第一，删除“由购买人承担的抵押权和担保权除外”

原《草案》中的清洁物权明确表述“不由购买人承担的抵押权和担保权”，即对于“由购买人承受的抵押权和担保权”依然附着于船舶之上（虽然工作组也没有具体阐述内涵），第一次修改本虽有人提出不妥，但是最终仍然未直接删除。而 2020 年的第二次修改本直接删去这一表述，[4]厘清概念，即不存在仍然需要购买人承担的抵押权和担保权，所有抵押权和担保权都归于清洁，不再附着于船舶。

第二，清洁物权的范围不再限于抵押权和担保权这两类

前两版本草案中清洁物权的范围都仅限于“抵押权”和“担保权”两类，但是在第二次修订本中直接改成“抵押权”和“对船舶的权利”，其中“对船舶的权利”范围显然远远大于“担保权”，除担保权以外，还包括船舶优先权、产权负担、使用权或留置权，对于买受人来说更为有利（船舶更清洁了）。

第三，公约下的船舶司法出售增加了要件“必须通知”

第二修订本新增了第四条——司法出售通知书，要求出售前必须要通知（也可能采用公告的方式）抵押权人以及其他“已登记的对船舶的权利人”，同时还有光船承租人、船舶优先权人以及船舶所有人。这一条的规定类似于出售前的预防性措施，尽可能让权利人知晓船舶拍卖，从而在保障司法拍卖买受人获得干净船舶的同时，最大程度保障权利人的利益，更加合理且容易被各国接受。这种修订和前面所述的德国、英国的措施如出一辙，都是通过增设程序上的限制尽可能减少对权利人的消极影响，并充分保障“完全的清洁物权”，以增加买受人船舶拍卖的信心。

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[1] United Nations Commission on International Trade Law, Judicial Sale of Ships: Proposed Draft Instrument Prepared by the Comité Maritime International, A/CN.9/WG.VI/WP.82 (2019), p.3, also see United Nations, https://undocs.org/en/A/CN.9/WG.VI/WP.82.

[2] United Nations Commission on International Trade Law, Draft Instrument on the Judicial Sale of Ships: Annotated Second Revision of the Beijing Draft, A/CN.9/WG.VI/WP.87 (2020), p.2,3, also see Untied Nations https://undocs.org/en/A/CN.9/WG.VI/WP.87.

[3] Convention on the International Recognition of Rights in Aircraft (1953), Article 8,also see Untied Nations,https://treaties.un.org/doc/Publication/UNTS/Volume%20310/volume-310-I-4492-English.pdf.

[4] United Nations Commission on International Trade Law, Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-sixth session，A/CN.9/1007 (2019), para.15, also see Untied Nationshttps://undocs.org/en/A/CN.9/1007.

但是关于通知也有许多国家提出了异议：通知是否构成承认清洁物权的必要前提？虽然有些国家在司法出售程序启动之初就已知悉出售将导致授予购买人清洁物权，但在另外一些国家并非如此。如果最终形成的公约仅适用于赋予船舶清洁物权的司法出售，则另外一些国家将难以履行要求“在司法出售之前”发送通知的第 4 条给其规定的义务。[1]但也有代表认为，通知要求不应作为一项独立的要求，而应当只是作为司法出售证书的一项签发条件。[2]因此关于通知本身是否必然构成适用公约的要件，目前还存在不同的理解，需要在接下来的修订中得到进一步明确。

（四）《北京草案》2021 年第三次修订本进一步确认完全的清洁物权

第三次修订本未对第二次修订本进行许多实质性修改，只是在表述和内涵方面进一步简化明确了公约采用“完全的清洁物权”的态度，整体来看，对清洁物权、船舶优先权的内涵进行了进一步扩张，新增了船舶的定义，但是对于司法出售的内涵和公约的适用范围进行了限缩。

第一，进一步扩展完全的清洁物权的范围，由“所有权”拓展到了更广义的“物权”。在第二次修订本中，“清洁物权”的定义是指“不附带任何抵押权或对船舶的权利的所有权”，而第三次修订本中所用的概念变成了“不附带任何抵押权或对船权的物权”，其中第二次修订本中“对船舶的权利”和第三次修订本中“对船权”的内涵完全一致，[3]因此主要的变化就是将“所有权”拓展到了“物权”，进一步确认了第二次修订本中对清洁物权内涵的扩张趋势，甚至更加“清洁”，反映出公约在利益选择中将更侧重于对买受人的保护。

第二，拓展了船舶优先权的范围，不再局限于“适用法律承认其为对船舶的优先权或海事优先权的任何索偿权”，而是“可适用的法律被确认为是附于船舶之上的优先权或先取特权的任何权利主张”。最主要的区别就是将“任何索赔权”扩展为“任何权利主张”，即船舶优先权不限于索赔权，可能包括其他的非金钱给付的权利主张。还需要注意的是，在修订过程中，有代表提出“船舶优先权”一词不应总是限于“根据司法出售国国际私法规则可予适用的法律”所承认的船舶优先权”，[4]但是此种观点最终没有被采纳，工作组还是使用“适用法律”来限定“船舶优先权”的范围。[5]

第三，增加了对于“船舶”的定义。第三修订本全新增加了对船舶的定义，公约下的船舶系指（在船舶登记处登记且可供公开查询的）任何船舶或船艇，并可以成为扣押或其他类似措施的客体，且根据司法出售国法律能够导致被司法出售。[6]此种定义一方面对司法拍卖的船舶进行限制，即必须经过登记且可公开查询，另一方面将船舶外扩到“船舶或船艇”，将小型船舶或者游艇也纳入司法拍卖国际承认执行的范围内。此外，值得注意的是，在修订过程中，一些国家提出疑问，内河航行船舶是否属于该定义下的“船

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[1] United Nations Commission on International Trade Law, Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-seventh session, A/CN.9/1047/Rev.1(2020), para.39, also see United Nations, https://undocs.org/en/A/CN.9/1047/Rev.1.

[2] United Nations Commission on International Trade Law, Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-seventh session, A/CN.9/1047/Rev.1(2020), para.42, also see Untied Nationshttps://undocs.org/en/A/CN.9/1047/Rev.1.

[3] United Nations Commission on International Trade Law, Draft Instrument on the Judicial Sale of Ships: Annotated Second Revision of the Beijing Draft, A/CN.9/WG.VI/WP.87 (2020), p.2, also see United Nations, https://undocs.org/en/A/CN.9/WG.VI/WP.87; United Nations Commission on International Trade Law, Draft Instrument on the Judicial Sale of Ships: Annotated Third Revision of the Beijing Draft, A/CN.9/WG.VI/WP.90 (2021), p.2, also see United Nation, https://undocs.org/en/A/CN.9/WG.VI/WP.90.

[4] United Nations Commission on International Trade Law, Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-sixth session，A/CN.9/1007 (2019), para.19, also see United Nations, https://undocs.org/en/A/CN.9/1007.

[5] United Nations Commission on International Trade Law, Draft Instrument on the Judicial Sale of Ships: Annotated Third Revision of the Beijing Draft, A/CN.9/WG.VI/WP.90 (2021), p.3, also see United Nations, https://undocs.org/en/A/CN.9/WG.VI/WP.90.

[6] United Nations Commission on International Trade Law, Draft Instrument on the Judicial Sale of Ships: Annotated Third Revision of the Beijing Draft, A/CN.9/WG.VI/WP.90 (2021), p.4, also see United Nations, https://undocs.org/en/A/CN.9/WG.VI/WP.90.

舶”呢？有代表认为，可以单独增设一个条款允许国家对内河航行船舶进行保留，但是也有人认为目前考虑内河航行船舶为时过早。[1]

第四，限缩司法出售的范围，删去了第二次修订本中“或司法出售国法律所规定的任何其他方式”的司法出售。第三次修订本中，船舶的“司法出售”系指满足下列条件的对船舶的任何出售：（一）该出售由法院或其他公共机构命令、批准或确认，并以由法院监督和批准实施的公开拍卖或非公开协议的方式完成；并且（二）将该出售所得款项分配给有关债权人。[2]工作组在此修订本的脚注 6 中表示，此种修订是工作组第三十七届会议的决定，[3]并且澄清由法院监督和批准的要求只适用于通过非公开协议实施的出售，这些进一步修订是为了更准确反映各法域司法出售实际做法。[4]

第五，第三修订本对公约的适用范围通过增加附件条件进行了限缩。在第三修订本中，适用北京公约需要同时满足两个条件，条件一和第二修订本保持一致，即(a)司法出售之时船舶实际处于司法出售国的领土内；条件二则是新增设的，要求(b)根据该国法律，司法出售赋予购买人对该船舶的清洁物权。[5]此种限制实质上对公约的缔约方提出了要求，即必须在国内法承认的前提下，缔约方之间的司法拍卖才被认可。

四、《北京草案》修订后清洁物权内涵的扩张带来的潜在挑战

在草案的讨论过程中，第二次修订本之前所有的报告都要求对清洁物权的概念进行限定，只包括抵押权和担保权，而其他权利仍然附着于船舶之上，这样会给买受人增设极大的风险，无法实现公约本身的目的。正如 Sheen 大法官在“Cerro Collorado”一案中指出，“几乎每个船东都希望从他的银行那里获得贷款并以船舶作为抵押物提供担保。然而，如果在法院在进行司法拍卖时，买受人不一定能获得完全的清洁物权，那么买受人可从银行那里获得的担保价值就会大大地减低。”[6]第六工作组在第二次修订本之后对此概念进行了扩展，真正实现了本公约所需要保障的促进船舶自由流动和司法拍卖获得执行的最终目的，然而，第三次和第二次修订本的这种扩张也为公约的通过本身带来了一些挑战。

第一，为了扩张清洁物权的内涵而牺牲公约的适用范围将使公约实际执行效力有限。虽然第六工作组将清洁物权的范围进行大刀阔斧地扩张，由抵押权和担保权拓展到所有的抵押权和任何对船权的物权，但同时也将公约的适用范围变为“仅适用于司法出售国国内法认可清洁物权的国家”，并且需要出售时处于出售国领土内。目前完全承认公约中规定的“所有权利”在司法拍卖后都归于清洁的国家为数不多，而且有部分国家目前对于司法拍卖后归于清洁的物权范围尚未做出十分明确的规定，因此如果将适用范围限缩到仅适用于司法出售国与申请执行国的两国国内法都完全认可公约下各类权利在司法拍卖后归于清洁的情形，可能会造成公约实质上缔约国很少，或者对缔约方无法产生实际拘束力的后果（即使签订条约，不满足条件的司法出售占绝大多数，公约难以适用），最终执行起来效力有限，还是无法解决目前广泛存在的船舶司法出售国际执行难的问题。

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[1] United Nations Commission on International Trade Law, Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-seventh session, A/CN.9/1047/Rev.1(2020), para.27, also see United Nations, https://undocs.org/en/A/CN.9/1047/Rev.1.

[2] United Nations Commission on International Trade Law, Draft Instrument on the Judicial Sale of Ships: Annotated Third Revision of the Beijing Draft, A/CN.9/WG.VI/WP.90 (2021), p.3, also see United Nations, https://undocs.org/en/A/CN.9/WG.VI/WP.90.

[3] United Nations Commission on International Trade Law, Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-sixth session，A/CN.9/1007 (2019), para.18, also see United Nations，https://undocs.org/en/A/CN.9/1007.

[4] United Nations Commission on International Trade Law, Draft Instrument on the Judicial Sale of Ships: Annotated Third Revision of the Beijing Draft, A/CN.9/WG.VI/WP.90 (2021), p.3, also see United Nations, https://undocs.org/en/A/CN.9/WG.VI/WP.90.

[5] United Nations Commission on International Trade Law, Draft Instrument on the Judicial Sale of Ships: Annotated Third Revision of the Beijing Draft, A/CN.9/WG.VI/WP.90 (2021), p.4, also see United Nations, https://undocs.org/en/A/CN.9/WG.VI/WP.90.

[6] The “Cerro Collorado” (1993) 1 Lloyd’s Rep.58.

第二，目前修订本中对清洁物权内涵的极大扩张可能不利于增强《北京公约》的国际影响力。我们可以理解，在扩展公约下“清洁物权”的内涵后，随之限缩公约适用范围至承认公约项下“完全清洁物权”的国家的做法是为了促进《北京公约》最终得以通过的一种妥协，但是这么做实质上会极大限缩《北京公约》未来的缔约国数量，并且从长远来看，会在承认“完全清洁物权”和“部分清洁物权/尚未对清洁物权明确规定”的国家之间产生制度不可融合的潜在问题，而与《北京公约》促进不同国家关于司法出售相互承认与执行的初衷背道而驰。前车之鉴就是铁路运输领域的《国际货约》和《国际货协》。铁轮运输领域的公约固然有其特定的时代背景，但是其从一开始就分离资本主义和社会主义国家，从而制定了两套不同的规范，使得亚欧大陆的铁路运输中的法律适用变得极其复杂，直到现在都未找到融合的途径。目前亚欧大陆铁路领域的合作只有 2006 年推出的统一运单，对于实体规则仍然没有可适用的一套标准。因此关于船舶司法拍卖的国际承认问题，我们也不能在一开始为了勉强通过公约，就将《北京草案》的适用范围仅限于承认完全清洁物权的国家，这样会极其限缩公约未来的可能性，无法使船舶司法出售获得普遍国际承认，影响船舶贸易发展，并可能使得《北京草案》失去实质意义。

针对以上挑战，笔者认为，首先，由于目前大部分国家尚未接受公约下“完全清洁物权”，而国家缔结公约主要根据的是自由意志，强行要求所有国家改变国内法不切实际，也无法解决缔约国寥寥的问题。那么，或许可以采取更温和的手段，例如在以完全的清洁物权为原则的基础上，可以设置一些例外条款，使得仅承认限定清洁物权或尚未对清洁物权内涵做出明确规定的国家也能在其允许的范围内适用未来的《北京公约》，而非完全排除适用。这种例外的设定可以在初期扩大缔约国的数量，增强公约影响力。同时，将完全的清洁物权作为《北京公约》的文本内容，长期来看有利于将其逐渐转变为国际习惯，使得采用限定清洁物权的国家或目前尚未对清洁物权内涵做出明确规定的国家有可能在未来转变态度在国内法采用完全清洁物权。

其次，除了在清洁物权条款内容本身上设置例外，《北京公约》适用范围的规定还可以参照目前影响力巨大的《承认与执行外国仲裁裁决的公约》（简称“纽约公约”）而设置一些宽松的扩张适用条款。[1]《纽约公约》第一条第一款规定，“仲裁裁决，因自然人或法人间之争议而产生且在申请承认及执行地所在国以外之国家领土内作成者，其承认及执行适用本公约。本公约对于仲裁裁决经声请承认及执行地所在国认为非内国裁决者，亦适用之。”除了传统意义上的“承认与执行地所在国之外的领土”做出的仲裁裁决，《纽约公约》同样适用于被申请承认与执行国认为的“虽然在领土内但是不属于本国裁决”的仲裁裁决。此处的规定就将裁量权归于被申请承认与执行国，而不认为“本国国土内的裁决”一律不可被承认与执行，这种设置无形之中扩大了《纽约公约》的潜在适用范围。而在《北京草案》第三次修订本中，公约的适用范围为“仅适用于司法出售国国内法认可清洁物权的国家”，并且需要出售时处于出售国领土内，完全没有为当事国设置任何自由裁量的空间。此条款的设置可能是出于各国对承认和执行外国司法出售决定的审慎考量，但或许可以再单设一条允许各缔约国（即使并非采完全清洁物权的国家）自由裁量的条款，并且允许国家对此自由裁量条款提出保留，这种做法在尊重各国审慎考量的同时，也不至于完全堵塞《北京公约》扩张适用的潜在可能性。

五、结论

[1] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), also see United Nations, https://www.newyorkconvention.org/english.

为了海运业的发展和船舶融资的需要，船舶司法出售是担保、实现海事请求权、强制执行针对船舶所有人的判决或仲裁裁决或其他可执行文书的有效方式。但由于船舶的司法出售大多具有域外性，如仅依各国的国内法律决定是否承认与执行司法出售的文书，会给船舶的登记与注销、权利转移及买受人对船舶的使用增加不确定风险，这些潜在风险会进一步对船舶在司法出售中的变现价格产生不利影响，从而给相关各方造成损害。因此有必要确立船舶司法出售国际承认的统一规则，对船舶司法出售的买受人提供充分的保护。

在此领域缺乏国际公约规制的情况下，对《北京草案》的研探与推动就显得尤为重要。其中清洁物权内涵的确立决定了公约能否实现最初设立的整体目标，《北京草案》第三次修订本在前言中也明确提及，“船舶一旦以司法出售方式售出，原则上不应再因司法出售前产生的任何索赔而被扣押，物权关系不稳定，影响流通。”[1]因此在三次修订的过程中，《北京草案》下清洁物权的内涵被不断拓展，愈发强调司法出售之后船舶买受人所享有的清洁物权，同时为了弥补此种制度可能给除原船舶所有权人以外的其他权利人带来的不利影响，公约增加了通知等程序性要求，尽可能做到了一种双方利益的平衡，这种观点整体来看和目前英美法系代表英国关于船舶司法出售所采取的剩余主义的态度是一致的，即通过程序方面的诸多限制克服船舶司法出售给其他潜在权利人造成的损害。但是各国国内法所规定的司法出售的承认与执行拥有一个天然的缺陷，即完全按照本国国内法去衡量是否承认与执行涉外的司法出售判决或者裁决的效力。因此，由于各国国内法的差异，实质上还是无法实现稳定司法拍卖后各种物权关系、降低买受人不确定风险以及鼓励船舶拍卖流通的目的。因此，在未来讨论的过程中，《北京草案》应当遵循三次修订的趋势，继续采取完全的清洁物权的态度（扩大清洁物权本身的内涵），但同时关于第三次修订本中关于“公约适用范围限缩”的态度，也需要各国进一步的审慎协商与讨论（如有必要非要在清洁物权内涵与公约适用范围之间抉择，笔者更倾向于适当减少一些“清洁物权”所囊括的权利类型，恢复到第二修订本的状态，以保全《北京公约》未来长远的影响力）。

在具体措施上，在《北京公约》的下一次修订中，或许可以讨论是否允许对采取限定清洁物权或者尚未对清洁物权内涵做出明确规定的国家适用例外，以增加缔约方数量，扩大《北京草案》的影响力，同时促进国际上形成以完全清洁物权为原则的趋势。此外，也可以在适用范围部分参照纽约公约，设置一些潜在的公约适用条款（同时允许缔约方对此进行保留），为公约未来的进一步扩大适用做好准备。

责任编辑：邱杨

[1] United Nations Commission on International Trade Law, Draft Instrument on the Judicial Sale of Ships: Annotated Third Revision of the Beijing Draft, A/CN.9/WG.VI/WP.90 (2021), p.2, also see United Nations, https://undocs.org/en/A/CN.9/WG.VI/WP.90.

"Clean Title" under the Three Revisions of Beijing Draft: Definition Expansion and Challenges*

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Abstract: The term "clean title" is a focus in the discussions on the international recognition of judicial sales of ships. The expression "unless assumed by any purchaser" was deleted during the first revision of the Beijing Draft in 2019, thereafter, gradually expanding the definition of "clean title" stipulated in the draft. Prior to the 2020 revision of the Beijing Draft, the second revision, "clean title" meant a title free and clear of any "mortgage" or "charge". However, in the 2020 revision, this term was expanded to mean a title free and clear of "any right which may be asserted against the ship". Following from this, the 2021 revision which marks the third revision of the Beijing Draft, further expands the term to mean a title free and clear of any right in the ship. Such amendments are increasingly oriented to protect the rights and interests of purchasers at judicial sales of ships. However, the accompanying challenge is whether or not this seemingly edgy term could create hinderances to the adoption of the Beijing Draft and as a result might see just a handful of State parties, thereby limiting the actual impact of the convention. This paper will initially embark on a comparative analysis of the provisions relating to clean title under the laws of States bearing in the mind the various different legal systems. It will next examine the changes on the pertinent provisions under the three revisions of the Beijing Draft. Based on these, the paper will study and explore the potential challenges facing such provisions and the possible solutions to address them.

Keywords: Judicial sale of ships; Beijing Draft; Clean Title; Recognition and enforcement

The United Nations Commission on International Trade Law (UNCITRAL) Working Group VI (judicial sale of ships) held, from 19 to 23 April 2021, its thirty-eighth session in New York. One of the major topics at the session focused on a third revision of the International Convention on Foreign Judicial Sales of Ships and Their Recognition (hereinafter referred to as the Convention).[1] The judicial sale of ships is entangled with interests of different stakeholders. The international maritime industry, due to the absence of uniform, specialized and effective international legislation in this realm, has encountered many problems, the most prominent of which is the international recognition of such sales. This issue is, in essence, caused by the divergent understanding on the clean title to a ship sold at a judicial sale. Some States believe that any rights attached to ships[2] shall be extinguished immediately after judicial sales (for example, Canada and the United Kingdom), while some other States only agree that part of the rights shall be extinguished and the purchaser will still be required to bear the remaining rights attached to the ship after a judicial sale (for example, the purchaser under Japanese law is required to bear the maritime lien on the ship.).[3] Draft International Convention on Foreign Judicial Sales of

* This paper is an achievement of the special research project sponsored by National Social Science Fund with the title of "Designing a Framework Mechanism for International Cooperation under the Belt and Road Initiative" (project No.: 18VSJ050).

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1 United Nations Commission on International Trade Law, Annotated provisional agenda, A/CN.9/WG.VI/WP.89 (2021), p. 2, at https://undocs.org/en/A/CN.9/WG.VI/WP.89., 1 May, 2021.

2 Including ownership of ships, maritime liens attached to the ship, mortgage of ships or other rights of similar kind, and other forms of real rights for security, any rights or encumbrances arising from voyage charter party or ship use or charter contract, or all kinds of rights and contracts registered in the original shipowner's name (including usufructuary rights, ship nationality registration, ship ownership registration, ship mortgage or similar registration, bareboat charter registration; relevant ship registration authorities should nullify the registrations as requested by the purchaser).

3 United Nations Commission on International Trade Law, Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-seventh session, A/CN.9/1047/Rev.1(2020), para. 39, also see United Nations Treaty Collection, https://undocs.org/en/A/CN.9/1047/Rev.1.

Ships and Their Recognition, hereinafter called "Beijing Draft", is an outcome of years of efforts by the Comité Maritime International (CMI). Since it officially initiated the discussion on the Beijing Draft and other attendant issues in 2019, the UNITRAL Working Group VI has intensified its efforts to transform the draft into an official one and further solve the problem related to the recognition of foreign judicial sales.[1] This paper will examine the three revisions of the Beijing Draft prepared by the UNITRAL Working Group VI. Starting from the concept of "clean title", the paper will explore the approach to transforming the draft provisions on international recognition of the judicial sales into provisions under an effective convention, as well as the response to the challenges brought by the "completely clean title" as proposed at the thirty-eighth session.

I. A Review of the Necessity to Develop the Beijing Draft

A. Obstacles Hindering the Development of Ship Trade Due to the Lack of International Recognition of the Judicial Sale of Ships

As international trade activities demand high capital liquidity, ship creditors often hope to be paid at the earliest possible time. Moreover, ship building costs are also going up by the day. Judicial sales of ships can not only help creditors to get paid for their claims, but also maximize the value of ships, which helps to tackle the difficulties facing the transfer of ships, and also makes it relatively easier to turn fixed assets (ships) into liquid ones for ease of trade. A problem normally raised with judicial sale is that, former right holders who have all kinds of mortgage to a ship and are not aware of its judicial sale, may raise the question of whether such rights could still be considered attached to the ship. This is a critical issue that needs addressing. Noticeably, the judicial sale of a ship is likely to take place in one State, with recognition in another. For example, a ship could be flying the flag of one State but operating in another. In that case, if the purchaser wants to operate the ship acquired in a valid auction, the ship may be registered in another State only after being deregistered from its presale registry. If the said State does not recognize the decision delivered by the court in the auction place, the purchaser will not be able to possess a ship with "clean title".

The recognition of foreign judicial sales can become an issue of public concern as was the case of Arux in 1960.[2] The Italian steamship Arux was arrested and the owner was sued in the UK. As the shipowner failed to respond to the lawsuit, the court ordered an auction of the ship. During the auction, a mortgagee of the ship appeared to register with the court, seeking for a priority for the repayment of the over £ 60,000 mortgage. The ship was eventually auctioned off to a new owner at the price of £45,500, which was insufficient to pay off the mortgage. Later in February 1961, the maritime judicial officers were informed that the new owner of the ship was unable to secure registration of the ship in its desired State, because of the failure to obtain a certificate of deletion from the Italian Register of Ships, evidencing that the clean title to the ship sold at the order of the British Admiralty Court was not recognized in Italy. In this case, since the judicial sale was not recognized by the State of registration, neither could the ownership be effectively transferred, nor could the purchaser register the ship in another State. Notwithstanding, the purchaser shall be obligated to pay off the attached mortgage.

Chinese courts have been in a similar predicament. The mortgage on the ship P was registered in St. Vincent and the Grenadines in 1999, but the ship was auctioned at the order of a North Korean court in 2004. The purchaser at the auction later sold the ship to the current owner in 2005, who then registered the ship in the original State of registration, but the mortgage was not cancelled. In the same year, the mortgagee in Paris requested Tianjin Maritime Court to arrest the ship. The Court decided that, after the ship was sold under the order of the North Korean court, all rights to the ship, including the mortgage the French bank created thereon, were extinguished, even though neither the ship nor the mortgage thereon had been deregistered in St. Vincent and the Grenadines; the Court found that the ship P had been forcibly sold at the order of the North Korean court, which was a confirmation of legal facts rather than a recognition of the Korean court's decision. It was held that the validity of the auction should be addressed by North Korean judicial authorities. The Chinese courts were not in a position to confirm anything other than the decisions of the North Korean court.[3]

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[1] United Nations Commission on International Trade Law, Proposals of the Comité Maritime International (CMI) and of Switzerland for possible future work on cross-border issues related to the judicial sale of ships, A/CN.9/WG.VI/WP.81 (2019), at https://undocs.org/en/A/CN.9/WG.VI/WP.81., 1 May, 2021.

[2] The "Acrux" (England) (1961), 1 Lloyds Reports, p. 405.

[3] BCEN-Euro Bank V. Ferta Trade Ltd. S.A. in respect of ship mortgage, Civil Judgment of Tianjin Maritime Court (2005) Jin Hai

Judicial sales, which cash out ships to pay off any pre-existing creditor's right, purport ultimately to ensure that new shipowners may have the ships registered and operated, and their shipping function fulfilled. If the ship purchased at an auction is denied a clean title by the original State of registration, or if States deny the decision of auction made by other jurisdictions on the grounds of different provisions on "clean title", the purchaser will need to confront uncertainty and risk, which would, in the end, discourage potential purchasers from participating in judicial sales, thereby holding back the development of international ship trade. Following from the above, it will be beneficial to formulate a separate and systematic convention pertaining to judicial sale of ships which will improve the status of the judicial sale of ships.

B. Failure of Existing Conventions to Address the Problem Pertaining to the Recognition of Judicial Sale of Ships

The international community has yet to agree on a convention directly addressing the judicial sale of ships. Nevertheless, some States have reached certain consensus on maritime liens and other relevant issues, giving rise to four conventions. The first is the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages (1926)[1], which provides for the proper procedures for the judicial sale of ships, although it merely has three State parties, namely Denmark, France and Luxembourg. The second is the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages (1967),[2] which also specifies the procedures for judicial sale of ships, including notice, distribution of sale proceeds, certificate, deregistration, among others. With five State parties (Denmark, Norway, Syria, Sweden and Finland), this convention contains more detailed and specific provisions than the first one. The third one is the International Convention on Maritime Liens and Mortgages (1993),[3] which has 11 signatories and 19 State parties. The convention provides for the receivers, content and form of the notice of judicial sale of a ship, the distribution of the proceeds of sale, and the procedures of sale, when a ship is forcibly sold for the purpose of enforcing any attached maritime lien and mortgage. The last one is the International Convention on Arrest of Ships (1999)[4], which provides that a valid judgment made under the law of the State where an arrest is sought, may be enforced through judicial forced sales. This convention currently has 6 signatories and 12 State parties, including Turkey, which joined in 2019.

The conventions listed above have three salient features. To begin with, the majority of them focus on procedural requirements, predominated by standard guidelines, without specific provisions for mutual recognition and enforcement of the judicial sale of ships. In particular, they fail to solve the dilemma haunting the purchaser where it cannot have the ship purchased at a judicial sale registered in a desired State, just because deregistration cannot be secured in another. Second, these conventions only have a handful of State parties; none of the leading maritime nations, such as the UK, the United States, Japan and Germany, have signed these conventions. In this case, their overall impact on international shipping is limited, even if they take effect. Third, some States expressed, during the negotiations, that they will not sign such conventions because the "uniformity" of conventions would conflict with their national interests. They felt that the added convenience of uniform rules and predictability would not compensate for the damages to their national laws.[5] With regard to the applicable law, for example, the 1926 Convention clearly set out that the applicable law concerning maritime liens and mortgages should be the law of the flag State, not the law of the convention or the forum. The last rule, though acknowledged by some non-contracting States, was often used solely as a general principle in subsequent developments or as a reference in domestic legislation; these States were reluctant to nail down the applicable law directly through conventions in the early stage.[6] To sum up, it is essential to devise a new and more specific

Fa Shang Chu Zi No. 401, at http://tjhsfy.chinacourt.gov.cn/paper/detail/2014/04/id/1323599.shtml, 6 May 2021. (in Chinese)

[1] International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages (1926), at https://treaties.un.org/pages/showDetails.aspx?objid=080000028016775a, 5 May 2021.

[2] International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages (1967), at http://www.admiraltylawguide.com/conven/liens1967.html, 5 May 2021.

[3] International Convention on Maritime Liens and Mortgages (1993), at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-D-4&chapter=11&clang=_en, 5 May 2021.

[4] International Convention on Arrest of Ships (1999), at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XII-8&chapter=12&clang=_en, 5 May 2021.

[5] Comment, The Difficult Quest for a Uniform Maritime Law: Failure of the Brussels Conventions to Achieve International Agreement on Collision Liability, Liens, and Mortgages, Yale Law Journal, Vol. 64, 1955, p. 899~900.

[6] John M. Kluz, Ship Mortgages, Maritime Liens, and Their Enforcement: The Brussels Conventions of 1926 and 1952, Duke Law Journal, Vol. 671, 1963, p. 676.

convention, if we want to effectively solve the problem relating to international recognition and enforcement of the judicial sale of ships.

C. Importance of the Concept "Clean Title" in the Formulation of Beijing Draft

First of all, the notion of "clean title" determines the application scope and influence of the Convention. Judicial sale of ships, a special method used to transfer ownership, is the disposition of ships in sale procedures guided or controlled by the court. Ships sold in this way will not be burdened with any other real rights; in that case, the purchaser may become the new owner of the ship with "clean title". This effect depends on whether the court where the sale is conducted legally recognizes the sale. Judicial sale of ships is transnational under most circumstances, where the auction and re-registration often take place in different States; therefore, it requires all the States concerned to recognize the whole judicial sale process. If an international consensus or compromise cannot be reached on the concept of clean title, the Convention will have limited influence due to the small number of State Parties. In that case, decisions on judicial sales may merely be enforceable among the State Parties; in the long run, the convention's impact on rules concerning international recognition of judicial sales would dwindle to nothing.

Second, the existence or otherwise of a clean title determines the validity of the certificate of judicial sale.[1] Such certificates are provided to prove the effectiveness of judicial sales, and finally to enforce the valid decisions to safeguard the lawful rights and interests of all right holders. The purchaser, upon the completion of a judicial sale, has the greatest demand for extinguishing all pre-existing rights to the ship, so as to register it as a "brand new" ship (i.e., one with a completely clean title). The purchaser is reluctant to, and should not, be always responsible for various unknown real rights to the ship. Such a heavy burden is not expected when the purchaser first plans to buy the ship at a judicial sale, which, in fact, goes against the national aspirations for expediting the process of ship trade. The scope of clean title is defined by domestic laws, while the problem needs to be solved by agreement of all the States concerned due to the liquidity of ships. Otherwise, States "not recognizing completely clean title" may deny the effective judgments or awards delivered by States "recognizing such title", which would, in turn, make the judgments or awards unenforceable. Under this circumstance, the certificates of judicial sales issued by one State would lose validity in another, which would further bring hurdles to deregistration and re-registration of the sold ship. Therefore, how to define "clean title" has become one of the most critical, contentious issues, should the judicial sale of ships be recognized internationally.

II. Theories of "Clean Title" in the Judicial Sale of Ships and Comparison of Pertinent Regulations in Different States

No direct and detailed views or reasons given by a certain State on the definition of clean title could be found in the discussion documents on the revision of the Beijing Draft, published by the UNITRAL Working Group VI, except a summarized phrase like "it was noted that…" . It is, therefore, necessary to trace back to relevant provisions and supporting systems pertaining to clean title after a judicial sale as stipulated in different States' national laws. It could, in this way, shed light on the reasons why States hold different attitudes toward the definition of clean title when revising the Convention and how to further amend the definition in the future. The current laws and regulations on clean title in Germany, Japan, the UK, and China will be analyzed and compared in the following, as a way to reveal how they balance their own interests by adopting different provisions on clean title.

A. Definition of "Clean Title" and the Current Three Doctrines

The concept of "clean title", which was proposed during the discussion of the Beijing Draft, has not yet been articulated in the domestic laws of various States. This term is usually used to describe the effect of judicial sale on any right attached to the ship to be sold.[2] In the third revision, UNCITRAL defines the term "clean title" as

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[1] United Nations Commission on International Trade Law, Judicial Sale of Ships: Proposed Draft Instrument Prepared by the Comité Maritime International, A/CN.9/WG.VI/WP.82 (2019), p. 2, at https://undocs.org/en/A/CN.9/WG.VI/WP.82, 6 May 2021.

[2] Henry Hai Li, A Brief Discussion on Judicial Sale of Ships (2008), p. 7, at https://comitemaritime.org/wp-content/uploads/2018/05/A-Brief-Discussion-on-Judicial-Sales-of-Ships.pdf, 6 May 2021.

title free and clear of "any mortgage" or "any right in the ship".[1] This definition focuses on the most ideal effect after the judicial sale of a ship, that is, the purchaser may acquire a "completely clean ship". However, it fails to reflect the actual attitude of most States towards this issue.

There is no explicit expression of clean title in the domestic laws of various States, but, concerning the effect of any pre-existing mortgage or other right following a judicial sale, three divergent viewpoints currently prevail in the academic circle: extinguishment, residual and succession doctrines.[2]

Under the succession doctrine, where the ship to be sold is burdened with security interests, usufruct or any other encumbrance that has a priority over the executing creditor, such encumbrances will not extinguish because of an auction, but continue to be attached to the ship and borne by the purchaser. This model has the following features: First of all, it is conducive to protecting the security interests, usufruct and other rights that have priority over the executing creditor's rights. Second, it could slash the financial burden on the purchaser and finally facilitate the sale of the ship; that is because, with the obligation to pay off the encumbrances, the purchaser is more likely to strike the deal at a low price, usually lower than the market price (the transaction price does not include the amount that the purchaser is bound to pay off the according encumbrances). Under this mode, the "clean title" to the ship is restricted, which means that the pre-existing rights remain attached to it. It can be seen that this model puts more weight on protecting the interests of the original right holder. This model has three downsides. First, it has complicated the price appraisal procedure, as the burden range and the amount bearable by the purchaser should be assessed during the auction. Second, the purchaser faces unknown risks due to the potential complex legal relationship entailed in the subject matter he or she purchased. Third, it is not conducive to the transfer of ships, as the unpredictable effect of auctions will thwart potential purchasers.

The extinguishment doctrine means that the burden of rights attached to the subject of an auction such as security or usufructuary rights that have priority over those of the executing creditor shall be extinguished if it is a compulsory auction. The advantages of this mode are as follows: firstly, the purchaser can obtain completely clean title and no longer bear any burden of the previous rights after a judicial sale, which can greatly encourage purchasers to participate in judicial sales. Secondly, such an arrangement can prevent right-holders given priority (i.e. holders of security and usufructuary rights who are given priorities over creditors) from exercising their rights against purchasers, thus reducing the burden of litigation. Thirdly, thanks to the completely clean title, the purchaser is free to mortgage, guarantee, or even resell the ship, which is conducive to promoting the circulation of ships. The extinguishment doctrine, however, also has two inherent shortcomings: one is that, as the previous rights attached to the ship will be completely extinguished as a result of a compulsory auction, holders of security and usufructuary rights will have no choice but accept payment in advance, thus losing expected benefits. What's worse, under the circumstance of insufficient auction amount, chances are that the holders of security and usufructuary rights may not be paid off what they had owned before. Another is that, because the purchaser does not bear any burden of the previous rights attached to the subject, the price of the auction under the extinguishment doctrine is often higher than expected, which reduces the possibility of more potential purchasers participating in the auction, thus affecting the selling time.

Due to the inherent flaws of the above-mentioned succession and extinguishment doctrines, countries need to integrate these two doctrines, and that's how the residual doctrine came into being. The residual doctrine means that when a person following the one who enjoys the first priority to be repaid or a common creditor applies for auction of a ship, the executing court must make an estimate: only if the auction price is higher than the "repayment or compensation for the person enjoying the first priority to be repaid and according execution costs" can a compulsory auction be carried out. Under the compulsory auction, the purchaser is still entitled to a "completely clean title". The restriction on auction under the residual doctrine is to protect the rights and interests of right-holders given priorities from being damaged by insufficient auction amount. The advantage of the residual doctrine lies in the fact that it not only guarantees the interests of the right-holders given priorities, but also prevents the purchasers from bearing unknown burden. But meanwhile, a compulsory auction under the residual doctrine only takes place where there is extra auction amount left after paying off right-holders given priorities. And such an arrangement is actually putting the ordinary creditors into a disadvantaged position.

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[1] United Nations Commission on International Trade Law, Draft Instrument on the Judicial Sale of Ships: Annotated Third Revision of the Beijing Draft, A/CN.9/WG.VI/WP.90 (2021), p. 3, at https://undocs.org/en/A/CN.9/WG.VI/WP.90, 5 May 2021.

[2] DENG Ting, International Legislative Principles Regarding the Handling of the Burden of Rights on Real Estate in Compulsory Auctions, BJGY.CHINACOURT.GOV.CN, at http://bjgy.chinacourt.gov.cn/article/detail/2011/09/id/883257.shtml. (in Chinese)

B. Germany: Adopting the Residual and Succession Doctrines

Germany, a typical civil law state, encapsulates the regulations on the judicial sale of ships in the Act on Enforced Auction and Receivership (ZVG), 1897. Overall, in order to reduce unnecessary judicial sale, Germany, on the one hand, raises the threshold for judicial sale by strictly limiting the conditions under which ships may be sold in judicial sales, as well as the adjudicators and the auction procedures. On the other hand, it ensures that any mortgage and other real right holder is informed of their rights and interests in advance through ways such as announcement and notice. If no party raises any objection prior to the expiration of the announcement period, it may be regarded as a voluntary abandonment of its right. Despite its belief in the residual doctrine, Germany endeavors to mitigate the potential harm to the former shipowner through the imposition of strict procedural restrictions on judicial sales, and at the same time confers a completely clean title on the purchaser following an auction, making the final judgments or awards enforceable. However, it should be noted that the residual doctrine under German law does not affect the "real rights for security" and "usufructuary rights" that have priority over the executing creditor's rights on ship. In other words, Germany recognizes that only part of real rights attached to the ship will be extinguished after a judicial sale; while the purchaser is still responsible for the remaining part of real rights for security and usufructuary rights to which succession doctrine is applied.[1]

Specifically, in order to reduce the risks brought by adopting provisions concerning clean title in Germany, the Act also contains some special provisions, namely ZVG Sections 162~171,[2] which could be summarized into two aspects.

The first is concerning the jurisdiction of court and conditions requisite for the initiation of auctions. Under German law, "enforcement on ships" falls under the sole jurisdiction of the primary courts where the ships are located. Ship auctions may be initiated by courts only when requested by a maritime claimant, and when the bid is higher than the amount required to pay off all the real rights enjoying priority over the execution creditor's rights, together with all the costs arising from the compulsory enforcement procedure; the shipowner is not allowed to commence the auction itself. Additionally, prior to a judicial sale, the court shall set, at its discretion, a "lowest bid", taking into account any existing encumbrance on the ship, the costs of the auction proceedings and other priority rights requiring cash payment by the purchaser.[3]

The second is concerning the announcement of the judicial sale of ships. The court competent to address the judicial sale of a ship shall be obliged to issue a notice of the ship auction. According to ZVG Section 41, the announcement shall be served on all the interested parties, including creditors (right holders), debtors (shipowners), registered mortgagees and other creditors recorded in the ship registry. In addition, the announcement shall be published in specified shipping magazines, such as TTäglicher Hafenbericht and HANSA, to ensure that all personnel in the industry are fully informed. Such announcements shall include particulars like the name of the ship, the name of the shipowner, the time and venue of the judicial sale, the mortgage, the rights not recorded in the ship registry, and the statement on the enforced auction. Any party dissatisfied with the judicial sale for suspecting its justice shall protest prior to the completion of the judicial sale proceedings.

C. Japan: Adopting Succession, Extinguishment and Residual Doctrines

Japan, also a typical civil law State, has a more complicated regulation regarding the scope of "clean title", for it adopts the extinguishment doctrine under the premise of the residual doctrine and uses the succession doctrine as a supplement.

Article 121 of the Japanese "Civil Execution Act" stipulates that the mandatory auction of ships shall refer to the applicable real estate rules.[4] Article 59 of this Act also provides for according treatments for different kinds of rights concerning real estate: any statuary lien, any pledge with provisions not to use or make profits from real

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[1] ZHENG Haotian, *Study on Legal Issue in Judicial Sale of Ships*, Master Dissertation of Dalian Maritime University, 2014, p. 14. (in Chinese)

[2] YANG Liu, *Act on Enforced Auction and Receivership of Germany*, Beijing: People's Court Press, 2010, p. 55. (in Chinese)

[3] *Act on Enforced Auction and Receivership of Germany*, Article 44(1), at https://www.chinacourt.org/article/detail/2002/06/id/6329.shtml, 7 May 2021. (in Chinese)

[4] Japanese Civil Execution Act, Article 121, at https://elaws.e-gov.go.jp/document?law_unique_id=354AC0000000004_20200401_501AC0000000002，2021.

property and any mortgage existing on real property shall be extinguished upon sales (That's the extinguishment doctrine under the premise of residual doctrine because the court will review the rights given priorities before making the decision on starting a mandatory judicial sale.). In case of exceptions, the Japanese "Civil Execution Act" also adopts the succession doctrine for part of the rights, including the usufructuary rights given top priority, liens, and pledge rights without provisions on not to use or make profits and given top priority.

In order to protect the interests of the former shipowners, the Japanese "Civil Execution Act" has also formulated a series of supporting provisions. For example, Article 60 of this Act provides for standard sales price, and Article 64 stipulates the obligation of the court to make a public notice before starting a judicial sale.

D. The UK: Favoring the Residual Doctrine

The UK, a maritime power, currently is positively cautious towards the judicial sale of ships. The UK inclines to confer a completely clean title on the purchaser at a judicial sale. It strictly limits the conditions where ships may be sold in judicial sales, requires that all the right holders be notified, creates a procedure for right holders to claim for priority, and specifies the period for priority claim and how to appraise the ship (But compared with Germany and Japan, the UK, due to its sole adoption of the residual doctrine, has apparently set more procedural barriers on judicial sales for the sake of protecting right holders who are given first priority.). Obviously, the UK has done its utmost to ensure that the pre-existing rights to the ship are well protected, and the interests of the purchaser and the original owner are well balanced. However, the scope of the judicial sale of ships under the British law is wider than that under German law. For example, the enforcement period is not limited to the time after the final judgment or award; and the maritime court may make an order of forced sale any time throughout the lawsuit.

Notably, under the common law system, there are two types of lawsuits, namely, actions in persona and actions in rem. In the sale of a ship in an action in rem, the ship "participates" in the lawsuit as an independent person, but its "persona" is destroyed the minute the ship is sold, and the purchaser acquires the original ownership accordingly. Forced sale of an arrested ship is a unique remedy granted in an action in rem. [1] The dispute over clean title under the Beijing Draft focuses on the question of whether "all the real rights attached to a ship" are extinguished at the completion of a judicial sale, and whether the purchaser will be required to pay off any unknown encumbrance. For these reasons, only sales in action in rem under British law will be explored in this section.

The general provisions on the judicial sale of arrested ships are laid down in the Senior Courts Act 1981, Section 49.[2] While rules concerning matters like the assessment of arrested ships, their forced sale and court rulings are specified in the British Rules of the Supreme Court (Order 75). The pertinent rules, which are formulated by the UK for the purpose of reducing risks engendered by adopting provisions concerning clean title, are stated as follows.[3]

The first is about the conditions where the judicial sale of ships may be initiated. The British maritime court may order the valuation and the forced sale of the arrested ship at any stage of the action in rem, without a final and binding judgment or award made. The parties who may apply for judicial sales are more diversified: they cease to be limited to maritime claimants, but expanded to any interested party including the respondent; and court executive officers may also apply for rulings of forced sale.

The second is regarding the maritime lien. Rules of the Supreme Court (Order 75), Article 8(2), provides that, at any time after the period referred to in Article 8.1 (4) of the Section of Litigation Guidelines, a party who may apply for an auction of the relevant property in accordance with the judgment may apply to the maritime court for confirmation of a maritime lien. Notice of the application shall be communicated to any party entitled to bring an action with respect to the property in question. A ruling on the maritime lien may only be delivered by the judge of the maritime court, unless otherwise ordered by the judge.

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[1] LI Xinwei & CHU Beiping, The Key Issues on the Drafting of an International Convention on Judicial Sale of Ships, Chinese Journal of Maritime Law, No. 1, 2020, p. 95. (in Chinese)

[2] The Senior Courts Act 1981, Section 49, at https://www.legislation.gov.uk/ukpga/1981/54/contents, 7 May, 2021.

[3] ZHANG Jinxian, Arrest and Forced Sale of Ships in the UK, The People's Judicature, No. 11, 1992, p. 45. (in Chinese)

The third concerns the distribution of the proceeds from the judicial sale of a ship. Rules of the Supreme Court (Order 75), Article 8(3), prescribes that, the proceeds from the sale shall only be distributed to the creditors upon the effectiveness of the judgment, in accordance with the maritime liens ascertained by the court as well as other orders of the court. In addition to the court order, the maritime court may also deliver other rulings indicating the period for maritime lien ascertainment, the particulars of the ship to be sold and whether any other right holders may bring a lawsuit within this period. At the same time, the application for the forced sale of the arrested ship shall be served on any party to the proceedings, as well as any party who have applied for a termination of the proceedings concerning the ship arrest. In order to protect the claimant's debt securities to the greatest extent, the maritime executive officer should sell the ship at the "highest price available" and not lower than the "fixed reserve price".[1]

E. China: Favoring the Residual Doctrine with Regards to the Five Types of Maritime Liens with Other Rights after Judicial Sales Being Unknown

China does not clearly define the concept "clean title", but the presence of provisions concerning "five types of maritime liens" can be found. These bear similarities to those on "clean title". Maritime Law of China, Article 26, provides that maritime liens shall not be terminated by virtue of the transfer of ship ownership, except those failing to be enforced within 60 days upon the announcement of the said transfer issued by a court, as requested by the transferee.[2] This provision has given potential protection to the purchaser, that is, after 60 days upon the announcement of the transfer as requested by one party, the five types of liens enumerated in Article 22 of the Maritime Law may be terminated along with the ownership transfer and cease to be attached to the ship, which means that the title will be "free and clear" of any charge against the purchaser.[3] In addition, Provisions of the Supreme People's Court on Several Issues Concerning the Law Applicable to the Arrest and Auction of Ships expresses, in Article 22, that maritime liens, possessory liens, ship mortgages, and other maritime claims related to the ship sold out shall be paid in priority.[4] This article extends relevant rights from maritime liens to other claims enjoying a priority of payment, but fails to provide for the effectiveness of these rights in the event of a transfer or forced sale of a ship. To sum up, China merely has provisions on five types of liens similar to those on "clean title", but it remains silent about the effectiveness of other real rights after the judicial sale of a ship.

In addition, it is also noted that Article 33 of the Special Maritime Procedure Law of China also contains regulations on the judicial sale of ships. This article reads:

The maritime court shall, 30 days prior to an auction of a ship, issue a notice to the ship registrar of the State of registry of the ship for auction, to all known holders of any maritime lien or mortgage and the shipowner. Such notice shall contain the name of the ship for auction, time and venue of the ship auction, reasons and grounds for the ship auction, registration of debts, etc. Such notice shall be given in writing or by other appropriate means where the receipt thereof can be confirmed.[5]

Moreover, China also requires the court to set the minimum price before the judicial sale to prevent the transaction price from being too low. Provisions of the Supreme People's Court on Several Issues Concerning the Law Applicable to the Arrest and Auction of Ships, Article 12(1), prescribes that "Maritime courts shall determine the reserve price of a ship based on its assessed value during the auction. The reserve price shall not be disclosed to the public."[6] However, presently in China, no provisions could be found with respect to who shall

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[1] Jackson D.C., Enforcement of Maritime Claims (4th ed.), Informa Law from Routledge, 2005, paras. 25 & 56.

[2] Maritime Code of the People's Republic of China, Article 26, at http://www.npc.gov.cn/wxzl/wxzl/2000-12/05/content_4575.htm, 9 May 2021. (in Chinese)

[3] (1) wages, repatriation costs, social insurance and other remunerations for crew members; (2) personal casualties loss occurred during the operation; (3) a ship's tonnage dues, pilotage, harbor dues and other port charges; (4) salvage at sea; and (5) compensation for loss of or damage to property arising from torts during the operation.

[4] Provisions of the Supreme People's Court on Several Issues Concerning the Law Applicable to the Arrest and Auction of Ships, Article 22, at http://www.court.gov.cn/zixun-xiangqing-13551.html, 9 May 2021. (in Chinese)

[5] Special Maritime Procedure Law of the People's Republic of China, Article 33, at http://www.npc.gov.cn/wxzl/gongbao/2000-12/05/content_5004761.htm, 5 May 2021. (in Chinese)

[6] The Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Arrest and Auction of

decide the "reserve price"; neither could uniform judicial practice in this field be spotted. In practice, some courts are determined by the judicial committee, some by the collegiate bench that hears the case involved, and some by the meeting of the authorities in charge of ship auction.[1] Despite the uncertain procedures of judicial sale in China in practice, China has already begun to curtail the potential losses to the pre-existing right holders; in order to protect their interests, China has imposed multiple procedural limits, such as the notice requirement, and implemented the reserve price regime. More importantly, such procedures are designed to balance the interests between the purchaser and any pre-existing right holder. That is to say, China, like Germany and the UK, adopts the "residual doctrine", but only with regard to the five types of maritime liens, where the possible "clean title" is recognized explicitly. But China holds a wait-and-see attitude to the effectiveness of other types of real rights after judicial sale.

III. Evolution of the Definition of Clean Title under the Beijing Draft Prior to the Third Revision

A. The Original Beijing Draft: Restricted Clean Title

CMI Beijing Draft, Article 7, Paragraph 1 (a), prescribes that the purchaser shall acquire clean title to the ship upon purchase at a judicial sale. In the draft, Working Group VI provides a restricted definition for "clean title": a title free and clear of any mortgage or charge unless assumed by any purchaser. According to the draft, "mortgage" means any mortgage effected on a ship in the State of Registration and recognized as such by the law applicable in accordance with the private international law rules of the State of judicial sale; "charge" includes any charge, maritime lien, lien, encumbrance, claim, arrest, attachment, right of retention or any other rights whatsoever and howsoever arising, which may be asserted against the ship.[2]

Overall, in the first stage, the clean title under the Beijing Draft only includes the title free and clear of any mortgage or charge "except as assumed by any purchaser", which fails to mention any real right other than "mortgage" and "charge". Meanwhile, the draft does not clarify what the "mortgage" or "charge" "assumed by any purchaser" is. That is to say, those rights not listed therein may continue to be attached to the ship. Such ambiguity offers sufficient protection to holders of rights other than "mortgage" and "charge". However, due to the different regimes of real rights under national laws, the views of courts in different countries may vary on the scope of the rights which a "clean title" is free and clean from. In addition, the court may have great discretion in the interpretation of the concept. Such uncontrollable and unpredictable conclusions may pose a huge unknown risk to the purchaser. Therefore, although such provisions in the original draft may be agreed by more States, they fail to achieve the initial purpose of the convention, which is to reduce the risks of the purchasers, give them sufficient predictability and reliability, and then increase their willingness to participate in the judicial sale and greatly boost the subsequent transfer of ships.

B. First Revision of the Beijing Draft in 2019: Expanded Scope of Clean Title

In order to ensure that the definition of "clean title" accurately covers all the effects envisaged in the original Beijing Draft, the definition of clean title has started to expand ever since the first revision proposed by UNCITRAL Working Group VI on September 10, 2019.[3] "Clean title" is tentatively defined as a title, free and clear of any mortgage or charge, except as assumed by any purchaser.[4] "Mortgage" means any mortgage or

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Ships (2015), Article 12, at http://www.court.gov.cn/fabu-xiangqing-13551.html. (in Chinese)

[1] LUO Dongchuan, WANG Yanjun, WANG Shumei & HUANG Xiwu, Understanding and Application of the Provisions of the Supreme People's Court on Several Issues Concerning the Law Applicable to the Arrest and Auction of Ships, The People's Judicature, No. 7, 2015, p. 29. (in Chinese)

[2] United Nations Commission on International Trade Law, Judicial Sale of Ships: Proposed Draft Instrument Prepared by the Comité Maritime International, A/CN.9/WG.VI/WP.82 (2019), p. 3, at https://undocs.org/en/A/CN.9/WG.VI/WP.82, 6 May 2021.

[3] United Nations Commission on International Trade Law, Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-sixth session, A/CN.9/1007(2019), para.49, at https://undocs.org/en/A/CN.9/1007, 13 May 2021.

[4] United Nations Commission on International Trade Law, Draft Instrument on the Judicial Sale of Ships: Annotated First Revision of the Beijing Draft, A/CN.9/WG.VI/WP.84 (2019), para. 6, at https://undocs.org/en/A/CN.9/WG.VI/WP.84, 6 May 2021.

hypothèque that is: (i) effected on a ship in the State in whose registry of ships the ship is registered; (ii) recognized as such by the law applicable in accordance with the private international law rules of the State of judicial sale. "Charge" means any right whatsoever and howsoever arising which may be asserted against a ship, including a maritime lien, lien, encumbrance, attachment, right of use or right of retention. This revision features three changes.

The first is the expression of "mortgage" and "charge". In the original draft, "mortgage" means any mortgage that is effected on a ship in the State of Registration and recognized as such by the law applicable in accordance with the private international law rules of the State of judicial sale.[1] This definition has been revised in the first revision to include hypothèque, apart from mortgage. In the original draft, "charge" includes any charge, maritime lien, lien, encumbrance, claim, arrest, attachment, right of retention or any other rights whatsoever and howsoever arising which may be asserted against the ship; this definition has been revised to open with the general definition of "any right whatsoever and howsoever arising which may be asserted against a ship", followed by specific examples including maritime lien, lien, encumbrance, attachment, right of use or right of retention. According to the report of Working Group VI on its work, the term "charge" is intended to cover all kinds of private rights and interests that could be enforced in rem.[2] Noticeably, weaker terms for rights, such as "encumbrance" and "claim", have been removed in the first revision.

Second, it has been suggested in this revision that the definition of "clean title" omit the phrase "assumed by any purchaser".[3] In this way, on the one hand, it may evade the need to discuss the kinds of mortgage and charge "assumed by any purchaser"; on the other hand, it may further expand the scope of clean title, so that ships may be "free and clear" of more rights, and be transferred easier and quicker. Such consideration is, in essence, consistent with the original purpose of the Convention: to place the purchaser in a stable legal relationship with other interested parties, and further to boost the subsequent transfer of ships, by providing that the ship to be auctioned shall, in principle, be free from any encumbrance.

Thirdly, in respect of the scope of application of the Convention, it has changed from judicial sales without any limitation to those with limitations. Article 2, paragraph 2, of the first revision prescribes that the Convention "shall only apply to a judicial sale of a ship by which all mortgages and charges[, except those assumed by the purchaser,] cease to attach to the ship." The proposed addition of this paragraph would greatly limit the judicial sale of ships to which the Convention applies.

To sum up, it has been discussed in the first revision that the original draft's limitation on the scope of clean title was inappropriate, as it could not help achieve the Convention's objective to facilitate the judicial sale and transfer of ships under the Convention.[4] Noticeably, the definition of clean title has been expanded substantively. Although the scope of claims that the title shall be 'free and clear of', continues to be limited to "mortgage" and "charge", many substantive contents, such as hypothèque and maritime lien, have been added.

C. Second Revision of the Beijing Draft: Promoting a Completely Clean Title

Ever since the first revision, States have become increasingly aware of the importance of the definition of clean title to the achievement of the purpose of the Convention. Against this background, the scope of clean title is further expanded in the second revision of 2020. The term is finally determined to mean that any title to or rights and interests in the ship existing prior to its judicial sale have been extinguished and that any charge or mortgage has ceased to attach to the ship, or to mean title free and clear of any mortgage or charge. Here, "charge" means any right whatsoever and howsoever arising which may be asserted against a ship, whether by means of arrest, attachment or otherwise, and includes a maritime lien, lien, encumbrance, right of use or right of

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[1] United Nations Commission on International Trade Law, Draft Instrument on the Judicial Sale of Ships: Annotated First Revision of the Beijing Draft, A/CN.9/WG.VI/WP.84 (2019), p. 8, at https://undocs.org/en/A/CN.9/WG.VI/WP.84, 6 May 2021.

[2] United Nations Commission on International Trade Law, Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-fifth session, A/CN.9/973(2019), para. 79, at https://undocs.org/en/A/CN.9/973, 14 May 2021.

[3] United Nations Commission on International Trade Law, Draft Instrument on the Judicial Sale of Ships: Annotated First Revision of the Beijing Draft, A/CN.9/WG.VI/WP.84 (2019), p. 9, at https://undocs.org/en/A/CN.9/WG.VI/WP.84, 6 May 2021.

[4] United Nations Commission on International Trade Law, Judicial Sale of Ships: Proposed Draft Instrument Prepared by the Comité Maritime International, A/CN.9/WG.VI/WP.82 (2019), para. 3, at https://undocs.org/en/A/CN.9/WG.VI/WP.82, 6 May 2021.

retention but does not include a mortgage.[1] Terminology similar to "free and clear of any mortgage or charge" is used in the Convention on the International Recognition of Rights in Aircraft (1948), which refers in Article 8 to the forced sale of an aircraft effecting the transfer of property in the aircraft "free from all rights".[2]

First, the text "except as assumed by any purchaser" has been deleted.

The term "clean title" is expressly defined in the original draft as a title, free and clear of "any mortgage and charge except as assumed by any purchaser", which implies that mortgage and charge assumed by the purchaser are still attached to the ship, although the Working Group does not elaborate on it. The text "except as assumed by any purchaser" is not omitted directly in the first revision, despite the concerns expressed. However, it is removed entirely in the second revision in 2020.[3] The concept is clarified this time. According to the revised definition, no mortgages or charges remain assumed by the purchaser; in other words, the ship is clean and clear of all mortgages and charges, which are no longer attached to the it.

Second, the clean title is not merely clean and clear of mortgage and charge.

"Clean title" under the first two versions of the draft is limited to a title, free and clear of "mortgage" and "charge". However, in the second revision, the concept is revised to mean a title free from any "mortgage" or "any right which may be asserted against a ship". Obviously, the scope of "any right which may be asserted against a ship" is much broader than that of "charge". Such rights cover, in addition to charge, a maritime lien, lien, encumbrance, right of use or right of retention; such a revision provides bigger benefits to the purchaser as a ship clean and clear of more rights would be conferred on the purchaser.

Third, a requirement on notice of judicial sale under the Convention is newly inserted.

Article 4 "Notice of judicial sale" is added in the second revision. This article provides that prior to the judicial sale of a ship, a notice of the sale shall be given to all holders of any mortgage or registered charge, the bareboat charterer of the ship, all holders of any maritime lien, and the owner of the ship. The notice shall also be published by press announcement. Such a provision is similar to the preventive measures taken before a sale. It is intended to take every possible means to protect the interests of the right holders by informing them of the sale, while the purchaser is guaranteed to acquire a ship with "clean" title. Such provisions are more reasonable, and thus have a higher possibility to be accepted by States. This kind of revision is on a par with the residual measures of Germany and the UK. They all aim to minimize the negative impact on right holders by adding procedural restrictions, and to increase the purchaser's confidence in the auction by sufficiently ensuring that they would get a "completely clean title".

However, objections were also raised by States on the "notice" requirement. Is the notice requirement essential for the recognition of any clean right? In some States, it was known at the beginning of a judicial sale procedure that the sale would result in the conferral of clean title on the purchaser, while in some other States that was not always the case. If the eventual convention applied only to a judicial sale that conferred clean title to the ship, it would be challenging for those other States to fulfill their obligations under Article 4, which required notice to be given "prior to a judicial sale".[4] However, it was also expressed that the notice requirement should serve not as a stand-alone requirement but only as a condition for issuing the certificate of judicial sale.[5] Therefore, there are still different understandings as to whether the notification requirement per se, necessarily, constitutes a requirement for the application of the Convention. This issue needs to be further clarified in later

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[1] United Nations Commission on International Trade Law, Draft Instrument on the Judicial Sale of Ships: Annotated Second Revision of the Beijing Draft, A/CN.9/WG.VI/WP.87 (2020), p. 2~3, at https://undocs.org/en/A/CN.9/WG.VI/WP.87, 6 May 2021.

[2] Convention on the International Recognition of Rights in Aircraft (1953), Article 8, at https://treaties.un.org/doc/Publication/UNTS/Volume%20310/volume-310-I-4492-English.pdf, 6 May 2021.

[3] United Nations Commission on International Trade Law, Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-sixth session, A/CN.9/1007 (2019), para. 15, at https://undocs.org/en/A/CN.9/1007, 6 May 2021.

[4] United Nations Commission on International Trade Law, Report of Working Group VI (Judicial Sale of Ships)on the work of its thirty-seventh session, A/CN.9/1047/Rev.1(2020), para. 39, at https://undocs.org/en/A/CN.9/1047/Rev.1, 15 May 2021.

[5] United Nations Commission on International Trade Law, Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-seventh session, A/CN.9/1047/Rev.1(2020), para. 42, at https://undocs.org/en/A/CN.9/1047/Rev.1, 15 May 2021.

amendments.

D. The 2021 Third Revision of the Beijing Draft Further Confirms a Completely Clean Title

The third revision does not make many substantive changes to the second one, rather, further simplifies the relevant expressions and definitions to harden its determination to use "completely clean title" under the Convention. Overall, on the one hand, the tradition to expand the definitions of clean title and maritime lien has been continued, with a definition of ship newly inserted; on the other hand, limitations have been imposed on the notion of judicial sale and the scope of application of the Convention.

First, the scope of "completely clean title" has been further expanded from "ownership" to the broader term "right". The second revision defines "clean title" as "title free and clear of any mortgage" or "any right which may be asserted against the ship", which was revised into "title free and clear of any mortgage" or "right in the ship" in the third revision. "Right which may be asserted against the ship" is exactly the same with "right in the ship".[1] Apparently, the main change is the expansion from "ownership" to "right", indicating a continuance of the trend towards expanding the concept of clean title, as revealed in the second revision. By doing so, the clean title is free and clear of even more claims against the ship, reflecting that the Convention is laying more emphasis on the protection of the purchaser's interests.

Second, the scope of maritime lien has been expanded. The text "any claim recognized as a maritime lien or privilège maritime on a ship under applicable law" has been revised into "any claim recognized as a maritime lien or privilège maritime on a Ship by the law applicable in accordance with the private international law rules of the State of Judicial Sale". Notably, it was suggested during the discussion on the revision that the term "maritime lien" should not always be limited to those maritime liens recognized by "the law applicable in accordance with the private international law rules of the State of Judicial Sale".[2] However, this view was ultimately not adopted; the Working Group retained the limitation, where "maritime liens" are still limited to those recognizable "under applicable law".[3]

Third, the definition of "ship" has been newly added. In the third revision, the ship under the Convention is defined as any ship or other vessel (registered in a registry that is open to public inspection) that may be the subject of an arrest or other similar measure capable of leading to a judicial sale under the law of the State of judicial sale.[4] This definition, on the one hand, limits the scope of ships subject to judicial sales, that is, they shall be registered in a registry that is open to public inspection; on the other hand, it extends the ships in question to "ships or vessels", in accordance with which small boats or pleasure craft are also included into the scope of ships whose judicial sales involve international recognition. Apart from that, it is also noted that at the revision stage, some States raised concerns on whether inland navigation vessels could be included into the definition of "ship". It was proposed that a provision could be inserted allowing a State party to reserve the right to exclude the application of the Convention to inland navigation vessels. In response, it was suggested that it would be premature to consider such vessels at this stage.[5]

Fourth, limitations have been imposed on the scope of judicial sale. The definition of "judicial sale" has been amended to omit the words "or any other way provided for by the law of the State of judicial sale" in the

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[1] United Nations Commission on International Trade Law, Draft Instrument on the Judicial Sale of Ships: Annotated Second Revision of the Beijing Draft, A/CN.9/WG.VI/WP.87 (2020), p. 2, at https://undocs.org/en/A/CN.9/WG.VI/WP.87, 7 May 2021; United Nations Commission on International Trade Law, Draft Instrument on the Judicial Sale of Ships: Annotated Third Revision of the Beijing Draft, A/CN.9/WG.VI/WP.90 (2021), p.2, at https://undocs.org/en/A/CN.9/WG.VI/WP.90, 7 May 2021.

[2] United Nations Commission on International Trade Law, Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-sixth session, A/CN.9/1007 (2019), para.19, at https://undocs.org/en/A/CN.9/1007, 6 May 2021.

[3] United Nations Commission on International Trade Law, Draft Instrument on the Judicial Sale of Ships: Annotated Third Revision of the Beijing Draft, A/CN.9/WG.VI/WP.90 (2021), p. 3, at https://undocs.org/en/A/CN.9/WG.VI/WP.90, 7 May 2021.

[4] United Nations Commission on International Trade Law, Draft Instrument on the Judicial Sale of Ships: Annotated Third Revision of the Beijing Draft, A/CN.9/WG.VI/WP.90 (2021), p. 4, at https://undocs.org/en/A/CN.9/WG.VI/WP.90, 7 May 2021.

[5] United Nations Commission on International Trade Law, Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-seventh session, A/CN.9/1047/Rev.1(2020), para. 27, at https://undocs.org/en/A/CN.9/1047/Rev.1, 15 May 2021.

second revision. In the third revision, "judicial sale" of a ship means any sale of a ship: (i) which is ordered, approved or confirmed by a court or other public authority either by way of public auction or by private treaty carried out under the supervision and with the approval of a court; and (ii) for which the proceeds of sale are made available to the creditors.[1] Such amendments, as indicated in note 6 of the third revision, reflect the decision of the Working Group at its thirty-seventh session.[2] It is also clarified that the requirement for court supervision and approval applies only to sale by private treaty. These further amendments are devised to reflect more accurately the practice of conducting judicial sales in various jurisdictions.[3]

Fifth, the third revision limits the scope of application of the Convention by adding conditions in an appendix. The third revision provides that the Beijing Convention is applicable only if two conditions are met. The first condition is consistent with the one under the second revision, namely, "the ship was physically within the territory of the State of judicial sale at the time of the sale". The second condition is one, which was newly added, and requires that "Under the law of that State, the judicial sale confers clean title to the ship on the purchaser".[4] Such a restriction imposes, in essence, a requirement on the parties to the Convention that a judicial sale between parties can only be recognized if it is recognized under the domestic law of the State of judicial sale.

IV. Potential Challenges of the Expanded Scope of Clean Title on the Beijing Draft

During the discussion of the draft, all the work reports prior to the second revision require that the concept of clean title be limited: the title should be clean and clear of any "mortgage" and "charge", while other rights remain attached to the ship. Such a requirement would pose greater risks to the purchaser and ultimately hamper the achievement of the purpose of the Convention. As Justice Sheen pointed out in the case of "Cerro Collorado", "from time to time every shipowner wants to borrow money from his bank and give as security, a mortgage over his ship. The value of the security would be drastically reduced if when it came to be sold by the Court there was any doubt as to whether a purchaser from the Court would get a title, free of encumbrances and debts".[5] Working Group VI expanded this concept in the second and third revisions, truly reflecting the Convention's ultimate goal to ensure the smooth transfer of ships and enforcement of judicial sales. However, the third and second revisions also brought up some challenges.

First, expanding the scope of clean title at the expanse of the application of the Convention will eventually limit its effectiveness. Working Group VI has aggressively expanded the scope of clean title, whose meaning was changed from a title, free and clear of any "mortgage" and "charge" to the one, free and clear of any "mortgage" or "any right in the ship". However, at the same time, the scope of application of the Convention was also revised. After the revision, the Convention applies only to States whose national laws confer clean title to the ship on the purchaser upon a judicial sale, and to the sale of a ship which is physically within the territory of the State of judicial sale at the time of the sale. Currently, the title clean and clear of "any right", as enshrined in the Convention, is fully recognized by only a handful of States. Limiting the scope of application to this point might result in a convention with essentially few State parties or with little actual binding effect on the State parties, as the Convention would not apply to a judicial sale that fails to satisfy the specified conditions, even if the State concerned has signed the Convention. In that case, the enforcement effect would suffer ultimately, leaving the difficulty facing the international enforcement of the judicial sale unaddressed.

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[1] United Nations Commission on International Trade Law, Draft Instrument on the Judicial Sale of Ships: Annotated Third Revision of the Beijing Draft, A/CN.9/WG.VI/WP.90 (2021), p. 3, at https://undocs.org/en/A/CN.9/WG.VI/WP.90, 7 May 2021.

[2] United Nations Commission on International Trade Law, Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-sixth session, A/CN.9/1007 (2019), para.18, at https://undocs.org/en/A/CN.9/1007, 6 May 2021.

[3] United Nations Commission on International Trade Law, Draft Instrument on the Judicial Sale of Ships: Annotated Third Revision of the Beijing Draft, A/CN.9/WG.VI/WP.90 (2021), p. 3, at https://undocs.org/en/A/CN.9/WG.VI/WP.90, 7 May 2021.

[4] United Nations Commission on International Trade Law, Draft Instrument on the Judicial Sale of Ships: Annotated Third Revision of the Beijing Draft, A/CN.9/WG.VI/WP.90 (2021), p. 4, at https://undocs.org/en/A/CN.9/WG.VI/WP.90, 7 May 2021.

[5] The "Cerro Collorado" (1993) 1 Lloyd's Rep.58.

Second, the expanded scope of clean title in the current revision may not contribute to the influence of the Convention on an international scale. The amendments above could be understood as a compromise made to accelerate the adoption of a convention addressing international recognition of the judicial sale of ships. However, such amendments would, in essence, slash the number of States willing to sign the Convention and, in the long run, give rise to potential and irreconcilable problems between States recognizing "completely clean title" and those only recognizing part of clean title or not having specific provisions on this field. That definitely goes against the intention of drafting the Convention — to make different States recognize and carry out provisions on judicial sales. Perfect examples include the Convention Concerning International Carriage of Goods by Rail and the Agreement on International Railroad through Transport of Goods, two legal regimes governing international rail transport. The two instruments were created in their distinctive historical backgrounds. Reflecting the division between the capitalist and socialist camps, the two instruments devised, from the very beginning, two different sets of norms, which immensely complicated the application of laws with respect to railway transport in Eurasia. Until now, a way to integrate the two instruments has not yet been found. The sole regime governing the cooperation on rail transport in Eurasia so far is the uniform waybill system introduced in 2006; however, there is still no set of standards applicable to substantive rules. In a similar vein, on the issue of international recognition of the judicial sale of ships, the Convention should not, for the sake of having its draft passed into law, limit its application only to States recognizing clean title. Such a limitation would harm the future of the Convention, because it may make the judicial sale of ships difficult to be recognized universally, which would, in turn, hinder the development of ship trade and finally deprive the Beijing Draft of its substance.

To address the above challenges, the authors believe that, first of all, it is not realistic to force all countries to change their domestic laws, nor will it be possible to reverse the situation of only a few contracting countries, given the fact that most countries currently haven't accepted the "completely clean title" stipulated in the Convention and whether a country will conclude a convention mainly hinges on free will. Owing to these, perhaps a more moderate approach can be adopted. Under the premise of completely clean title, for example, instead of completely ruling out the possibility of application, some exception clauses can be set up so that countries that only recognize part of clean title or have not yet made clear provisions on clean title can also apply to the Convention within their permissions. Such exception clauses can include more contracting States to the Convention in the initial stage, thereby boosting its influence. Meanwhile, adopting completely clean title in the Convention, in the long run, is of significance in turning it into an international practice. This, in turn, might change the attitudes of countries that only recognize part of clean title or have not yet made clear provisions on clean title, thereby adopting completely clean title in their domestic laws in the future.

Secondly, besides setting up exception clauses for clean title, provisions on the scope of application of the Convention could also draw on those of the currently influential convention — Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958 (hereinafter referred to as the "New York Convention").[1] That is to say, some broader and more inclusive provisions on the application of the Convention are recommended. As stipulated in Article 1(1) in the New York Convention, "this Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." In addition to the "recognition and enforcement of arbitral awards made in the territory of a State", which is traditional, the New York Convention is also applicable to the "recognition and enforcement of awards made in the territory of another contracting State". The provisions here attribute the discretion to the country that is applied for recognition and enforcement, and hold that "awards within the State's territory" can also be recognized and enforced. Such kind of provisions expands the scope of application of the New York Convention in an invisible way. In the third revision of the Beijing Draft, however, the scope of application of the Convention is limited to States whose domestic laws of judicial sales recognize clean title; and it also requires the ship to be physically within the territory of the State of judicial sale at the time of sale. Such a provision does not leave much room for discretion by the States concerned. This clause may be the result of prudent considerations of States on the recognition and enforcement of foreign judicial sales, but perhaps a separate clause, which allows contracting States (including States not adopting completely clean title) discretion and reservations, can be set up. Such a separate clause will not only show respect to the considerations of

[1] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), also see United Nations, https://www.newyorkconvention.org/english.

contracting States but also leave room for expanding the application of the Convention in the future.

V. Conclusions

The needs of the shipping industry and ship finance require that the judicial sale of ships is maintained as an effective way of securing and enforcing maritime claims and the enforcement of judgments or arbitral awards or other enforceable documents against the owners of ships. However, if the recognition and enforcement of the documents on judicial sale are decided solely by the domestic law of a State, uncertainty would increase with regard to the deletion or transfer of registry, as well as the purchaser's use of the ship, given the extraterritorial nature of most judicial sales. Such uncertainty may have an adverse effect upon the price realized by a ship sold at a judicial sale to the detriment of all interested parties. Therefore, uniform rules need to be adopted with regard to the international recognition of judicial sales, so as to provide sufficient protection to purchasers of ships at judicial sales.

In the absence of an international convention in this domain, it is particularly important to study and push the adoption of the Beijing Draft. The definition of "clean title", inter alia, determines whether the Convention can achieve its original overall objective. The third revision articulates in the Preamble that "once a ship is sold by way of a judicial sale, the ship should in principle no longer be subject to arrest for any claim arising prior to its judicial sale", and a volatile title may result in challenge to "the subsequent transfers of the ownership in the ship".[1] Therefore, the definition of clean title under the Beijing Draft has been revised and expanded in each revision, showing an increasingly strong tendency to confer a clean title on the purchaser upon purchase at a judicial sale. At the same time, in order to mitigate the adverse effects that such a regime may impose on any right holders other than the former shipowner, procedural requirements, such as the notice requirement, have been inserted. By doing so, the Convention tries to balance the interests of all parties concerned to the extent possible. On the whole, this view is consistent with the "residual doctrine" that typical common law states like Germany and common law States like the UK adopt to deal with the judicial sale of ships, that is, to minimize the damage caused by the judicial sale of ships to other prospective right holders through procedural restrictions. However, there is an imperfection inherent in the recognition and enforcement of judicial sales under national laws, as the recognition of the effect and enforcement of judgments or arbitral awards are completely done in line with domestic laws. Due to the differences in domestic laws, it would not, in essence, be able to achieve the Convention's purpose to encourage the transfer of ships, steady all kinds of proprietary relations and reduce the uncertainty and risk for the purchaser upon a judicial sale. Considering all these factors, it is proposed that future discussions on the Beijing Draft should, on the one hand, follow the trend reflected in the three revisions to insist on conferring clean title on the purchaser, for instance, by expanding the definition of clean title per se, and on the other hand, it also requires States to be involved in further negotiations and discussions on lifting the limitation on the scope of application of the Convention contemplated in the third revision. If a choice must be made between the definition of clean title and the scope of application, the authors are inclined to contract the said definition appropriately or revert it to the one under the second revision so as to ensure the long-term influence of the Convention.

In terms of specific measures, in the next revision of the Convention, discussions if possible may be focused on whether to allow exceptions to countries that have only recognized part of clean title or have not yet clearly clarified clean title. Such exceptions could increase the number of contracting parties, thereby maximizing the influence of the Beijing Draft and accelerating the international acceptance of a completely clean title. In addition, with regard to the scope of application, references could be made to that of the New York Convention by formulating some potential applicable provisions (while leaving some room for contracting parties) so as to be prepared for further expansion of the application of the Convention in the future.

Translators: XIE Hongyue and LI Jiaxin

Editor (English): Godfred Sowah Khartey

[1] United Nations Commission on International Trade Law, Draft Instrument on the Judicial Sale of Ships: Annotated Third Revision of the Beijing Draft, A/CN.9/WG.VI/WP.90 (2021), p. 2, at https://undocs.org/en/A/CN.9/WG.VI/WP.90, 7 May 2021.

美国联邦海事委员会“第 29 号事实调查”及补充命令问题研究

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摘要：新冠疫情的全球流行几乎给全部行业都造成了问题、带来了挑战，同时也催生了新的模式和机遇。在疫情转缓前各行业面临更多的还是它所造成的问题和如何解决。美国国际远洋航运正面临劳动力短缺、港口拥堵等严重影响正常运作的问题。随之而来的是利益相关人对承运人和海运码头运营商收取的免箱和免堆的滞期费的抱怨。由于费用数额巨大以及问题的广泛性、严重性，美国联邦海事委员会发布了第 29 号事实调查和补充命令，专门调查其中是否存在违法行为并寻找商业解决方案。美国航运业出现的这一问题不只涉及到其自身的问题，因为航运具有全球性，而且该问题已经因为集装箱流转量不足等原因影响到我国国际贸易和海洋运输，为此我国同样应当予以密切关注。通过对第 29 号事实调查的前因后果、来龙去脉的研究；对调查结果的持续关注；对世界主要经济体后续航运政策调整的判断和分析，于我国航运发展来讲具有理论和现实意义。

关键词：美国联邦海事委员会；第 29 号事实调查；免箱和免堆的滞期费

一、问题简要阐述

在 2019 年和 2020 年交汇之际，COVID-19 疫情突如其来，并在全球范围蔓延。这一公共卫生事件造成了世界范围的很多行业几近停摆。这样的情况持续了半年之后才逐渐复工复产。在此期间引发的问题很多，就航运领域来讲，其中一个严重的问题就是港口操作在全球恢复情况和程度不平衡，突出体现在跨太平洋航线。今年 5 月以后，跨太平洋航线的货量从恢复到持续强劲增长，方向主要是中国运往美国。货量火爆除了引发航运运价的激增之外，美国主要港口也面临严重的拥堵问题。中国的生产、运输、港口等部门已基本全面复工复产，但是美国这三个行业的复工复产情况还没能恢复到疫情发生前的水平。造成中国运至美国的集装箱到达港口后处理不及时，使集装箱流转不畅。美国港口洛杉矶、长滩和芝加哥，及纽约、新泽西正在经历空前的繁忙和拥堵，并可能面临停摆。大量空集装箱滞留在美国主要港口直接导致的问题就是中国港口缺箱，以及巨额的滞期费等由此产生的附加成本的增长。由港口货运协会领导的联盟估计，2020 年因交通拥堵产生的滞期费达到了 1.5 亿美元。这对美国的经济增长、就业增长以及在世界的竞争地位都是一个严重的影响。美国联邦海事委员会（Federal Maritime Commission，以下简称 FMC）负有明确

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且紧迫的责任，即调查那些对港口交通拥堵产生前所未有负面影响和对国家供应链的其他环节产生瓶颈作用的行为。FMC 调查将试图确定这些航运公司的政策和做法与美国出口货物严重滞留产生的滞期费、集装箱返回和集装箱可用性是否有关，是否违反了现行的法律法规。具体来讲，法律问题包括国际航运联盟成员中的航运公司是否存在不公平收费行为，行为中是否存在不合法的联合行为，运价大幅上涨是否存在违反竞争标准的横向竞争协议，供应链上下游企业间是否存在不合法的竞争协议，这些都涉及美国航运竞争法律和法规。

在这个问题中，中国是重要利益相关国：第一，中国远洋运输（集团）总公司（以下简称中远）作为 Ocean Alliance 联盟中最大的船公司要接受调查并按规定提交贸易数据；第二，中国货主被收取了可能不合理的费用；第三，中国出口贸易受到集装箱滞留美国而导致缺箱的影响；第四，美国对航运竞争最新的管理和行动中体现出的航运政策，有很大可能会影响欧盟的航运政策和中国的航运政策，甚至会影响我国正在进行中的《中华人民共和国国际海运条例》的修订，其最初制定时很多条文引入、借鉴了美国的相关规定，调查中或调查后可能出现的新的法规同样存在被引入的可能性。因此，对这一问题来龙去脉的研究；对调查结果的持续关注；对世界主要经济体后续航运政策调整的判断和分析，于我国航运发展来讲具有理论和现实意义。

二、事件发展详述

（一）第 28 号事实调查

2018 年 3 月 5 日，FMC 发布关于“第 28 号事实调查”命令的调查：关于国际海运商业中的免箱[1]、免堆[2]滞期费和免费时间的条款和做法，对运营船舶的普通承运人和海运码头运营商展开与美国免堆、免箱滞期费和按日计费相关做法的非裁决性调查。根据美国《航运法》，FMC 负责管理美国对外贸易中的水上货物运输普通承运人（“班轮服务”）。法定目的包括建立一个高效、经济的运输系统，将政府干预和监管成本降至最低，通过更加依赖市场竞争来促进美国出口的增长和发展。

2018 年 3 月 5 日，FMC 指定 Rebecca F. Dye 专员为事实调查官，并指示她在 FMC 派来的调查工作人员的协助下，建立一份记录。FMC 还授权事实调查官举行公开或非公开会议，并授权发表中期报告、最终报告及建议。从 2018 年 3 月开始，Rebecca F. Dye 专员向 23 家海运承运人、44 家海运码头运营商和营运港口发出了包括问题和文件要求在内的命令，并向货主（托运人和收货人）、拖车供应商以及海运中介

[1] Detention，中期报告对各利益相关者可能对“detention”和“demurrage”的含义和使用不一致的问题进行了调查，并在最终报告中做了总结。广义上有两种方法对二者进行界定。第一，传统的免箱和免堆的滞期费的定义， detention 是指在码头外使用集装箱承运人的收费，在码头外（大门外）超过免费使用时间使用设备（集装箱）的费用。第二，从费用来源的角度界定免箱和免堆的滞期费。根据这种方法， detention 是对使用集装箱收取的费用，无论在码头内外。承运人仍然可以区分集装箱在码头和非码头的使用。文中简称免箱。

[2] Demurrage,按第一种定义，demurrage 是指在码头（大门内）使用码头空间或承运人在码头内的集装箱而收取的任何费用，在某些情况下，这可能导致两种类型的 demurrage：承运人通过价目表和服务合同对货主征收的费用，和海运码头运营商按照码头服务协议的约定对承运人征收的费用。按第二种定义，demurrage 是对使用码头的土地或空间收取的费用，这将导致一种 demurrage，由海运码头运营商或控制码头土地的港口收取。文中简称免堆。

公司征集有关免箱、免堆滞期费做法的证据。[1]

调查源于 2016 年 12 月 17 日，港口公平实践联盟以及代表美国货物利益的贸易协会联盟[2]向 FMC 提交了一份请愿书。FMC 接到了超过 110 份请愿书意见并于 2018 年 1 月举行了两天的公开听证会。除其他事项外，该请愿书认为，现行的免箱免堆滞期费、海运普通承运人和海运码头运营商对使用空间和设备按日收取费用的做法，是不公正和不合理的。[3]

表 1 所选船公司免箱和免堆的滞期费情况表

（All charges in USD, per Calendar Day, per Container）

船公司	免堆的滞期费	免箱滞期费	生效日期
CMA CGM[4]	进口：普通箱 5-7 日为 245；8-12 日为 290；13 日之后为 335 出口：普通箱 6-8 日为 185；9-13 日为 200；14 日之后为 220	进口：普通箱 5-8 日为 155；9-12 日为 205；13 日之后为 255 出口：普通箱 5-8 日为 155；9-12 日为 205；13 日之后为 255	进口免堆：2020 年 2 月 15 日 进口免箱：2020 年 4 月 1 日 出口免堆：2020 年 1 月 1 日 出口免箱：2020 年 4 月 1 日
Hapag-Lloyd	沿海：美国西部港口（洛杉矶港/长滩港/塔科马港/西雅图港）：3-6 日为 350；之后为 500 萨凡纳港/休斯顿港：3-6 日为 375；之后为 500[5] 内陆：普通箱/不需操作温控箱：3-7 日为 130；之后	出口：普通箱 5-9 日为 125；10-12 日为 150；之后 170 特种箱：5-9 日为 125；10-12 日为 150；之后为 170[6] 进口：普通箱 5-9 日为 160；10-14 日为 185；之后为 200[7]	2020 年 1 月 7 日

[1] Fact Finding 28, Issued Interim Report FEDERAL MARITIME COMMISSION, Sep. 4, 2018 at p.3, https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF28_int_rpt2.pdf/.访问日期：2020.12.8

[2] 该联盟由 26 个组织组成，代表数千家美国企业，包括零售、汽车零部件和配件、食品、肉类、咖啡、茶叶、化学品和其他商品的大小进出口商。也代表在美国东部、西部和墨西哥湾沿岸港口运营的汽车运输公司和货运公司。物流供应商、货代和报关行也是联盟的一部分。参见 Fact Finding 28, Issued Interim Report at p.2

[3] Fact Finding 28, Served Fact Findings Investigation No. 28., FEDERAL MARITIME COMMISSION, Mar. 5, 2018at p.1, available at https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/ff-28_ord2.pdf/.访问日期：2020.12.8

[4] Demurrage and detention tariff available at http://www.cma-cgm.com/static/DemDet/Attachments/DD%20Tarifs%20US%2020200401.pdf.访问日期：2020.12.19

[5] USA - Import Demurrage Charges of Hapag-Lloyd. https://www.hapag-lloyd.com/en/news-insights/news/2019/12/usa---import-demurrage-charges.html.访问日期：2020.12.17

[6] USA - Export Detention under Merchant Haulage.https://www.hapag-lloyd.com/en/news-insights/news/2019/12/usa---export-detention-under-merchant-haulage.html.访问日期：2020.12.17

[7] USA - Import Detention under Merchant Haulage. https://www.hapag-lloyd.com/en/news-insights/news/2019/12/usa---import-detention-under-merchant-haulage.html.访问日期：2020.12.17

	为 180 需操作温控箱：3-7 日为 380；之后为 400[1]
ZIM	东海岸纽约港为例：普通箱：5-8 日为 285；9-12 日为 380；13 日以上为 440 西海岸洛杉矶港为例：普通箱：5-8 日为 235；9-12 日为 290；13 日以上为 320[2]

查询日可用

sources：news published by each carrier's website

对比之前的收费，从总体上看收费都是上涨的，据报道法国达飞轮船公司（CMA）相关收费上涨幅度在 10 美元至 595 美元之间，美国总统轮船（APL）也将因集装箱接受海关检查增收附加费，赫伯罗特货柜航运有限公司（Hapag-Lloyd）根据不同的箱型和不同的地区免箱和免堆的滞期费上涨幅度在 10 美元至 375 美元之间，以星综合航运有限公司（ZIM）也将根据超过免费时间的长度上涨 50 美元至 380 美元不等。[3]

此前在 2013 年至 2015 年，该问题就已被提出并受到 FMC 的关注。FMC 采取了如举行论坛、发布报告等行动关注、协调这一问题。托运人、收货人、拖车供应商和其他人认为以下原因导致他们被收取不合理的滞期费：联邦政府的检查要求、卡车短缺、集装箱拖车短缺、不相关的天气事件、劳资纠纷、缺乏有效的预约制度引致海运码头运营商和海运普通承运人声称的做法，以及港口及周边地区的一般情况。这些利益相关者还声称，他们对此类事件缺乏控制力，并因此而招致了大量的与这些事件相关的免箱和免堆的滞期费。还有，大型托运人可以和海运承运人谈判码头和设备免费时间的问题，但是小型托运人通常没有这样的能力。[4] 并且根据调查统计，在 2014 年至 2018 年间 FMC 的消费者事务和争议解决办公室 Office of Consumer Affairs and Dispute Resolution, CADRS)处理了数百起涉及商业货物免堆滞期费纠纷的案件。在这段时间内，最常见的免堆滞期费投诉是拥挤问题（由封闭的码头、缺乏可用的预约制、劳动力短缺和积压造成）；集装箱拖车问题（拖车短缺、拖车供应商的变化和超重卡车）；由于双方对其他问题有争议而产生的免堆滞期费；文件问题（迟交的文件、系统错误、错误的目的地、货物所有权问题）；以及海关扣留。[5]

另外，在农业运输联盟（AgTC）第 30 届年度会议中，有拖车供应商指出，使用货运代理的小客户有时不知道免费时间，因为他们不了解（有船）承运人和货运代理之间的协议条款。还有，卡车司机并不是决定免费时间合同的一部分，集装箱免费时间和集装箱拖车（运输）天数并不一致。[6] 美国国家进口税经

[1] USA - Import (CY) Demurrage Charges. https://www.hapag-lloyd.com/en/news-insights/news/2019/12/usa---import--cy--demurrage-charges.html.访问日期：2020.12.17

[2] Demurrage & Detention Tariff. https://www.zimchina.com/tools/demurrage-detention-tariff.访问日期：2020.12.18

[3] 未列明的承运人并非不存在免箱和免堆的滞期费上涨情况。

[4] Fact Finding 28, Issued Interim Report FEDERAL MARITIME COMMISSION, Sep. 4, 2018 at p.2, https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF28_int_rpt2.pdf/.访问日期：2020.12.8

[5] Fact Finding 28, Issued Interim Report FEDERAL MARITIME COMMISSION, Sep. 4, 2018 at p.4, https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF28_int_rpt2.pdf/.访问日期：2020.12.8

[6] Fact Finding 28, Issued Interim Report FEDERAL MARITIME COMMISSION, Sep. 4, 2018 at p.5,

纪人与转运公司协会(National Customs Brokers and Forwarders Association of America,简称 NCBFAA)年会中，海运中介提出他们对于这个问题的观点：有船承运人客户服务差；有船承运人延迟更正账单；争议解决程序和免费时间政策之间缺乏统一性；海运码头运营商对关闭和接收退回设备的能力缺乏事先通知或沟通；政府货物检查导致的大量免堆、免箱滞期费账单；免费时间减少；海运中介不是托运人和海运承运人之间的合同安排的一部分；还有内陆港口和铁路站缺乏拖车资源和集装箱拖车。

因此，FMC 根据其法定职责，根据《联邦法规》第 46 卷第 502.281 条及以下等等内容，命令调查运营船舶的普通承运人和海运码头运营商的当前状况和做法，以及在美国免堆、免箱滞期费和按日计收的费用。FMC 将利用本次调查中获得的信息和事实调查官的建议，确定受管制主体关于免堆、免箱滞期费和免费时间的做法。

具体而言，事实调查官可编制以下记录：

1. 因商业利益、合同利益和货物利益的结盟是否会增强或恶化货物通过美国港口的有效运输能力，以及如果是的话，是如何增强或恶化的。美国的商业和合同条件是否与其他海运国家相似；以及其他海运国家是否有处理因承运人、海运码头运营商或托运人无法控制的情况而征收免堆、免箱滞期费的做法，如果有，这些做法是否有效。

2. 承运人或海运码头运营商是否向托运人和收货人交付了货物，如果是，何时交付的。在货物交付时，通知的一般做法；以及收到交货通知时，提货的障碍。

3. 为免堆、免箱滞期费开具发票的记账收费做法，具体来说：有船承运人和海运码头运营商的账单关系，包括与免堆、免箱滞期费有关的服务和费用的某一方账单；描述或具体确定所征收的免堆、免箱滞期费的账单做法；以及签发免堆、免箱滞期费发票的时限。

4. 与各种外部或干预事件引起的延误有关的做法；当进入码头受到此类事件影响时，海运码头运营商或有船承运人是否或何时决定免除或减少免堆、免箱滞期费；以及卡车和集装箱拖车问题在不同类型集装箱货物运输中的作用（门到门与港到港）。

5. 承运人或海运码头运营商与托运人之间的免堆、免箱滞期费争议的解决办法的做法。审查或减轻免堆、免箱滞期费的现有程序；免堆、免箱滞期费争议解决方案的时限；以及关于取消或减轻责任的免堆、免箱滞期费发票的做法。

2018 年 12 月 17 日，FMC 颁布了第 28 号事实调查命令：国际海运商业中的免箱、免堆滞期费和免费时间的条款和实践。事实调查官负责向 FMC 报告这些问题以及 FMC 采取进一步行动的任何建议，包括对禁止行为、执法优先权、政策、规则制定程序或本程序中形成的事实记录所保证的其他行动的任何调查。

事实调查官分两个阶段进行调查，并于 2018 年 12 月 3 日发布最终报告。最终报告建议 FMC 组织由行业领导人组成创新团队在有限的、较短的时间内举行会议，以改进商业上可行的免箱、免堆滞期费的办法：标准化的语言；明确、简化和便于使用的计费和争议解决做法；争议解决方案相关证据指南；以及统一的给货主的集装箱可用性的通知。FMC 于 2018 年 12 月 7 日接受了本报告并批准了其中的建议。

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https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF28_int_rpt2.pdf/.访问日期：2020.12.8

为促进创新团队的发展，FMC 命令将第 28 号事实调查持续到 2019 年 9 月 3 日，以便 Rebecca F. Dye 专员作为事实调查官，在 FMC 工作人员的协助下，可以组织和带领由行业领导人组成的团队，以增强供应链的可靠性和弹性，进一步调查和完善 2018 年 12 月报告中提出的四种方法的商业可行性。每个团队的成员都由供应链代表组成，包括公共港口当局、海运码头运营商、受益货主、远洋运输中介机构、班轮运输公司、拖车货运公司、沿岸劳工代表、铁路官员和集装箱拖车供应商。根据 FMC 发布的第 28 号事实调查的相关文件，调查覆盖以下主要问题。

1. 术语定义、海运承运人和码头运营商做法不一致

海运承运人和码头运营商处理免箱和免堆的滞期费问题时并不明确，或没有一个标准方式，这使得托运人很难避免被收取费用。FMC 监督着 255 个海运码头，横跨东部，海湾和太平洋沿岸，以及阿拉斯加。不同地方关于免费时间做法的政策各不相同，甚至在同一港口的码头之间也是如此。尽管有些海运码头运营商和港口的收费允许，在无法于免费时间内提供货物交货的码头或港口，有额外的免费时间或更低的费率，但这些做法似乎并不普遍。海运码头运营商如何向托运人、收货人、拖车提供商或承运人收取费用，也有几种模式。这些不同的模式可能当进入港口受到限制或港口拥挤时，会在托运人、收货人和拖车供应商之间关于如何评估免堆和免箱的滞期费产生不确定性[1]。

在过去的五十年里，国际远洋班轮贸易发生了巨大的变化，这在很大程度上是由于集装箱运输的出现。与 75 年前卸载一艘相对较小的散货船相比，在现代码头卸载一艘 10000 标准箱的船舶是非常不同的操作。需要考虑的一个相关问题是，交货的法定义务和它的免费时间以及免堆、免箱滞期费和按日计费的关系，是否跟上了卸货、将货物从码头移走并交付给收货人这些港口做法的变化。免费时间、免堆、免箱滞期费问题的另一个根本问题是，谁承担因延迟造成的免堆、免箱滞期费用的经济负担，这涉及风险的分配，且根据情况的不同可能有很大差异。[2]

交货没有被定义，并且关于交货的问题和货物控制极容易因实际情况而不同，因而不能做一般性规定。一些承运人认为交货和货物责任有关，和免箱和免堆的滞期费没有直接关系。但反对意见认为，绝大多数有船承运人认为他们的责任是交货（提交），而不是交付货物（送达）。这根据港口不同而不同，最多的说法是当货物从船上卸下他们的义务就履行完成了。还有人比起实际交货更关注推定交货，即货物在适当的码头从船舶上卸下，且收货人收到货物已卸下的应得到的且合理的通知，并有合理的机会将货物移走或妥善保管。还有的说，是当货物可以被提走或在码头交付给直接货主（Beneficial Cargo Owner，BCO）的卡车司机时，或当货物准备好从码头发出时。调查需要考虑的是免费时间在集装箱可用之前开始是否合理。

调查中还提到一些其他问题存在做法上的不一致。一是，免箱和免堆的滞期费账单支付时限虽然由统一的多式联运交接协议（Uniform Intermodal Interchange Agreement, UIIA）管理其会员，但是仍缺乏一致性。免箱和免堆的滞期费账单关系通常有三种不同类型。二是，对于港口或码头因外部或干预事件不可进

[1] Fact Finding 28, Served Fact Findings Investigation No. 28., FEDERAL MARITIME COMMISSION, Mar. 5, 2018 at p.1. https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/ff-28_ord2.pdf/.访问日期：2020.12.8

[2] Fact Finding 28, Served Fact Findings Investigation No. 28., FEDERAL MARITIME COMMISSION, Mar. 5, 2018 at p.2. https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/ff-28_ord2.pdf/.访问日期：2020.12.8

入时，有船承运人和海运码头运营人对免箱和免堆的滞期费予以减免或延长免费时间的做法不一。保证免费时间自动展期的情况因承运人而异，但通常包括使整个港口或部分关闭的天气事件或罢工。而绝大多数海运码头运营人会根据具体情况延长免费时间。一些有船承运人不会在集装箱为接受检查被取出码头期间收取免堆滞期费。

2. 信息、流程、做法及纠纷处理透明度不足

关于免堆滞期费的做法缺乏可见度，即不够透明。这些做法的报告都提出了在一个竞争性的且可靠的美国货运系统中，目前的做法是否被允许的问题。根据《美国法典》第 46 卷第 41102 条的规定，承运人和海运码头运营商必须采用公正合理的规定和做法管理免费时间、免堆和免箱滞期费。[1] 应用于码头做法的合理性检验，检验的是他们的“做法必须是在其他方面合法的，不过度，相对合理，最终将适合和恰当作为目标。”[2]免堆和免箱滞期费的做法受第 41102（C）条所规制，因为它们涉及码头的操作、仓储和（货物）所有权交付。[3]

具体包括但不限于以下几点。第一，集装箱可用性的通知由于海运码头运营商会将信息公布于网站，就不会另外给货主提供集装箱可被取回的通知。第二，账单的透明度常常和海运码头运营商是否通过电子支付系统有关。第三，关于集装箱拖车短缺问题，由于港与港之间承运人一般不提供拖车，而门与门之间（堆场之间）承运人则会提供拖车，因此有一半的承运人表示如果他们提供拖车但出现短缺，会免除因此造成的免堆滞期费。但是海运码头运营人不会减免因此产生的免堆滞期费。第四，在纠纷解决做法中，很少有有船承运人和海运码头运营人能提供他们接到的这样的纠纷的数量和那些纠纷如何被解决的这样有意义的统计数据。即使数据有限还是可以发现一些趋势：第一，免箱纠纷多于免堆纠纷；第二，退款是解决纠纷的罕见方法；第三，通过未来合同条款解决纠纷是极为罕见的。[4]总的来说，有船承运人和海运码头运营人解决纠纷各不相同而且很多是不正规的。

3. 免箱和免堆滞期费的目的被质疑

为了达到更好的评估关于免箱和免堆滞期费的目的，调查命令从有船承运人和海运码头运营商处收集相关信息和数据：关于免箱和免堆的滞期费利润以及在不同港口超过时限被收取的免箱和免堆的滞期费在集装箱（利润）中比例。海运承运人和码头运营商认为，免堆滞期费的目的是，保持通过码头运输货物时需要的“码头速度”，免箱滞期费的目的是，为有效率的供应链提升“设备速度”。[5]也是减少非居住用码头区财产安置而产生的海运码头设施费用，以及不鼓励将其用作货物储存的需要，承运人需要维持一个平衡的设备流量和流动性网络，需要市场竞争来解决免箱和免堆的滞期费问题。在因天气原因使用中断期间海运

[1] Fact Finding 28, Served Fact Findings Investigation No. 28., FEDERAL MARITIME COMMISSION, Mar. 5, 2018 at p.2. https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/ff-28_ord2.pdf/.访问日期：2020.12.8

[2] Fact Finding 28, Served Fact Findings Investigation No. 28., FEDERAL MARITIME COMMISSION, Mar. 5, 2018 at p.2. https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/ff-28_ord2.pdf/.访问日期：2020.12.8

[3] Fact Finding 28, Served Fact Findings Investigation No. 28., FEDERAL MARITIME COMMISSION, Mar. 5, 2018 at p.2. https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/ff-28_ord2.pdf/.访问日期：2020.12.8

[4] Fact Finding 28, Issued Interim Report FEDERAL MARITIME COMMISSION, Sep. 4, 2018 at p.14, https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF28_int_rpt2.pdf/.访问日期：2020.12.8

[5] Fact Finding 28, Issued Interim Report FEDERAL MARITIME COMMISSION, Sep. 4, 2018 at p.2, https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF28_int_rpt2.pdf/.访问日期：2020.12.8

承运人之间延长免费天数的做法中，海运承运人倾向于加快设备周转速度，而不是收取免箱滞期费，而海运码头运营商则倾向于将货物运出码头而不是收取免堆滞期费。但是请愿书中的各方认为免箱和免堆的滞期费是有船承运人和海运码头运营商的一个利润来源。

2013 年，有船承运人免箱和免堆的滞期费的收入相对较低，但在 2014 年增长了 90%，接着在 2015 年又同比增长了 86%。在那一年，22 家响应调查的承运人的总免箱和免堆的滞期费收入达到峰值。2015 年年中西海岸劳动力问题得到解决，2016 年有船承运人总免箱和免堆的滞期费收入同比下降了 23%。但 2016 年的总免箱和免堆的滞期费收入仍约为 2013 年的 2.7 倍。简言之，承运人的免箱和免堆的滞期费水平没有回到或接近 2014-2015 年及之前的水平。2017 年，有船承运人免箱和免堆的滞期费总收入再次上升，几乎与 2015 年的峰值水平持平，与 2016 年相比增长了 30%。然而，必须指出的是，虽然在所有接受调查的 22 家承运人的总免箱和免堆的滞期费收入上可以看到相似的趋势，但各个航线之间的免箱和免堆的滞期费趋势有很大差异。例如，2016 年至 2017 年间，一条航线的一年的免箱和免堆的滞期费收入增加了 77%（比整体 30%的增长率高出一倍多）。2017 年它的免箱和免堆滞期费总收入较 2015 年上一个峰值，高 34%。另一条航线在 2016 年至 2017 年间，它一年的免箱和免堆的滞期费收入则增加了 190%。仅从免堆滞期费收入的模式来看，与 2015 年相比有几乎一半，即在 22 个响应的有船承运人中的 10 家，在 2017 年收取了更高数额的免堆滞期费。而从海运码头运营商 2013 至 2017 年的免堆滞期费收入来看，2017 年的增长幅度尽管与承运人数据相比没有这么巨大，但是有相似的趋势。此外，根据海运码头运营商提供的逐年数据，估计大型港口收免堆滞期费的集装箱总数似乎有所减少，而在较小港口则有所增加。[1]

对比美国和其他海运国关于免箱和免堆的滞期费规章的监管环境，许多承运人坚持说，其他国家给予他们比在美国更大的行动灵活性。一些承运人指出，在美国以外的地区，他们有更多的自由来免除或减轻免箱和免堆的滞期费。[2]关于这个方面，由于目前调查仍在进行中，尚未发现更多的详细、具体的内容，在后续研究中值得持续关注，进行下一步和更进一步的研究。

4. 预约制度和免费时间计时问题

货主声称，如果承运人和海运码头经营人向卡车司机签发集装箱不可用的票据，海运码头经营人和承运人提供货场或码头关闭通知，以及卡车司机无法在 48 小时内获得集装箱可用的预约，则应停止免费时间或免堆滞期费计时。根据这些货主的说法，在这些情况下停止计时是适当的，因为集装箱由于超出货主的控制范围的因素而无法移动，而且这样一个过程将促使海运码头经营者确保预约制度和堆场作业足以应付贸易量。[3]而海运码头强调，如果集装箱因其控制范围内经核实的问题而无法使用，例如当集装箱无法定位、码头关闭或集装箱处于封闭区域时，他们将免除免堆滞期费或延长免费时间。在讨论交货的定义时，同样提到免费时间在集装箱可用之前开始是否合理的问题。没有异议的做法是，海运码头运营商将适当的

[1] Fact Finding 28, Issued Interim Report FEDERAL MARITIME COMMISSION, Sep. 4, 2018 at p.7-8, https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF28_int_rpt2.pdf/.访问日期：2020.12.8

[2] Fact Finding 28, Issued Interim Report FEDERAL MARITIME COMMISSION, Sep. 4, 2018 at p.16, https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF28_int_rpt2.pdf/.访问日期：2020.12.8

[3] Fact Finding 28, Issued Final Report, FEDERAL MARITIME COMMISSION, Dec. 3, 2018, at p.16. https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF-28_FR.pdf/.访问日期：2020.12.8

联系方式提供给货主和卡车司机。

5. 最终报告调查发现

第一，对于术语的定义，被调查者将免堆滞期费描述为为了取回码头以外的集装箱的一种激励。[1]第二，各方都希望免箱和免堆滞期费账单流程更加透明，货主主张按地区将账单做法标准化，承运人或海运码头运营商对使他们的网站上有更多可用的免箱和免堆的滞期费信息没有特别的异议。[2]第三，货主表示，在处理免箱和免堆的滞期费时，通常没有明确的争议解决联系人、程序或价格调整点。海运中介主张要有明确的权限和可用的争端解决政策。第[3]四，寻求免除免堆滞期费或延长免费时间的货主应以确凿的文件证明其论点，他们认为制定指导方针可以更有效地解决争端。[4]第五，集装箱可用性的定义、集装箱在什么状态可以称为可用、发给货主及他们卡车司机的通知是否及时、免堆免费时间及何时开始计时为合适，以及预约系统等问题在第二阶段仍是各执一词、仍为没有共识的状态。

在第 28 号事实调查的最终报告中总结调查结果，事实调查官发现：第一，免箱和免堆的滞期费在其应用于激励货主迅速将货物从港口和海运码头运离时，是一项有价值的费用；第二，所有国际供应链参与者都可以受益于透明、一致和合理的免箱和免堆的滞期费做法，这将提高美国港口的吞吐速度，更有效地利用商业资产，并节省行政开支；第三，将港口和海运码头业务集中在实际货物可用性通知上，将实现免箱和免堆的滞期费做法的目标，并提高国际商业供应链的绩效。[5]

6. 调查影响

根据调查要求成立的创新小组提出的四个商业解决方案，以及在调查官和创新小组与被调查企业的会议过程中得出的讨论结果，第 28 号事实调查促使国际货运代理协会联合会（International Federation of Freight Forwarders Associations，FIATA）于 2018 年 9 月制定了免箱和免堆的滞期费的最佳做法。有的码头操作者开始在他的码头持续跟踪纠纷。

调查还促使颁布了一项法规，“第 19-05 号案卷，《航运法》下的免箱和免堆的滞期费的解释性规则”，已在联邦公报上公布后生效，即 2020 年 5 月 18 日。法规的目的在于就委员会将如何解释《美国法典》第 46 卷第 41102 条（C）和《联邦法规》第 46 卷第 545.4 条（d）中有关免堆和免箱滞期费的内容提供指导。规则中就调查中出现的问题点（激励原则、货物可用性[6]、空箱返还、货物可用性通知、政府检验、免堆和免箱的滞期费政策、争议解决政策、账单、证据、透明的术语、承运人拖运等）均给出了指导，就各个不同情况给出了对法律解释的指导和分析。

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[1] Fact Finding 28, Issued Final Report, FEDERAL MARITIME COMMISSION, Dec. 3, 2018, at p.12. https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF-28_FR.pdf/.访问日期：2020.12.8

[2] Fact Finding 28, Issued Final Report, FEDERAL MARITIME COMMISSION, Dec. 3, 2018, at p.14. https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF-28_FR.pdf/.访问日期：2020.12.8

[3] Fact Finding 28, Issued Final Report, FEDERAL MARITIME COMMISSION, Dec. 3, 2018, at p.14-15. https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF-28_FR.pdf/.访问日期：2020.12.8

[4] Fact Finding 28, Issued Final Report, FEDERAL MARITIME COMMISSION, Dec. 3, 2018, at p.17. https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF-28_FR.pdf/.访问日期：2020.12.8

[5] Fact Finding 28, Issued Final Report, FEDERAL MARITIME COMMISSION, Dec. 3, 2018, at p.3. https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF-28_FR.pdf/.访问日期：2020.12.8

[6] 此处可用性指货物是可以被提取、运往下一环节的状态。

（二）第 29 号事实调查

FMC 于 2020 年 3 月 31 日发布了名为“国际海运供应链参与”的第 29 号事实调查命令。FMC 主席 Michael Khouri 指出：“COVID-19 全球流行正在影响我们整个海洋供应链。我再次要求 Rebecca F. Dye 专员能够成立在第 28 号事实调查中召集的创新团队，以确定针对这一国际供应链中的不确定性和问题的协作解决方案。”[1]

保持全球货运系统的有效性和可靠性对于国家持续的经济活力至关重要。不幸的是，港口和国家供应链其他环节的拥堵和瓶颈，已构成对美国经济增长、就业增长以及在世界上竞争地位的严重风险。最近的全球事件只突出了之于美国国际货运系统有效性，反应较大的港口和码头业务的经济紧迫性。鉴于 FMC 的任务是确保为海洋商业建立一个高效和经济的运输系统，FMC 有明确和紧迫的责任积极应对当前影响全球供应链和美国经济的挑战。[2]

因此，依据《美国法典》第 46 卷第 41302、40302、41101 至 41109、41301 至 41309 和 40104 条，以及《联邦法规》第 46 卷第 502.281 条及以下等等条款，FMC Rebecca F.Dye 专员与供应链利益相关者参加公开或非公开讨论，以确定某些影响美国国际供应链顺利运行的未解决供应链问题的商业解决方案；FMC 进一步下令，FMC 专员成立一个或多个由美国国际供应链所有商业部门的领军人们组成的供应链创新团队，以制定解决港口拥堵和相关供应链挑战的商业解决方案；FMC 进一步下令，专员向 FMC 定期更新为该命令所作努力的结果；专员根据《联邦法规》第 46 卷第 502.281 至 502.291 条拥有充分的权力，根据美国法律和 FMC 规定履行必要的职责。专员将由主席指派的工作人员协助；并且最后命令，这项命令的通知被公布在《联邦公报》上。[3]

Rebecca F.Dye 专员于 2020 年 6 月 17 日宣布圣佩德罗湾讨论结果，创新团队确定了解决圣佩德罗湾港口四个关键运营挑战（对应前四条方法）的方法：

1.卡车司机应被指示将空集装箱返还他们提箱的码头，以便他们进行双向运输并减少所需的集装箱拖车数量。

2.码头大门关闭的通知应在关门前至少三天，最好是之前七天发出。任何时候都不应在中班时关闭。

3.停航通知不仅应发给直接货主，还应至少提前 7 天在承运人网站的显著位置公布。绕港的通知应至少提前 72 小时公布。

4.承运人和码头应依据出口货物接收时间表立即寻求合作，以便更好地达到协调它们之间的相互作用的目的。

5.FMC 应考虑成立一个由港口、承运人和海运码头运营商组成的咨询委员会，以促进和推动这三个行业部门之间更大的合作。

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[1] Chairman Michael Khouri Comments on Fact Finding 29. https://www.fmc.gov/chairman-michael-khouri-comments-on-fact-finding-29/.访问日期：2021.3.3

[2] Fact Finding 29: International Ocean Transportation Supply Chain Engagement, FEDERAL MARITIME COMMISSION, 2020, at p.1-2. https://www2.fmc.gov/readingroom/docs/FFno29/FF29_Order.pdf/.访问日期：2020.12.8

[3] Fact Finding 29: International Ocean Transportation Supply Chain Engagement, FEDERAL MARITIME COMMISSION, 2020. https://www2.fmc.gov/readingroom/docs/FFno29/FF29_Order.pdf/.访问日期：2020.12.8

调查专员于 2020 年 10 月 1 日公布建议，将服务合同备案要求的监管救济展期到 2021 年 6 月。FMC 规定，在海运承运人根据服务合同被允许运输货物之前，必须向 FMC 提交服务合同备案。FMC 在 4 月份投票通过，允许（合同）各方在合同条款达成一致后 30 天内向 FMC 提交服务合同。2020 年 4 月授予的救济计划原本只展期至 2020 年 12 月 31 日。在即将到来的谈判季，延长服务合同提交的截止日期这一救济进一步展期，保证了承运人和托运人能够在不触犯法律的情况下继续开展业务。[1]

第 29 号事实调查已进行至第二阶段调查工作，而由于整体情况的发展变化，再次发布补充命令。

（三）第 29 号事实调查补充

FMC 于 2020 年 11 月 19 日发布“第 29 号事实调查”的补充命令：“国际海运供应链参与-据《美国法典》第 46 卷第 41102 条（C）的可能违规行为”。2020 年 3 月 31 日，FMC 发布了一项命令，确立了第 29 号事实调查：国际海运供应链参与，85 号联邦法令 19146（2020 年 4 月 6 日）的命令。事实调查的主要目的是确定与最近全球事件有关的货运系统挑战的业务解决办法。[2]

第 29 号事实调查最初的关注点在于商业解决方案。根据事实调查中获得的信息，FMC 关心的是，停靠纽约港和新泽西港或停靠长滩港和洛杉矶港的联盟中的运营船舶的普通承运人，可能采用了违反《美国法典》第 46 卷第 41102（C）条的做法和规定。例如，参与第 29 号事实调查讨论的利益相关者分享了他们遇到的在空箱返回上的政策问题。[3]

事实调查官根据《美国法典》第 46 卷第 40104 条授予的权力，有向停靠纽约港和新泽西港或停靠长滩港和洛杉矶港的联盟承运人发出调查通知（NOI）和/或强制性信息要求的能力。FMC 完全赞同第 29 号事实调查官 Rebecca F.Dye 专员在 2020 年 3 月 31 日命令的授权下所作的努力，调查停靠纽约港和新泽西港或停靠长滩港和洛杉矶港的联盟承运人是否采用了违反第 41102（c）条的做法或规定。这包括但不限于与滞期费、根据《联邦法规》第 46 卷第 545.5 条进行的空箱返回的相关做法和规定，以及与美国出口运输相关的做法。

三、透露出的航运政策倾向

（一）监管航运联盟竞争行为维持市场公平

为了打击潜在的违反竞争法规的行为，FMC 加大对三大航运联盟的监管力度。根据协议的权限和地域范围以及潜在的市场条件，三大联盟受到了最高最严格的审查，因为这三个协议最有可能引起或促成对

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[1] Commission Extends Temporary Exemption of Certain Service Contract Filing Requirements, FEDERAL MARITIME COMMISSION, Oct. 1, 2020. https://www.fmc.gov/commission-extends-temporary-exemption-of-certain-service-contract-filing-requirements/.访问日期：2020.12.12

[2] Fact Finding 29：International Ocean Transportation Supply Chain Engagement - Possible Violations of 46 U.S.C. § 41102(C), FEDERAL MARITIME COMMISSION, Nov. 19, 2020, at p.1. https://www2.fmc.gov/readingroom/docs/FFno29/FF29_41102(c)_%20Supplemental_Order.pdf/.访问日期：2020.12.22

[3] Fact Finding 29：International Ocean Transportation Supply Chain Engagement - Possible Violations of 46 U.S.C. § 41102(C), FEDERAL MARITIME COMMISSION, Nov. 19, 2020, at p.2. https://www2.fmc.gov/readingroom/docs/FFno29/FF29_41102(c)_%20Supplemental_Order.pdf/.访问日期：2020.12.22

航运市场不利的影响。根据 FMC 主席 Michael Khouri 的指示，FMC 已向 2M、Ocean Alliance、THE Alliance 发出每月必须向 FMC 提交某些特定于运营商的贸易数据的要求信函。要求原先必须每季度提交给委员会的某些特定的运营商贸易数据现在必须每月提交一次。[1]FMC 航线分析署（Commission's Bureau of Trade Analysis，BTA）传统上依靠单个船舶运营商秘密提供的数据和商业数据中的信息来监测和分析集装箱承运人的运费和服务市场变化趋势。但考虑到最近市场的波动，他们需要更频繁地直接从联盟航运公司接收关键的贸易数据，以便更好地让经济学家能够及时评估跨太平洋和跨大西洋贸易的变化，并向 FMC 报告调查结果。FMC 的核心功能是监视向该机构提交的海洋承运人联盟协议。FMC 接收并评估来自海运承运人联盟协议的当事方的详尽的、商业敏感的信息，这些信息和其他允许 FMC 调查人员确定市场趋势和潜在非法行为的信息将一起被仔细分析。不仅是 FMC 旨在建立、维护一个高效、经济的运输系统，依赖市场竞争促进美国出口贸易增长和发展，美国航运政策优先考虑的亦是如此。

FMC 会持续监控所有全球联盟协议的关键经济指标和基本市场状况的变化，以发现协议成员可能会提高并维持高于竞争水平的运费和任何联合活动，或不合理地减少任何服务的垄断行为。对于这些协议，FMC 工作人员会进行更详细的审查，并定期向 FMC 介绍当前的调查结果和建议。

FMC 主席 Michael Khouri 说："如果我们发现任何可能违反《航运法》第 6（g）条竞争标准的承运人行为迹象，我们将立即寻求承运人直接讨论以解决这些问题。如有必要，FMC 将向联邦法院寻求禁止令，以禁止联盟协议进一步执行。"[2] 换句话说，FMC 的做法是在保证竞争法实现其保障公平和有效竞争的基本作用。保护经营者和消费者各方的合法权益。

这次事实调查内容之一就是要发现三大联盟是否存在横向竞争协议。如果三大联盟对免箱和免堆的滞期费存在协议，那么即属于《联合国竞争示范法》第 3 条规定的"'固定价格或其他销售条件'，包括在国际贸易领域。"，具有竞争关系或潜在竞争关系的企业不得订立此类协议。航运联盟（Alliance）这种联合经营体的形式是一种战略联盟，是一种合作形式，不一定构成垄断组织，但至少是具有市场优势地位的。但是正如调查命令中所说，这三个协议组织最有可能引起或促成对航运市场不利的影响，因此，需要确保其行为的合法性。

（二）保护航运产业全球竞争力

调查专员表示，因调查召集的创新团队成员是认真思考保护美国货物运输系统的能力和竞争力的。[3] 无论是 FMC 的事实调查和监管，或是美国航运法中的规定，最终目的还是建立一个高效、经济的运输系统，保持全球货运系统的有效性和可靠性。这些从根本上说都是与美国持续的经济活力息息相关的。

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[1] Federal Maritime Commission Increases Global Alliances' Information Monitoring Report Requirements. https://www.fmc.gov/federal-maritime-commission-increases-global-alliances-information-monitoring-report-requirements/.访问日期：2020.3.3

[2] Federal Maritime Commission Increases Global Alliances' Information Monitoring Report Requirements, FEDERAL MARITIME COMMISSION, Nov. 25,2020. https://www.fmc.gov/federal-maritime-commission-increases-global-alliances-information-monitoring-report-requirements/.访问日期：2020.12.12

[3] Fact Finding 29 Innovation Teams Identify Information Helpful to Mitigating COVID-19 Impacts on Supply Chain, FEDERAL MARITIME COMMISSION, May 14,2020. https://www.fmc.gov/fact-finding-29-teams-covid-19-impacts-supply-chain/.访问日期：2020.12.12

在利益相关者质疑承运人和海运码头运营商收取免箱和免堆的滞期费作为利润来源的时候，第 29 号事实调查最终报告中给出的结论仍是“免箱和免堆的滞期费在其应用于激励货主迅速将货物从港口和海运码头运离时，是一项有价值的费用”。产生质疑的原因在于，航运的显著放缓，许多承运人、海运码头运营商和其他海运机构都面临财务破产，这可能会导致这些企业依赖收取费用维持下去。在如疫情全球流行这样特殊的情况下，这些费用似乎被用作一种可持续发展的手段，将当前经济危机的痛苦转嫁给那些不适合补贴其他人的人。[1] 然而，在最终解释性规则中指出，长期以来的原则是，根据价目表强加的惯例，即是法律意义的默示合同，必须被适用以满足其预期目的。[2] 但是，在提货或者还箱时，免箱和免堆的滞期费已经不具有其功能的情况下，应暂停收取。

其实 FMC 之前还对提单中“merchant 条款”[3]及相关收费问题进行了调查，但是据目前情况来看，承运人的收费并没有减项或者降低。由此，我们是否可以得出结论，承运人让出的利益远小于他们获得的利益。

（三）航运商业解决方案目的是促进贸易

美国航运政策包括航运服务消费者保护政策，并且其价值趋向将货主利益置于航运经营者利益之先考虑。这基于比起航运大国，美国更是贸易大国的事实。美国的进出口贸易总额一直位居世界首位，所以作为经济的重要支撑部分，贸易主体的利益优先自然而然。无论是第 28 号事实调查还是第 29 号事实调查，不仅调查的问题和内容存在相似性，而且启动调查的事实根源不仅是阻碍了航运系统的运行，更是严重影响了美国的出口贸易，特别是在美国出口贸易中占重要地位的农产品的出口。有消息称，由于严重缺箱，美国农产品遭到了形同“拒载”的待遇，无法照常出口。

调查将特别集中于承运人和海运码头在集装箱返还、集装箱出口方面可能存在的不合理做法，而洛杉矶港、长滩港和纽约-新泽西港的免箱和免堆的滞期费对由美国处理的贸易增长的能力构成了严重的风险。在第 28 号事实调查之后发布的“免箱和免堆的滞期费的解释性规则”中写道：“这个解释性规则旨在反映三个一般性原则：第一，进口商、出口商、中间商和卡车司机在无法从海运码头取回集装箱或将集装箱退回海运码头的情况下，不应受到免箱和免堆的滞期费做法的处罚，因为在这些情况下，收费不能起到激励作用。……”[4]

受到影响的不仅是美国的出口贸易，进口贸易同样存在困难。中国和美国是重要的贸易伙伴，美国港口拥堵势必造成空集装箱不能即时流回中国，因此目前我国出口贸易托运人同样面临“一箱难求”的困境，这将直接影响美国从中国进口的贸易。另外，在中美贸易中 FOB 条件和 CIF 条件下的贸易比例已经不像

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[1] Statement of Commissioner Sola to Accompany Vote on Notation No. 20-20, Interpretive Rule on Detention and Demurrage”, FEDERAL MARITIME COMMISSION, Apr. 30, 2020. https://www.fmc.gov/sola-interpretive-rule-detention-demurrage/.访问日期：2020.12.12

[2] Interpretive Rule on Demurrage and Detention Under the Shipping Act, May 18, 2020. https://www.federalregister.gov/documents/2020/05/18/2020-09370/interpretive-rule-on-demurrage-and-detention-under-the-shipping-act.访问日期：2020.12.12

[3] Chairman Michael A. Khouri’s Remarks for the Global Maritime Conference - Federal Maritime Commission - Federal Maritime Commission. https://www.fmc.gov/chairman-michael-a-khouris-remarks-for-the-global-maritime-conference/.访问日期：2020.3.3

[4] Interpretive Rule on Demurrage and Detention under the Shipping Act（46 CFR Part 545 Docket No. 19-05）, FEDERAL MARITIME COMMISSION, Oct. 31, 2019 at p.1. https://www2.fmc.gov/readingroom/docs/19-05/19-05_cmnts_AgriTC.pdf//.访问日期：2020.3.3

以前那么悬殊，中国托运人同样面临需要承担按日计费的免箱和免堆的滞期费。而且，这个情况在美国疫情尚未好转之前，只会一直持续，那么累加的费用对托运人或收货人来说将是一笔巨额开支。所以，第 29 号事实调查结论中是否会有关于免箱和免堆的滞期费的减免的解决方案将成为重点。在合理、公平的情况下，如何将各方损失降到最低将是缓解贸易瓶颈、促进贸易发展的关键。

四、后续影响

FMC 主席在 2020 年全球海事会议讲话中重点提到第 29 号事实调查补充命令调查的内容。而 FMC 从承运人直接获取的是确实的承运人特别的贸易数据，而且如果发现任何可能违反竞争标准的行为，将在有必要的情况下，诉诸联邦法院禁止违法的联盟协议的进一步运作。因为如前述讨论的，第 28 号和第 29 号事实调查已经在免箱和免堆的滞期费问题上做出了很多努力，也在调查结果的报告中为解决问题提出了很多建议，并且相关企业也有一些已经开始实践了。所以，后续 FMC 关注更多的数据预计是联盟中承运人停航或者停止接载的数据，以及下一步的运价变动。

在疫情影响还在持续的情况下，海运各环节承载能力如果仍存在不能适应贸易量的情况的话，尤其是劳动力短缺的情况得不到缓解，停航和运价的问题或将一直存在。根据数据显示，美国新冠疫情并没有出现好转迹象，确诊病例依旧在持续增加。那么，劳动力将绝对性短缺，进出口货物检验检疫也不会放松，而美国对货物的需求是增加的，货运量增加和操作能力持续不足之间的不匹配将得不到根本解决。笔者认为本文论述问题的根本解决途径在于疫情防控，其他方法可能治标不治本。

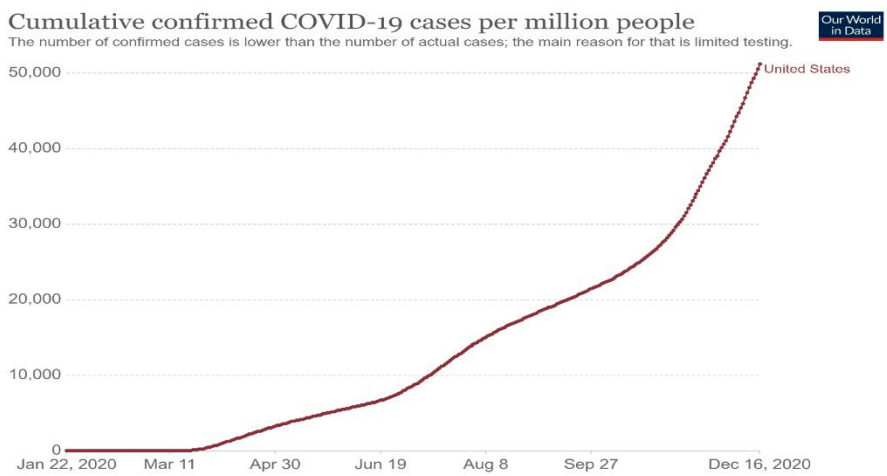


图 1 美国累积 COVID-19 确诊病例数（单位：每百万人）

Source：Johns Hopkins University CSSECOVID-19 Data（Last updated 17 December，06:06 London time）CC by Our World in Data

另一个后续情况是一些承运人宣布取消船班或停止订舱，但是“只要这些联合行动不违反美国《航运法》的竞争标准，这种行为是允许的”[1]。但是问题可能会积压并延续至明年。多家船公司陆续公布了新一

[1] Chairman Michael A. Khouri’s Remarks for the Global Maritime Conference”, FEDERAL MARITIME COMMISSION, Dec. 8, 2020. https://www.fmc.gov/chairman-michael-a-khouris-remarks-for-the-global-maritime-conference/.访问日期：2020.12.12

轮的停航空班计划。本应是中国出口旺季的年底，船公司却停止接载了，无疑传达出运力收紧的信号。原因就是因为疫情的影响美国港口劳动力等的缺乏、检验检疫限制、新年和疫情导致的采购和进口增加带来的贸易量和运量的高于往年正常水平的增长，以及包括冷藏箱等特种箱在内的集装箱返回亚洲远远不足量。每年元旦前后，会因为西方圣诞节带来的货物需求增加，以及中国春假长假之前的集中出口，使得中国出口美国的贸易量和航运运量大幅增加，但是 2020 年乃至持续至 2021 年的一段时间，中国出口贸易要面对集装箱大量短缺、美国港口拥堵等重大影响。贸易的问题和航运的问题从来都不是一国面临的问题，我国进出口企业也需要思考对策。

表 2 所选船公司空班/暂停接载情况表

船公司	空班/暂停接载情况	公布日期
MSK[1]	第 50 周 TP2、TP6、AE10、AE6、AE1 航线调整 第 51 周 AE5 航线调整	12 月 1 日
CMACGM	第 49、50、51 周亚洲至北欧航线临时停止接载[2]	12 月 4 日
Hapag-Lloyd[3]	第 49 周 FP2 停航 第 51 周 MD3 停航 第 50、52 周 EC3 停航 第 50、53 周 AL4 停航 第 53 周 AL1 停航	最近更新于 12 月 10 日
YangMing[4]	同上（THE 联盟通知）	11 月 11 日
ONE[5]	2021 年 1 月中至 2021 年二月底暂停接载	12 月 8 日

sources：news published by each carrier’s website

还有，对跨太平洋航线的运价需要持续关注。这可能是调查的起因，也是最有可能违反美国《航运法》规定的竞争标准的问题。根据波罗的海航运交易所与以色列数字集装箱货运平台 Freightos 共同推出的全球集装箱货运指数（Freightos Baltic Indices（FBX））显示，集装箱运价从今天 5 月开始迅速上涨，以 12 月 18 日价格来看，2020 年为 3004 美元/FEU，比 2019 年 12 月 18 日的 1431 美元/FEU 高出约 110%。相

[1] News of MAERSK. https://www.maersk.com.cn/news/articles/2020/12/01/q4-seasonal-service-adjustments-north-america-to-asia-services-2020 and https://www.maersk.com.cn/news/articles/2020/12/01/q4-seasonal-service-adjustments-asia-to-north-europe-services-2020.访问日期：2020.12.12

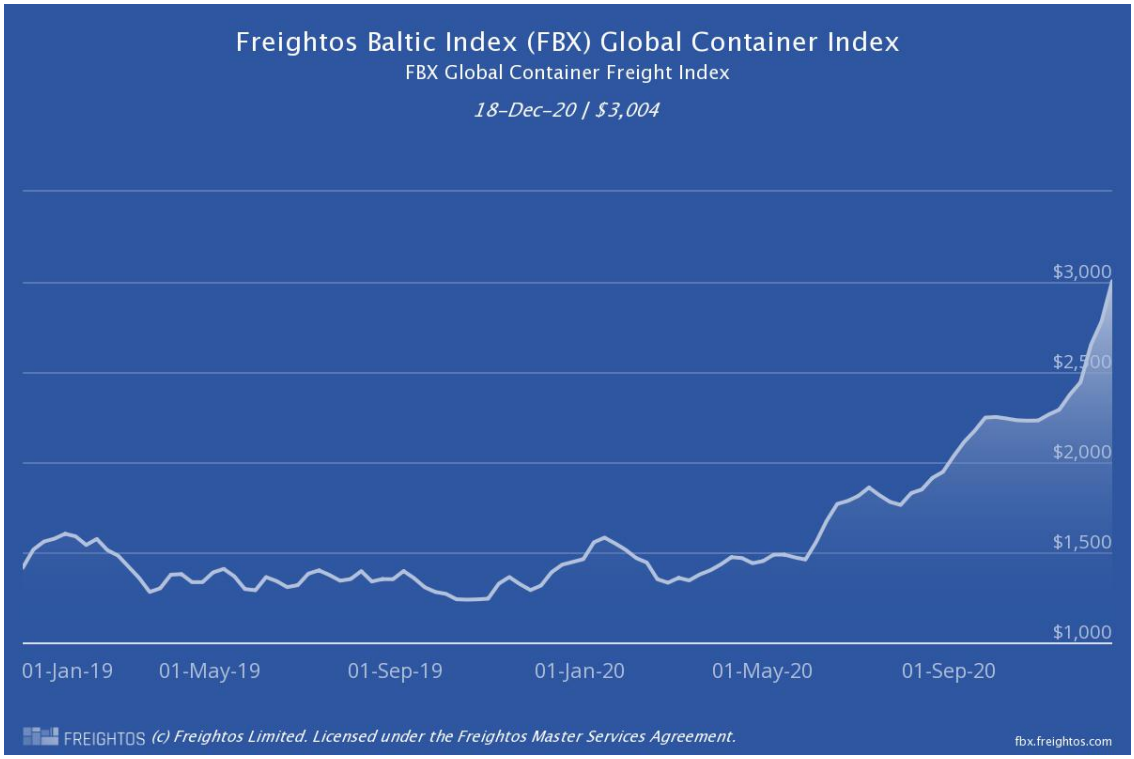
[2] Maritime News. https://www.joc.com/maritime-news/cma-cgm-puts-hold-asia-europe-bookings_20201204.html.访问日期：2020.12.12

[3] Blank Sailing Section of Hapag-Lloyd. https://www.hapag-lloyd.com/en/about-us/covid-19-update/overview-blank-sailings.html#tabnav.访问日期：2020.12.12

[4] THE Alliance Announces Updated Service Adjustments for December 2020. https://www.yangming.com/News/press_release/PressContent.aspx?BulletinType=PressRelease&uid=13955&localSiteD=.访问日期：2020.12.12

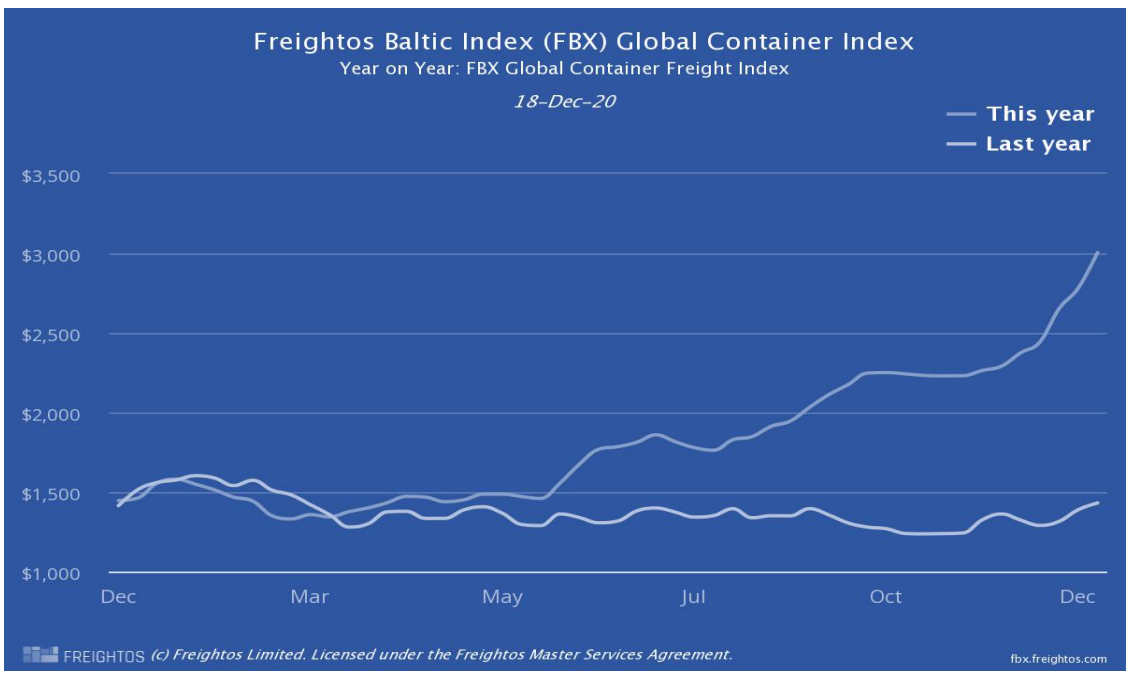
[5] TEMPORARY SUSPENSION OF CARGO ACCEPTANCE TO SOUTH CHINA DURING CHINESE NEW YEAR. https://www.one-line.com/sites/g/files/lnzjqr776/files/2020-12/20201208_Temporary%20Suspension%20of%20cargo%20acceptance%20to%20South%20China_Customer%20Advisory-converted.pdf.访问日期：2020.12.12

比中国至美国东海岸或西海岸的运价的大幅上涨，美国东海岸或西海岸至中国的价格却是存在很大波动而不是单调上涨的。值得注意的是，11 月开始价格有了逐渐平稳的趋势。



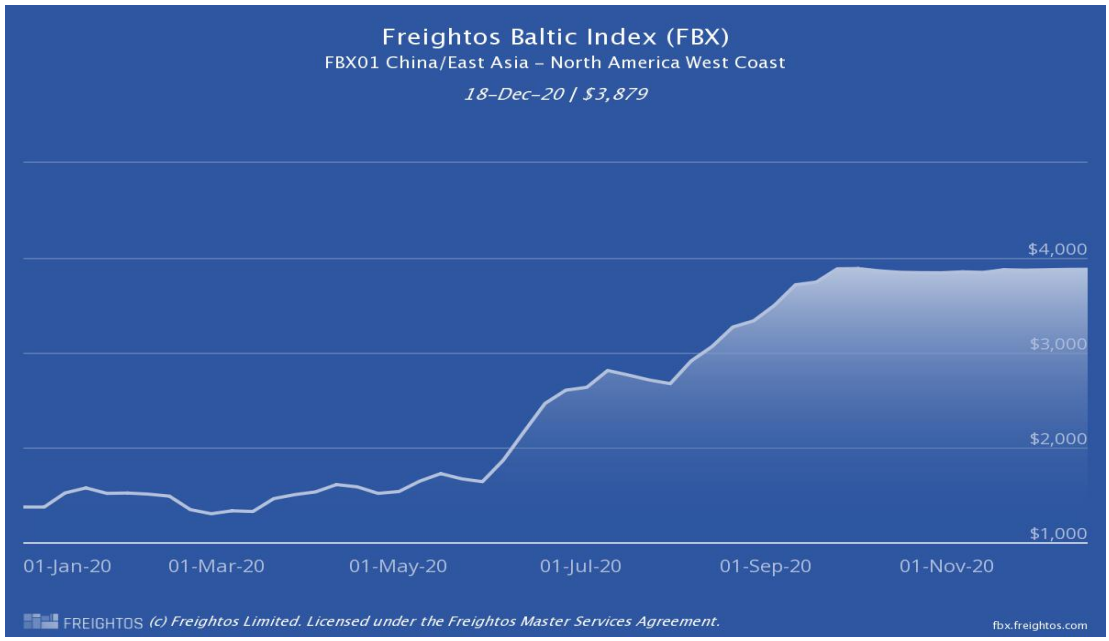
Source：Freightos（Last visited December 19, 2020）

图 2 全球集装箱货运指数走势图



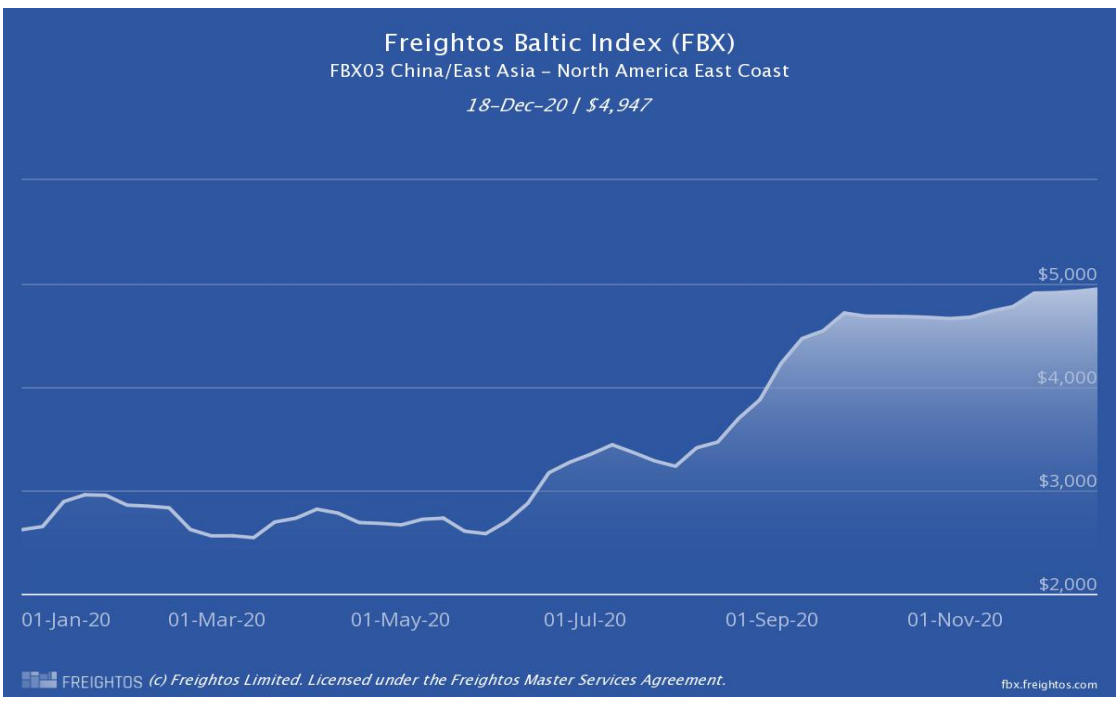
Source：Freightos （Last visited December 19, 2020）

图 3 全球集装箱货运指数上年同比趋势图



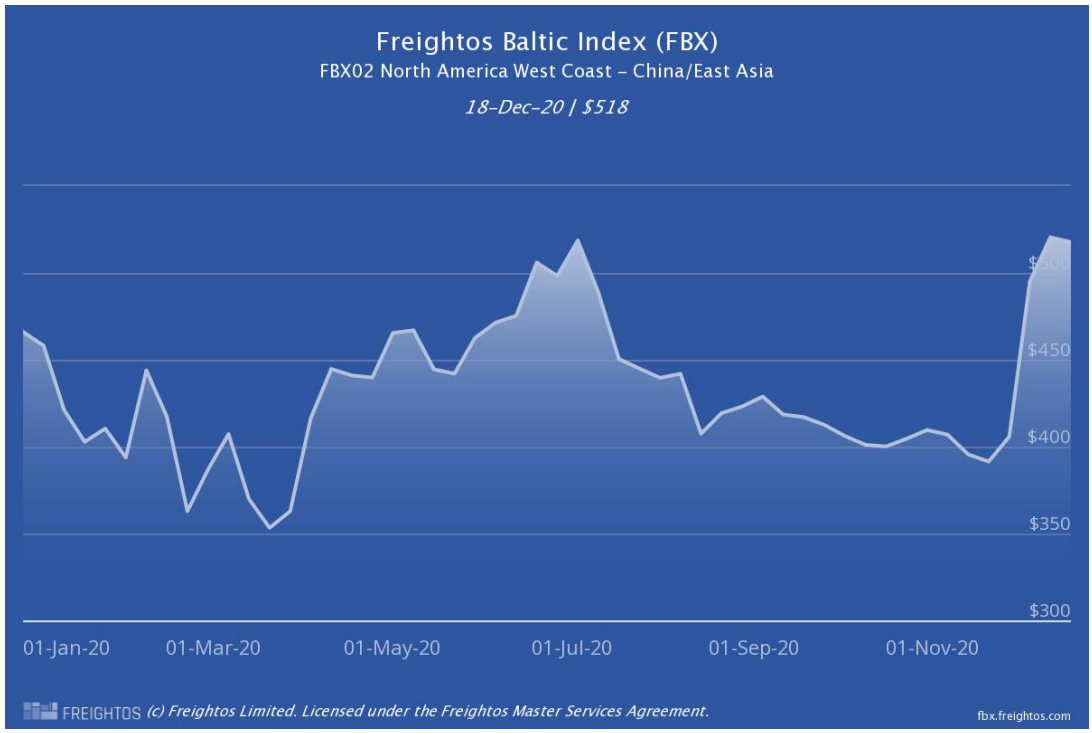
Source：Freightos （Last visited December 19, 2020）

图 4 中国/东亚至北美西岸货运指数图



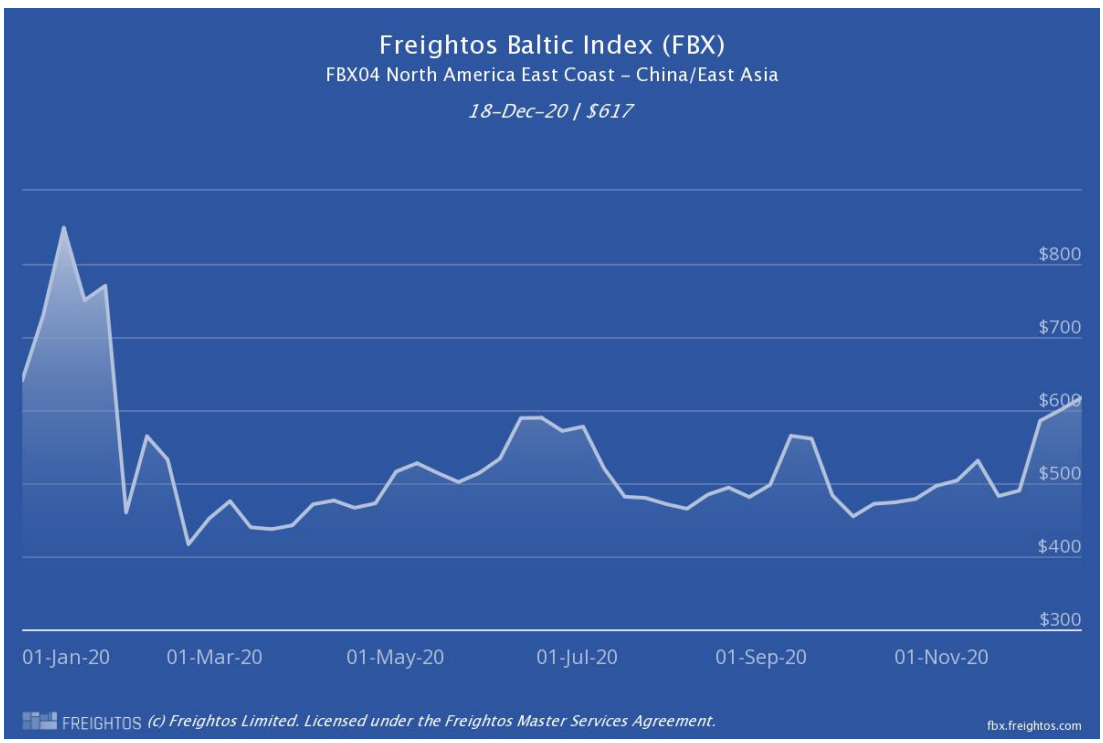
Source：Freightos （Last visited December 19, 2020）

图 5 中国/东亚至北美东岸货运指数图



Source：Freightos （Last visited December 19, 2020）

图 6 北美西岸至中国/东亚货运指数图



Source：Freightos （Last visited December 19, 2020）

图 7 北美东岸至中国/东亚货运指数图

FMC 主席在 2020 年全球海事会议讲话最后展望 2021 年的时候，提到“我希望会继续关注机会，放宽海洋集装箱运输领域的不必要地增加成本降低货物流动性的监管限制负担。”放松国际航运商业运营和实践的管制是方向和趋势。目前已知的放松措施已在第 29 号事实调查建议中提到，服务协议可以在达成一致后 30 日内向 FMC 备案，在接下来的运价谈判季这个时间长度中发生的运价和提供服务的不可控空间尚未能估计。后续是否会有更多的放松政策和措施出台或将取决于美国疫情的发展。

五、结语

第 28 号、29 号事实调查中可以反映出几个重要问题。第一，跨太平洋航线运价激增；第二，运力收紧和海运码头操作能力不足等供应链环节瓶颈导致大量免箱和免堆的滞期费以及这一费用可能向不合理主体收取的问题；第三，国际航运环节流转不畅影响国际贸易。这些问题都是在 COVID-19 影响作用下产生的。已形成的、公布的解决方法和措施基本都是旨在如何缓解现有状况，而非从根本上解决问题。但是，这些措施是有用的、有效的，而且可能对以后的承运人和海运码头运营商的做法和规定产生或形成积极影响。航运联盟是否存在违反法律的行为仍未有定论。如果发现有违反法律的行为，那么禁止联盟协议的进一步进行是对现在状况有益还是雪上加霜，需要仔细评估；如果发现并没有违反法律，那么请愿方的问题如何根本解决。单就各个承运人收取的，如免箱和免堆的滞期费等费用来说，长久以来都是如此收取的，比起讨论是否违法，寻找一个对收付费各方都相对合理的平衡点对缓和现有问题更为有效。另一个方面来说，突发的全球性大事件也许是许多问题的“不可抗力”，但是同时也是检验一个国家或者一些行业韧性的考验。我国在这一点上展现出来的力量便可圈可点，积极地、科学地平息事件才是上上之策。美国是否会出台对航运业进一步放松监管的政策和措施应被关注，因为它的趋势将在一定程度上影响世界主要经济体的航运政策。这是国家要保持在世界上的竞争地位需要重点关心的。站在中国的角度，美国和欧盟的航运政策是我国相关政策制定时需要加以考虑的，虽然我国航运领域已经足够开放，航运政策非常支持领域内各行业的发展，但是有一些问题还是需要仔细考量最佳的解决方案，如航运企业竞争法律制度实践中的细节和特殊问题、市场份额衡量市场地位及相应规制等问题，如何通过法律法规将政策固化、文字化地体现出来，还有待进一步研究。

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责任编辑：李庆霖

Research on Fact Finding Investigation No. 29 and Its Supplemental Order of the US Federal Maritime Commission

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Abstract: The global epidemic of COVID-19, though new models and opportunities have emerged during the epidemic, has caused problems and brought challenges for almost all industries. What all industries are facing, before the epidemic is under full control, is how to solve the problems engendered. In its international shipping industry, the United States is facing labor shortages, port congestion and other problems that affect shipping operations. This could result in complaints from stakeholders about detention and demurrage fees charged by carriers and marine terminal operators. Considering the huge amount of the detention and demurrage charges, the seriousness of the problem and its widespread influence on the society, the US Federal Maritime Commission issued Fact Finding Investigation No. 29 and the Supplemental Order, which aims to investigate if there are illegal charging activities and find commercial solutions. This issue, though occurring in the US shipping industry, is now bringing challenges to China because the shipping industry itself is actually a global business. China's international trade and ocean transportation have been affected due to the insufficient supply of containers; this issue, therefore, is not a problem only concerning the US, and China should pay close attention to it. China could develop its shipping industry in both theoretical and practical aspects by studying the causes and consequences of the Fact Finding Investigation No. 29, paying continuous attention to the investigation results, and analyzing and predicting subsequent shipping policy adjustments made by major economies in the world.

Keywords: US Federal Maritime Commission; Fact Finding Investigation No. 29; Detention and Demurrage Charges

I. Brief Description of the Problem

The COVID-19 epidemic hit the world unexpectedly at the end of 2019 and spread on a global scale. This public health emergency, COVID-19, caused many industries around the world to almost shut down, and this situation continued for half a year before people could gradually resume work and production. There were many tricky problems which occurred during the pandemic. Concerning the shipping industry, one of the serious problems is the imbalance of ports arranged to resume navigation around the world, particularly in trans-Pacific routes. The cargo volume of trans-Pacific routes had recovered by May 2020 and continued to soar, mainly from China to the United States. The increased cargo volume not only results in rapid increase in shipping rates but also brings serious congestion to major US ports. Industries in China including production, transportation and ports have recovered from the pandemic, while it is not the same for the United States where the abovementioned industries have not yet returned to the level before the outbreak of the pandemic. As a result, the containers shipped from China to the United States are not processed in time after they arrive at the port, which leads to poor

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circulation of containers. The US ports such as Los Angeles, Long Beach, Chicago, New York and New Jersey are experiencing unprecedented congestion, and may be shut down due to the pandemic. A large number of empty containers stranded in major ports in the United States are directly resulting in the lack of containers in Chinese ports, the huge amount of detention and demurrage charges, and the increase in additional costs. According to an estimate by the Agriculture Transportation Coalition, the detention and demurrage charges caused by traffic congestion had reached over 150 million dollars, which could cause damage to the economy, the employment, and the competitive capacity of the United States. The Federal Maritime Commission of the United States (hereinafter referred to as "FMC") is clear about its responsibility to immediately conduct an investigation that aims to figure out what causes traffic congestion in ports in such an unprecedented negative way and how does it block other sectors in the national supply chain. The FMC will review whether the policies and practices of the shipping companies involved are related to the demurrage and detention charges engendered by the detained export goods in the United States, the containers returned, and the availability of containers, and whether the shipping companies involved violate current laws and regulations. Specifically speaking, the legal issues involved include whether the shipping companies in the International Shipping Alliance have unfairly charged others, whether they conspire together to seek profits by illegal acts, whether the sharp increase in shipping rates is caused by horizontal agreements that violate the competition standards, and whether there are illegal competition agreements between the upstream and downstream enterprises engaged in the supply chain. All these issues are related to the US shipping competition laws and regulations.

Regarding this issue, China is an important stakeholder based on four aspects: (a) China COSCO SHIPPING Corporation Limited, as the largest shipping company in the Ocean Alliance, should receive investigation and submit trade data in accordance with relevant regulations; (b) Chinese shippers may have been unreasonably charged; (c) China's export trade industry suffers from container shortages caused by containers detained in the United States; (d) the shipping policies and regulations recently revised or adjusted by the United States in order to gain competitive edge are likely to have an impact on those of the European Union and China. They would even affect China's ongoing revision of the Regulations of the People's Republic of China on International Ocean Shipping for it, when formulated in the first place, drew on many relevant provisions of that of the United States, and new regulations of the United States that will emerge in the future, during or after the investigation, could also be potential references for China. China, therefore, will develop its shipping industry in both theoretical and practical ways by studying the causes and consequences of the demurrage and detention charges, paying continuous attention to the investigation results, and analyzing and predicting subsequent shipping policy adjustments made by major economies in the world.

II. Details of the Issue

A. Fact Finding Investigation No. 28

On 5 March 2018, the FMC issued an order on the Fact-Finding Investigation No. 28: conditions and

practices relating to detention[1], demurrage[2], and free time in international ocean borne commerce. It is a non-adjudicatory investigation into current conditions and practices of vessel operating common carriers and marine terminal operators, and U.S. demurrage, detention, and per diem charges. Pursuant to the U.S. Shipping Act of 1984, FMC is responsible for regulating the common carriage of goods by water in the foreign commerce of the United States ("liner service"). In doing so, FMC must be mindful of the statutory purposes of its regulation. Those purposes include an efficient and economic transportation system with a minimum of government intervention and regulatory costs, promotion of the growth and development of U.S. exports by placing a greater reliance on the marketplace.

Rebecca F. Dye was designated as the Fact-Finding Officer on 5 March 2018 by FMC. The Fact-Finding Officer shall be assisted by staff members assigned by FMC to establish a record. The Fact-Finding Officer shall have full authority to hold public or nonpublic sessions and to issue an interim report of findings and recommendations, and a final report of findings and recommendations. Beginning in March 2018, Commissioner Dye served orders comprising questions and document requests on 23 ocean carriers and 44 marine terminal operators and operating ports, and solicited evidence concerning demurrage and detention practices from cargo interests (shippers and consignees), drayage providers, and ocean transportation intermediaries.[3]

The investigation could trace back to 17 December 2016 when the Coalition for Fair Port Practices and a coalition of trade associations representing American cargo interests filed a petition with FMC. The FMC received more than 110 comments on the petition and held a two-day public hearing in January 2018. This petition argued, among other things, that the current practices of demurrage, detention, and per diem, i.e., charges by ocean common carriers and marine terminal operators for the use of space and equipment, is unjust and unreasonable.[4]

Table 1 Detention and Demurrage Charges of Selected Shipping Companies

(All charges in USD, per Calendar Day, per Container)

[1] The use of the terms "detention" and "demurrage" were not consistently applied among stakeholders. The inconsistent use of terms was investigated in the Interim Report of the Fact Finding Investigation No. 28 and clarified in the Final Report. In broad strokes, there seem to be two main approaches to defining "detention" and "demurrage:" Firstly, according to the traditional definitions of demurrage and detention, "detention" refers to the carrier's charge for use of a container outside the terminal – i.e. a charge for use of equipment (containers) beyond the allotted free time outside the port. Secondly, based on the source of the charge, "detention" is the charge for use of equipment (containers) beyond the allotted free time – whether at the terminal or outside the port. Carriers could still distinguish between on-terminal and off-terminal use of a container. "Detention" was translated as "免箱" in Chinese in this paper.

[2] The term "demurrage", according to the first approach, refers to any charge for use of terminal space or a carrier's container within the terminal, in some instances, this may lead to two types of demurrage: the demurrage imposed on cargo interests by carriers via tariffs and service contracts, and the demurrage imposed on carriers by marine terminal operators, as set forth in terminal services agreements. Under the second approach, demurrage is a charge for the use of terminal land or space. This would result in one kind of demurrage, charged by the marine terminal operators or ports that control terminal land. "Demurrage" was translated as "免堆" in Chinese in this paper.

[3] Interim Report of the Fact Finding Investigation by Federal Maritime Commission, p. 3, at https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF28_int_rpt2.pdf/ (last visited December 8, 2020)

[4] Fact Finding 28, Served Fact Findings Investigation No. 28., FEDERAL MARITIME COMMISSION, Mar. 5, 2018 at p. 1, at https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/ff-28_ord2.pdf/ (last visited December 8, 2020)

Shipping Company	**Demurrage Charges**						**Detention Charges**				
	Import/Export	*Type of Ship*	*Place*	*After Free time Day*	*Charge*	*Start Validity*	*Import/ Export*	*Type of Ship*	*After Free time Day*	*Charge*	*Start Validity*
CAM CGM[1]	Import	GP	All	From 5th To 7th	245	15-Feb-20	Import	GP	From 5th To 8th	155	1-Apr-20
				From 8th To 12th	290				From 9th To 12th	205	
				From 13th Onwards	335				From 13th Onwards	255	
	Export	GP	All	From 6th To 8th	185	1-Jan-20	Export	GP	From 5th To 8th	155	1-Apr-20
				From 9th To 13th	200				From 9th To 12th	205	
				From 14th Onwards	220				From 13th Onwards	255	
Hapag-Lloyd	*Import/Export*	*Type of Ship*	*Place*	*Days*	*Charge*	*Start Validity*	*Import/ Export*	*Type of Ship*	*Days*	*Charge*	*Start Validity*

[1] Demurrage and detention tariff available at http://www.cma-cgm.com/static/DemDet/Attachments/DD%20Tarifs%20US%2020200401.pdf（last visited December 19, 2020）

	Import	Reefer Container (Temperature Controlled)	At USA West Coast Ports (Only: Los Angeles/Long Beach/Tacoma/ Seattle)	Free time	DOD +2 WD	/	7-Jan-20	Export	Dry Container (Non-temperature controlled, non-hazardous)	Free time	1-4 WD	/	7-Jan-20
				First Period	3-6 CD	350				1st Period	5-9 CD	125	
				Thereafter	CD	500				2nd Period	10-12 CD	150	
	Import	Reefer Container (Temperature Controlled)	At USA ports of Savannah and Houston[1]	Free time	DOD +2 WD	/	7-Jan-20			Thereafter	CD	170	
				First Period	3-6 CD	375		Export	Special Equipment Container (Non-temperature controlled, non-hazardous)[2]	Free time	1-4 WD	/	7-Jan-20
				Thereafter	CD	500				1st Period	5-9 CD	125	
	Import	Dry Container	Inland	Free time	DOG + 2 WD	/	7-Jan-20			2nd Period	10-12 CD	150	

[1] USA - Import Demurrage Charges of Hapag-Lloyd available at https://www.hapag-lloyd.com/en/news-insights/news/2019/12/usa---import-demurrage-charges.html (last visited December 17, 2020)
[2] USA - Export Detention under Merchant Haulage available at https://www.hapag-lloyd.com/en/news-insights/news/2019/12/usa---export-detention-under-merchant-haulage.html (last visited December 17, 2020)

				First Period	3-7 CD	130				Thereafter	CD	170	
				Thereafter	CD	180				Free time	1-4 WD	/	7-Jan-20
	Import	Temperature Controlled Container (Non-Operating)	Inland	Free time	DOG + 2 WD	/	7-Jan-20	Import	Dry Container[1]	1st Period	5-9 CD	160	
				1st Period	3-7 CD	130				2nd Period	10-14 CD	185	
				Thereafter	CD	180				Thereafter	CD	200	

[1] USA - Import Detention under Merchant Haulage, at https://www.hapag-lloyd.com/en/news-insights/news/2019/12/usa---import-detention-under-merchant-haulage.html (last visited December 17, 2020)

	Import	Temperature Controlled Container (operating)[1]	Inland	Free time	DOG + 2 WD	/	7-Jan-20	/
				1st Period	3-7 CD	380		
				Thereafter	CD	400		

	Place	*Days*		*Charge*	*Start Validity*
ZIM	New York Port	Level 2 Days	5-8 Days	285	Date of the query
		Level 3 Days	9-12 Days	380	
		Level 4 Days	13-9999 Days	440	
	Los Angeles Port[2]	Level 2 Days	5-8 Days	235	Date of the query
		Level 3 Days	9-12 Days	290	
		Level 4 Days	13-9999 Days	440	

* CD = Calendar Day； WD = Working Day；DOD= Day of Discharge ； DOG = Day of Grounding

sources: news published by each carrier's website

[1] USA - Import (CY) Demurrage Charges, at https://www.hapag-lloyd.com/en/news-insights/news/2019/12/usa---import--cy--demurrage-charges.html (last visited December 17, 2020)
[2] Demurrage & Detention Tariff, at https://www.zimchina.com/tools/demurrage-detention-tariff (last visited December 18, 2020)

The charges have increased in general compared with the previous ones. As it is reported, the related charges of CMA CGM Group have increased between $10 and $595; the American President Lines will start charging additional fees for container-checking by customs; Hapag-Lloyd will increase demurrage and detention charges, up from $10 and $375, according to different container types and different regions; and ZIM will also increase charges at a range from $50 to $380 depending on the length of the free time.[1]

Previously from 2013 to 2015, the issue of increasing demurrage and detention charges had emerged and drawn the FMC's attention. The FMC took actions such as holding forums and issuing reports to try to solve the issue. Shippers, consignees, drayage providers and others believed that they have been unreasonably charged due to the following reasons: inspection requirements by federal government, truck shortages, container trailer shortages, unexpected incidents caused by weather complications, certain labor issues, the lack of sufficient marine terminal appointments for drayage truckers, and the general situation in the port and surrounding areas. These stakeholders also claimed that they lacked control over such incidents, which engendered huge amount of detention and demurrage charges. Although large shippers may negotiate terminal and equipment free time with certain ocean carriers, small shippers generally lack that ability.[2] In addition, between 2014 and 2018, the Commission's Office of Consumer Affairs and Dispute Resolution of the FMC handled hundreds of cases involving commercial cargo demurrage disputes. The most common demurrage complaints during that time period were congestion (driven by closed terminals, lack of available appointments, labor shortages, and backlogs); drayage issues (chassis shortages, changes in the drayage provider, and overweight trucks); demurrage incurred due to disputes between the parties on other issues; paperwork problems (late paperwork, system errors, incorrect destinations, cargo title issues); and customs holds.[3]

In addition, at the Agriculture Transportation Coalition 30th Annual Meeting, one drayage provider pointed out that small customers who use freight forwarders are at times unaware of free time because they are not privy to the terms of the agreements between vessel operating common carriers and the freight forwarder. Another drayage provider pointed out that truckers are not part of the contracts that determine free time, and container free time and chassis days do not align.[4] Similarly, at the National Customs Brokers and Forwarders Association of America annual conference, multiple ocean transportation intermediaries contributed their views and experiences to the FMC's efforts. They raised concerns about poor customer service provided by vessel operating common carriers; vessel operating common carrier delays in correcting bills; lack of uniformity among dispute resolution procedures and free time policies; lack of advance notice or communication from marine terminal operators about closures and terminal ability to receive returned equipment; large demurrage and detention bills due to government cargo examinations; decreased free time; ocean transportation intermediaries are not part of the contractual arrangements between shippers and ocean carriers; and lack of drayage resources and chassis at inland ports and railyards.

Therefore, consistent with its statutory duty, pursuant to 46 C.F.R. § 502.281 et seq., the FMC hereby orders an investigation into current conditions and practices of vessel operating common carriers and marine terminal operators, and US demurrage, detention, and per diem charges. The FMC will use the information obtained in this investigation and recommendations of the Fact-Finding Officer to determine its policies with respect to detention, demurrage, and free time practices of regulated entities.

Specifically, the Fact-Finding Officer named herein may develop a record on the following:

[1] It does not say that carriers not listed are without the increase in demurrage and detention charges.
[2] Fact Finding 28, Issued Interim Report at p. 2.
[3] Fact Finding 28, Issued Interim Report at p. 4.
[4] Fact Finding 28, Issued Interim Report at p. 5.

1. Whether, and if so, how, the alignment of commercial, contractual, and cargo interests enhance or aggravate the ability of cargo to move efficiently through United States ports.
   a. Whether the commercial and contractual conditions in the United States are similar to the conditions in other maritime nations; and
   b. Whether other maritime nations have practices to address detention or demurrage charges imposed due to conditions beyond carriers', marine terminal operators, or shippers' control, and if so, whether they are effective.
2. Whether, and if so, when, the carrier or marine terminal operator has tendered cargo to the shipper and consignee.
   a. Common practices for notification of when cargo is tendered; and
   b. Impediments to cargo pickup when notified of tender.
3. Billing practices for invoicing demurrage or detention, specifically:
   a. Billing relationships for vessel operating common carriers and marine terminal operators, including which party bills for which services and charges relating to demurrage and detention;
   b. Billing practices on describing or specifically identifying detention or demurrage charges imposed; and
   c. Timeframes for issuance of demurrage or detention invoices.
4. Practices with respect to delays caused by various outside or intervening events;
   a. Whether and when a marine terminal operator or vessel operating common carrier determines to waive or reduce demurrage or detention charges when access to the terminal is impacted by such events; and
   b. The role of truck and chassis issues in different types of container cargo movements (door-to-door versus port-to-port).
5. Practices for resolution of demurrage and detention disputes between carriers or Marine terminal operators and shippers.
   a. Existing processes for reviewing or mitigating demurrage or detention charges;
   b. Timeframes for the resolution of demurrage or detention disputes; and
   c. Practices relating to the cancelation or mitigation of demurrage or detention invoices.

On 17 December 2018, FMC issued an order of Fact-Finding Investigation No. 28: Conditions and Practices Relating to Detention, Demurrage, and Free Time in International Oceanborne Commerce. The Fact-Finding Officer is directed to report to the FMC on these issues and inform of any recommendations for the FMC's further action, including any investigations of prohibited acts, enforcement priorities, policies, rulemaking proceedings, or other actions warranted by the factual record developed in this proceeding.

The Fact-Finding Officer, as requested, should conduct the investigation in two steps and issue the final report on 3 December 2018. The Fact Finding Officer recommended that the FMC organize FMC Innovation Teams composed of industry leaders to meet on a limited, short-term basis to refine commercially viable demurrage and detention approaches in the following areas: transparent, standardized language for demurrage and detention practices; clear, simplified, and accessible demurrage and detention billing practices and dispute resolution processes; explicit guidance regarding the types of evidence relevant to resolving demurrage and detention disputes; and consistent notice to cargo interests of container availability. FMC accepted the final report and approved the recommendations contained herein on 7 December 2019.

In order to shape the Innovation Teams, the FMC decided to have the Fact Finding Investigation No. 28 extended to 3 September 2019. By doing so, the Commissioner Rebecca F. Dye, as a Fact-Finding Officer, can

organize and lead the Innovation Teams comprised of leaders in this field, with the assistance of FMC staff, to make the supply chain more reliable and resilient, to further test the feasibility of the four methods proposed in the final report (released on 3 December 2018) and make improvements. Each team is composed of representatives from the supply chain, including public port authorities, marine terminal operators, beneficiary shippers, ocean shipping intermediaries, liner shipping companies, trailer freight companies, coastal labor representatives, railway officials, and container trailer suppliers. According to the Fact-Finding Investigation No. 28 issued by the FMC, the investigation covers the following issues.

1. Ambiguous Definitions of Terminologies and Inconsistent Practices of Ocean Carriers and Terminal Operators

Ocean carriers and terminal operators are not clear about how detention and demurrage are charged; to put it simply, there is no standard manner to deal with it, which makes it difficult for shippers to avoid being charged. The FMC oversees 255 marine terminals across the East, Gulf, and Pacific coasts, in addition to Alaska. Policies on free time practices vary, even among terminals at the same port. Although some marine terminal operators and ports have tariffs that allow for additional free time or lesser rates where the terminal or port is unable to tender cargo for delivery during free time, these practices do not appear to be universal. There are also several models of how the marine terminal operators collect the charges from shippers, consignees, drayage providers, or carriers. These varying models may generate uncertainty among shippers, consignees, and drayage providers about how demurrage and detention will be assessed when access to ports is restricted or ports are congested.[1]

The international ocean liner trade has changed dramatically over the last fifty years, driven in large part by the advent of containerization. Unloading a 10,000 TEU vessel in a modern terminal is a very different operation than the unloading of a relatively small breakbulk vessel seventy-five years ago. A related issue to consider is whether the legal duty to tender and its relationship to free time and the imposition of demurrage, detention, and per diem fees have kept up with the changes in port practices unloading vessels, moving cargo off the dock, and delivering it to consignees. Also fundamental to the issue of free time and detention and demurrage charges is the question of who bears the economic burden of delay resulting in detention and demurrage, which involves the allocation of risk and can vary greatly depending on the circumstances.

What does the term “delivery” mean? It is not clearly defined. As issues concerning delivery and cargo could easily change due to actual situations, it is natural that there is no specific and general definition for delivery. Some carriers believe that delivery is primarily related to the responsibility of delivering goods, not detention and demurrage charges. But some argue that most of the ship carriers believe that their responsibility is to tender (submission) rather than to deliver the goods to consignees (service). What delivery and responsibility means differ from port to port, but most carriers believe that they have fulfilled their mission at the time when the cargo is unloaded from the ship. Some prefer presumptive delivery than actual delivery; that is to say, the consignee will receive the notice that the goods have been unloaded from the ship at a certain dock, and he or she will have an opportunity to remove or keep the goods properly. Some hold the view that delivery finishes at the time when the goods can be picked up or delivered to the trucker consigned by the Beneficial Cargo Owner, or at the time when the goods are ready to be sent out from the terminal. The investigation is targeted to find out whether it is reasonable for the free time to start clocking before the container is available.

There are also other inconsistencies in practices mentioned in the investigation. Firstly, concerning detention

[1] Fact Finding 28, Served Fact Findings Investigation No. 28, FEDERAL MARITIME COMMISSION, Mar. 5, 2018 at p. 1, available at https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/ff-28_ord2.pdf/ (last visited December 8, 2020)

and demurrage billing timeframes, there is a lack of uniformity in both demurrage and detention billing, although detention billing timeframes are ultimately governed by the Uniform Intermodal Interchange Agreement, for those who are party to it. There are usually three different types of billing relationship between detention and demurrage. Secondly, when the port or terminal is not accessible due to external or intervening events, ship carriers and marine terminal operators launch different policies regarding to the reduction and exemption of detention and demurrage charges or the extension of free time. The conditions for automatic extension of free time vary from carrier to carrier, but usually include weather incidents or strikes that lead to the closure of the entire port or part of it. The majority of maritime terminal operators, however, will extend the free time according to actual circumstances. Some ship carriers will not charge demurrage while the container is taken out of the terminal for inspection purpose.

2. Lack of Transparency of Information, Procedures, Practices and Dispute Resolution

The practices of demurrage charges are not accessible; that is to say, they are not transparent enough. In all these reports concerning demurrage practices, whether the current practices are allowed in the American freight delivery system, which is competitive and reliable, is under questions. Under 46 U.S.C. § 41102, carriers and marine terminal operators must adopt just and reasonable regulations and practices governing free time and demurrage and detention charges.[1] The test of reasonableness as applied to terminal practices "is that the practice must be otherwise lawful, not excessive, and reasonably related, fit and appropriate to the ends in view."[2] Demurrage and detention practices are encompassed within § 41102(c) because they relate to the handling, storing, and delivery of property at terminals.[3]

The practice includes, but is not limited to, the following ways. Firstly, regarding notification of container availability, marine terminal operators will make container status information available on websites, which cargo interests can access, and where they can sign up to retrieve status updates. Typically, marine terminal operators, however, do not provide cargo interests with another notice that a container is available for retrieval. Secondly, billing transparency is often related to whether the marine terminal operator uses electronic payment systems. Thirdly, regarding the shortage of container trailers, carriers generally do not provide trailers for port moves (with some exceptions in service contracts) while they do provide trailers for door moves. Half of the carriers, therefore, said if they provide trailers but suffer from a shortage, the resulting demurrage charges will be exempted. Marine terminal operators, however, will not reduce or exempt the demurrage charges incurred. Fourthly, few vessels operating common carriers and marine terminal operators provided meaningful statistical data regarding the number of demurrage disputes they receive and how those disputes are resolved. Most said they do not track complaints or disputed charges. Despite the limited data, a few trends emerged. (a) It appears that detention is more often disputed than demurrage. (b) Among both vessel operating common carriers and marine terminal operators, refunds are a rare method of resolving disputes. (c) Those who responded stated that resolving demurrage and detention disputes via the terms of future contracts is extremely rare. In general, there are different dispute resolutions between vessel operating common carriers and maritime terminal operators, and many of them are informal.

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[1] Order of Fact Finding Investigation No. 28, p. 2.

[2] W. Gulf Mar. Ass'n v. Port of Houston, 18 S.R.R 784, 790 (FMC 1978), aff'd without opinion sub nom. W. Gulf Mar. Ass'n v. Fed. Mar. Comm'n, 610 F.2d 1001 (D.C. Cir. 1979), cert. denied, 449 U.S. 822 (1980).

[3] See, e.g., California v. United States, 320 U.S. 577, 584-85(1944) (interpreting the analogous provision in the Shipping Act of 1916 as applying to demurrage); Am. Export-Isbrandtsen Lines, Inc. v. Fed. Mar. Comm'n, 444 F.2d 824, 829 (D.C. Cir. 1970) (interpreting the analogous provision in the Shipping Act of 1916 as applying to detention).

3. The Purpose of Charging Detention and Demurrage Is Questioned

In order to better assess the purpose of charging detention and demurrage fees, vessel operating common carriers and marine terminal operators should provide relevant information and data as requested by the investigation: concerning the profit generated by detention and demurrage charges and the proportion of detention and demurrage charged on containers (profit) collected by different ports over the time limit. The ocean carriers and marine terminal operators believe that the purpose of demurrage lies in moving cargo through the terminal and the need to maintain "terminal velocity," and the purpose of detention charges in facilitating "equipment velocity" for an efficient supply chain. The purpose of charging detention and demurrage also includes: the expense of non-residential waterfront property housing marine terminal facilities and the need to discourage use of that property as cargo storage, the need for carriers to maintain a balanced equipment flow and a fluid network, the need for marketplace competition to address demurrage and detention problems, the approach among ocean carriers to extend free days during weather disruptions, the ocean carrier preference for quicker turnaround for equipment over collecting detention charges and the marine terminal operator preference for moving cargo off terminal over collecting demurrage charges. Parties in the petition, however, consider the role of these charges as a source of profit for vessel operating common carriers and marine terminal operators.

Vessel operating common carriers' combined demurrage and detention income for 2013 was relatively low but increased 90% in 2014, followed by an additional year-on-year increase of 86% in 2015. In that year, total demurrage and detention income peaked for the 22 responding carriers. As expected, given the resolution of the West Coast labor issues by mid-2015, the year of 2016 saw a year-on-year decline in vessel operating common carrier total demurrage and detention income by 23%. But the total 2016 demurrage and detention income was still roughly 2.7 times the 2013 figure. Put simply, demurrage and detention levels for carriers did not return to, or near to, their pre-2014-2015 levels. In 2017, total vessel operating common carrier demurrage and detention income rose again, virtually to the same as 2015's peak level, and a 30% increase compared to 2016. It is important to note, however, that while a trend is visible in the combined demurrage and detention revenue of all 22 carriers surveyed, there is significant variation in demurrage and detention trends among individual lines. For example, one line increased its annual demurrage and detention income by 77% between 2016 and 2017 (more than double the 30% collective increase). And its total demurrage and detention income in 2017 was 34% higher than it was in the previous peak year of 2015. Another line increased its annual demurrage and detention income by 190% between 2016 and 2017. Looking at the pattern in income from demurrage alone, almost half, 10 of the 22 responsive vessel operating common carriers, collected higher amounts of demurrage in 2017 as compared to 2015. The data on marine terminal operator demurrage income for 2013-2017 showed similar trends, though a less dramatic rise in 2017 as compared to that in the carrier data. Moreover, based on the year-over-year data provided by marine terminal operators, it appears that the total number of containers on which demurrage is assessed has decreased at larger ports, whereas it has increased at smaller ports.

Comparing the regulatory atmosphere between the United States and other States, many carriers insisted that other States granted them more flexibility in their operations than they had in the United States. Some carriers noted that they had more freedom to waive or mitigate demurrage or detention outside the United States. Regarding this aspect, the current investigation is still in progress and no more details have been found; further research on this aspect is needed in the future.

4. Concerning Appointment System and Free Time Clocking

Cargo interests asserted that carriers and marine terminal operators should be required to stop the free time or demurrage clocks if a container-not-available ticket is issued to a trucker, when a marine terminal operator and carrier provide notification of a yard or terminal closure, and when a trucker cannot obtain an appointment within 48 hours of container availability. According to these cargo interests, stopping the clock in such situations was appropriate because the container could not be moved due to factors outside the cargo interest's control, and that such a process would induce marine terminal operators to ensure that appointment systems and yard operations are adequate for the volume of trade. The marine terminal emphasized that if a container is not available due to a verified issue within their control, such as when a container cannot be located, a terminal is closed, or a container is in a closed area, they waive demurrage or extend free time. When it comes to the definition of delivery, the question is whether it is reasonable to start clocking the free time before the container is available. Nonetheless, there was no objection with providing cargo interests and truckers with appropriate contact information.

5. Final Report Findings

Firstly, regarding the definition of terms, many respondents involved characterized demurrage as an incentive, to get containers out of the terminal. Secondly, all parties concerned agreed to make demurrage and detention billing procedures more transparent. Cargo interests advocated for standardized billing practices by region. And there were no particular objections by carriers or marine terminal operators to making more demurrage and detention information available on their websites. Thirdly, Cargo interests stated that when dealing with demurrage, there was often no clear dispute resolution contact person, procedure, or escalation point. The ocean transportation intermediaries also advocated for clear lines of authority and accessible dispute resolution policies. Fourthly, cargo interests seeking a demurrage waiver or free time extension should substantiate their arguments with corroborating documentation and that having guidelines could resolve disputes more efficiently. Finally, stakeholders have very different ideas concerning the following questions in Phase Two of the investigation: the definition of container availability, what it means for a container to be "available", whether the notice to shippers and their truck drivers is timely, the length of demurrage free time and when to start clocking is appropriate, and the appointment system.

In the final report of the Fact-Finding Investigation No. 28, the Fact-Finding Officer found that: Firstly, demurrage and detention are valuable charges when applied in ways that incentivize cargo interests to move cargo promptly from ports and marine terminals; secondly, all international supply chain actors could benefit from transparent, consistent, and reasonable demurrage and detention practices, which would improve throughput velocity at US ports, allow for more efficient use of business assets, and result in administrative savings; and thirdly, focusing port and marine terminal operations on notice of actual cargo availability would achieve the goals of demurrage and detention practices and improve the performance of the international commercial supply chain.

6. Impact of the Investigation

The International Federation of Freight Forwarders Associations designed the best practices regarding to detention and demurrage charges in September 2018 – a fruit yielded by the Fact-Finding Investigation No. 28 that includes the four commercial approaches proposed by the Innovation Teams and the results of discussion during the meeting between the Fact-Finding Officer, the Innovation Teams, and the investigated companies. Some terminal operators began to keep track of disputes at their terminals.

The investigation also prompted the promulgation of a regulation, "Docket No. 19-05, Interpretive Rule on Demurrage and Detention under the Shipping Act", which took effect after being published in the Federal Register on 18 May 2020. The purpose of this regulation is to provide guidance about how the FMC will interpret 46 U.S.C.

41102(c) and 46 CFR 545.4(d) in the context of demurrage and detention. This interpretive rule provides legal guidance and analysis on various situations arisen during the investigation, concerning incentive principles, cargo availability[1], empty container return, notice of availability, government inspections, policies on detention and demurrage charges, policies on dispute resolution, billing, evidence, transparent and consistent terminology, and carrier haulage.

B. Fact Finding Investigation No. 29

FMC issued the order of Fact-Finding Investigation No. 29 entitled "International Ocean Transportation Supply Chain Engagement" on 31 March 2020. FMC Chairman Michael Khouri pointed out: "The global COVID-19 pandemic is having effects throughout our ocean supply chain. I requested Commissioner Rebecca Dye to, once again, stand up the Innovation Teams that were assembled within the Fact-Finding Investigation No. 28 to identify collaborative solutions to uncertainties and problems in this international supply chain."

Maintaining the effectiveness and reliability of the global freight delivery system is critically important to the United States' continued economic vitality. Unfortunately, congestion and bottlenecks at ports and other points in the US supply chain have become a serious risk to the growth of the U.S. economy, job growth, and to the US competitive position in the world. Recent global events have only highlighted the economic urgency of responsive port and terminal operations to the effectiveness of the United States international freight delivery system. Given the Commission's mandate to ensure an efficient and economic transportation system for ocean commerce, the FMC has a clear and compelling responsibility to actively respond to current challenges impacting the global supply chain and the American economy.

Therefore, pursuant to 46 U.S.C. §§ 41302, 40302, 41101 to 41109, 41301 to 41309, and 40104, and 46 C.F.R. § 502.281 et seq., Commissioner Rebecca F. Dye shall engage supply chain stakeholders in public or non-public discussions to identify commercial solutions to certain unresolved supply chain issues that interfere with the smooth operation of the U.S. international supply chain; it is further ordered that the Commissioner form one or more supply chain innovation teams, composed of leaders from all commercial sectors of the U.S. international supply chain, to develop commercial solutions to port congestion and related supply chain challenges; it is further ordered that the Commissioner provide periodic updates to the FMC on the results of efforts undertaken by this Order; That, the Commissioner have full authority under 46 C.F.R. §§ 502.281 to 502.291, to perform such duties as may be necessary in accordance with U.S. law and FMC regulations. The Commissioner will be assisted by staff members as may be assigned by the Chairman; That, notice of this Order be published in the Federal Register.[2]

Commissioner Rebecca Dye had announced findings of San Pedro Bay discussions on 17 June 2020 and identified approaches to address the four critical operational challenges at the San Pedro Bay ports identified by Innovation Teams:

1. Truckers should be directed to return empty containers to the terminal where they were picked up, allowing them to make dual moves and reduce the number of chassis required.

2. Notice of terminal gate closures should be given no less than three days, and preferably seven days, before gate closing. At no time should a closure occur during mid-shift.

3. Notice of blank sailings should be given not only to beneficial cargo owners (BCOs), but also posted

[1] The availability here refers to the state in which the cargo can be picked up and shipped to the next link.

[2] Fact Finding 29: International Ocean Transportation Supply Chain Engagement, FEDERAL MARITIME COMMISSION, 2020, at https://www2.fmc.gov/readingroom/docs/FFno29/FF29_Order.pdf/ (last visited December 8, 2020)

prominently on a carrier's website, at least seven days in advance. Notice of bypassed ports should be posted at least 72 hours in advance.

4. Carriers and terminals should immediately seek to collaborate regarding Export Cargo Receiving Timelines with the goal of better coordinating their interaction.

5.The FMC should consider establishing an Advisory Board consisting of ports, carriers, and marine terminal operators in the interest of fostering and promoting greater collaboration across those three industry sectors.

Under the suggestion of the Fact-Finding Officer released on 1 October 2020, FMC will extend regulatory relief for service contract filing requirements until June 2021. FMC regulations require the filing of service contracts with the FMC before an ocean carrier is permitted to move cargo under a service contract. The FMC voted in April to allow parties to file service contracts with the FMC up to 30 days after contract terms had been agreed to. The relief granted in April 2020 was scheduled to expire on 31 December 2020. Extending this relief on service contract filing deadlines through the upcoming negotiating season assures that carriers and shippers are able to continue to do business without running afoul of the law.[1]

Fact-Finding Investigation No. 29 had entered into Phase Two, but, with the whole changing situation, FMC issued a supplemental order again.

C. Supplement to Fact Finding Investigation No. 29

The FMC issued a supplementary order for Fact Finding Investigation No. 29 on November 2020: International Ocean Transportation Supply Chain Engagement – Possible Violations of 46 U.S.C. § 41102(C). On 31 March 2020, in an effort to respond to growing concerns about challenges impacting the global supply chain and the American economy, the FMC issued an order establishing Fact-Finding Investigation No. 29: International Ocean Transportation Supply Chain Engagement, 85 Fed. Reg. 19146 (6 April 2020). The primary purpose of the Fact-Finding Investigation was to identify operational solutions to cargo delivery system challenges related to recent global events.

The initial focus in Fact Finding Investigation No. 29 was on commercial solutions. Based on information obtained in the fact finding, the FMC is concerned that vessel operating common carriers in alliances who call on the Port of New York and New Jersey or who call on the Port of Long Beach and the Port of Los Angeles may be employing practices and regulations that violate 46 U.S.C. § 41102(c). As one example, stakeholders who participated in discussions in Fact-Finding Investigation No. 29 shared problems they are experiencing with policies regarding the return of empty containers.

The Fact-Finding Officer's authority includes the ability to issue a Notice of Inquiry (NOI) and/or compulsory information demands under 46 U.S.C. § 40104 to alliance carriers who call on the Port of New York and New Jersey or who call on the Port of Long Beach and the Port of Los Angeles. The FMC fully endorses efforts by the Fact-Finding Investigation No. 29 Officer, Commissioner Rebecca F. Dye, under the authority existing in the 31 March 2020 Order, to investigate whether alliance carriers who call on the Port of New York and New Jersey or who call on the Port of Long Beach and the Port of Los Angeles are employing practices or regulations in violation of § 41102(c). This includes, but is not limited to, practices and regulations related to demurrage and detention, empty container return in light of 46 C.F.R. § 545.5, and practices related to the carriage of U.S. exports.

[1] "Commission Extends Temporary Exemption of Certain Service Contract Filing Requirements", FEDERAL MARITIME COMMISSION, Oct. 1, 2020, at https://www.fmc.gov/commission-extends-temporary-exemption-of-certain-service-contract-filing-requirements/ (last visited December 12, 2020)

III. Potential Shipping Policy Trends

A. Supervising the Competition of Carrier Alliances to Maintain Market Fairness

In order to combat potential violations of competition regulations, the FMC has increased its supervision over the three major global carrier alliances. They are the top priority and receive the highest scrutiny because these three agreements have the greatest potential to cause or facilitate adverse market effects based on the agreement's authority and geographic scope in combination with underlying market conditions. Following the instruction from FMC Chairman Michael Khouri, the FMC has issued letters to the three global carrier alliances (2M, Ocean Alliance, and THE Alliance) requiring that certain carrier-specific trade data currently filed with the FMC quarterly, must now be submitted on a monthly basis. The FMC's Bureau of Trade Analysis (hereinafter referred to as "BTA") has traditionally relied on a combination of individual vessel operator confidentially provided data and information from commercially available industry data to monitor and analyze container carrier freight rates and service market trends. The FMC's BTA has determined that given recent fluctuations in the markets, they need to receive key trade data directly from alliance carriers on a more frequent basis in order to better position staff economists to timely evaluate changes in the transpacific and transatlantic trades and report findings to the FMC. A core function of the FMC is the monitoring of ocean carrier alliance agreements filed with the agency. The FMC receives and evaluates exhaustive, commercially sensitive information from regulated entities, in this case, parties to an ocean carrier alliance agreement. That information is carefully analyzed, along with other information that permits FMC staff to determine trends in the marketplace and the potential for illegal behavior. The FMC is not the only one that aims to establish and maintain an efficient and economical transportation system and rely on market competition to promote the growth and development of U.S. export trade; that is also the top priority when the U.S. formulated its shipping policy.

On an ongoing basis, the FMC monitors key economic indicators and changes to underlying market conditions for all global alliance agreements to detect any joint activity by agreement members that might raise and maintain freight rates above competitive levels, or unreasonably decrease services. For these agreements, FMC staff conducts more detailed reviews, and periodically presents current findings and recommendations to the Commission.

Chairman Khouri stated, "If we detect any indication of carrier behavior that may violate the Shipping Act's section 6(g) competition standard, we will immediately seek to address these concerns with direct carrier discussions. If necessary, the FMC will go to federal court to seek an injunction to enjoin further operation of the alliance agreement."[1] In other words, the FMC tries to make sure that the competition law is as fair and effective as it is during the enforcement so as to protect the legitimate rights and interests of all operators and consumers.

One of the purposes of this investigation is to find out whether the three alliances have reached horizontal competition agreements. If the three major alliances do have an agreement on detention and demurrage charges, then they are in violation of Article 3 of the United Nations Model Law on Competition, which prohibits certain agreements between rival or potentially rival firms, and agreements fixing prices or other terms of sale, including in international trade, are on the list of prohibition. Alliance or joint venture is a kind of strategic cooperation. Though it does not belong to a kind of monopoly organization, it at least has a dominant position of market power.

[1] "Federal Maritime Commission Increases Global Alliances' Information Monitoring Report Requirements", FEDERAL MARITIME COMMISSION, Nov. 25, 2020, at https://www.fmc.gov/federal-maritime-commission-increases-global-alliances-information-monitoring-report-requirements/ (last visited December 12, 2020)

However, as stated in the investigation order, these three major alliances are most likely to cause damage to the shipping market or exacerbate the situation. Therefore, it is necessary to ensure the legality of their actions.

B. Protecting the Global Competitiveness of the Shipping Industry

The Fact-Finding Officer, Rebecca Dye, said that the Innovation Teams members are serious minded about protecting the capabilities and competitiveness of America's cargo delivery system.[1] Whether it is the Fact-Finding Investigation and supervision conducted by the FMC, or the provisions of the U.S. Shipping Act, the ultimate goal is to establish an efficient and economical transportation system so as to maintain the effectiveness and reliability of the global freight system. All of these are fundamentally related to keeping the economic vitality of the United States.

Although stakeholders questioned that carriers and marine terminal operators characterized detention and demurrage charges as a source of profit, the final report of the Fact Finding Investigation No. 28 concluded that "demurrage and detention are valuable charges when applied in ways that incentivize cargo interests to move cargo promptly from ports and marine terminals". Because of the significant slowdown in shipping, many carriers, marine terminal operators, and other maritime agents are facing financial ruin, which may lead some of these enterprises to rely upon "fees" to stay afloat. In special circumstances such as the global pandemic, sometimes these fees are simply for services which have routinely been provided but are now singled out for attention and in other instances they are long standing and readily accepted fees that have been perverted from their original intent.[2] However, as stated in the Interpretive Rule on Demurrage and Detention under the Shipping Act, the ''longstanding principle that practices imposed by tariffs, which are implied contracts by law, must be tailored to meet their intended purpose.''[3] Detention and demurrage charges, however, should be suspended when they no longer function because shippers are prevented from picking up cargo or returning containers within time allotted.

In fact, the FMC also defines the term "merchant" in bills of lading and related charges, but currently the carrier's charges show no sign of decline. A conclusion, perhaps, could be drawn therefrom that the benefits that carriers give up are far less than the benefits they get.

C. Shipping Commercial Solutions Aim at Promoting Trade

The US shipping policy includes a consumer protection policy for shipping services, and it tends to put the interests of cargo owners before that of shipping operators. This is based on the fact that the United States is more a trading State than a shipping one. The total import and export trade volume of the United States has always ranked first in the world; therefore, it makes sense that the interests of trade subjects, an important supporting part of the economy, are the top priority. The drive triggering fact finding investigation, whether Fact Finding Investigation No. 28 or Fact Finding Investigation No. 29 which investigate similar issues, lies in the fact that these issues not only hinder the operation of the shipping system but also affect the export trade of the United States, especially agricultural products that have an important hold in the US export trade. It is reported that due to

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[1] "Fact Finding 29 Innovation Teams Identify Information Helpful to Mitigating COVID-19 Impacts on Supply Chain", FEDERAL MARITIME COMMISSION, May 14, 2020, available at https://www.fmc.gov/fact-finding-29-teams-covid-19-impacts-supply-chain/ (last visited December 12, 2020)

[2] "Statement of Commissioner Sola to Accompany Vote on Notation No. 20-20, Interpretive Rule on Detention and Demurrage", FEDERAL MARITIME COMMISSION, Apr. 30, 2020, available at https://www.fmc.gov/sola-interpretive-rule-detention-demurrage/ (last visited December 12, 2020)

[3] Interpretive Rule on Demurrage and Detention Under the Shipping Act, May 18, 2020, at https://www.federalregister.gov/documents/2020/05/18/2020-09370/interpretive-rule-on-demurrage-and-detention-under-the-shipping-act (last visited December 12, 2020)

a severe shortage of containers, American agricultural products have been "rejected" and cannot be exported as usual.

The investigation focuses on unreasonable practices of carriers and marine terminals in returning and exporting containers. The detention and demurrage charges imposed on the Port of Long Beach, the Port of Los Angeles, and the Port of New York and New Jersey have posed a serious risk to the United States in its capacity of handling trade businesses. As provided in the Interpretive Rule on Demurrage and Detention Under the Shipping Act, released after the end of the Fact Finding Investigation No. 28, "the interpretive rule was intended to reflect three general principles: 1. Importers, exporters, intermediaries, and truckers should not be penalized by demurrage and detention practices when circumstances are such that they cannot retrieve containers from, or return containers to, marine terminals because under those circumstances the charges cannot serve their incentive function. …"

The United States encounters difficulties in both export trade and import trade. China is an important trading partner with the United States, and containers congested in the US ports means that empty containers could not return to China immediately. Shippers involving export trade in China, therefore, are facing container shortages, which will directly affect U.S. imports from China. In addition, the proportion gap under FOB and CIF conditions in Sino-US trade is no longer as wide as before. Chinese shippers, therefore, also need to bear the detention and demurrage charged on a daily basis. Moreover, this situation will only continue until the epidemic situation in the United States is under fully controlled. The resulting accumulated costs will be a huge expense for both shippers and consignees. Therefore, whether there will be a solution for the reduction or exemption of detention and demurrage charges in the final report of the Fact Finding Investigation No. 29 will be crucial to the issue. Under reasonable and fair conditions, how to minimize the losses of all parties will be the key to alleviating trade bottlenecks and promoting trade development.

IV. Follow-up Impact

In his speech at the 2020 Global Maritime Conference, the FMC Chairman Michael highlighted the supplemental order of the Fact Finding Investigation No. 29. The FMC receives certain carrier-specific trade data directly from alliance carriers, and if it detects any indication of carrier behavior that may violate the competition standard, the FMC, if necessary, will go to federal court and seek to enjoin further operation of the offending alliance agreement. As discussed above, great efforts have been made to deal with the detention and demurrage charges, and many recommendations have been put forward as shown in the Fact Finding Investigation No. 28 and No. 29. Some related enterprises have also put to practice what they are recommended. Therefore, it is predicted that the FMC's next step is to pay more attention to data about cancelled or "blanked" sailings announced by carriers in the alliance and the follow-up changes in freight rates.

Under the ongoing impact of the pandemic, especially without any improvement on labor shortages, the issues of cancelled sailings and freight rates may continue to exist if the carrying capacity of various links in the shipping industry still fails to adapt to the volume of trade. Relevant data shows that COVID-19 in the United States has shown no sign of improvement, and the number of confirmed cases continues to increase. That means there will be an absolute shortage of labor, and although the demand in the United States is on the increase, the inspection and quarantine of imported and exported goods will not be relaxed. That is to say, the mismatch between the increase in freight volume and the continued operational incapability will not be fundamentally addressed. The author holds that the fundamental solution to the issues discussed in this paper lies in the

prevention and control of the epidemic, and other methods may only treat the symptoms not the root cause of the issues.

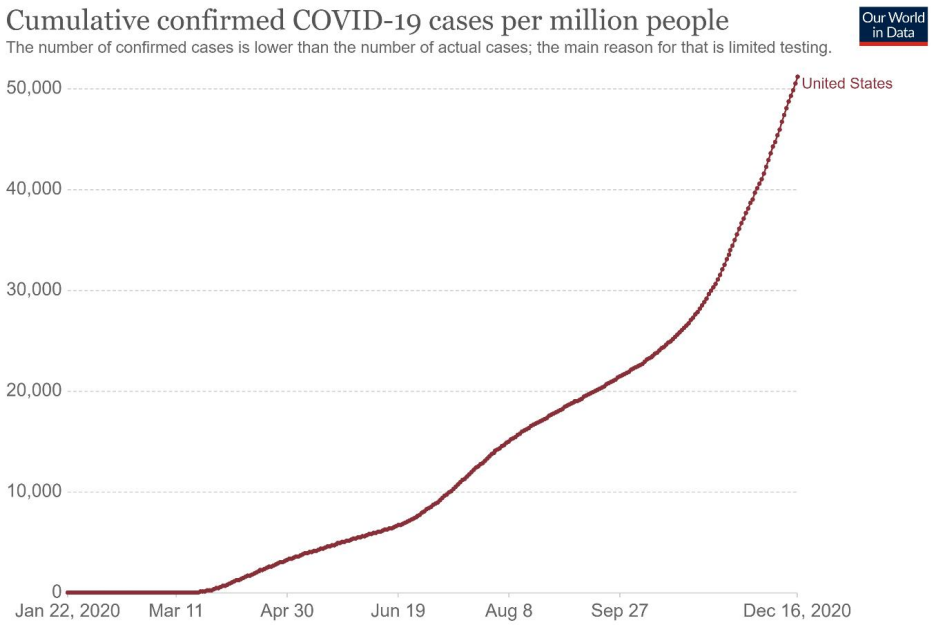


Figure 1 Cumulative Confirmed COVID-19 Cases in the United States (unit: per million people)

Source: Johns Hopkins University CSSE COVID-19 Data (Last updated 17 December, 06:06 London time) CC by Our World in Data

Another follow-up consequence is that some ocean carriers responded to the challenges brought by COVID-19 through cancelled or "blanked" sailings. Such actions are permitted under the US Shipping Act so long as the joint actions do not violate the Shipping Act competition standard.[1] But the problem may remain unsolved and continue to emerge next year. Many shipping companies have successively released new plans on cancelled sailings. The end of every year was supposed to be the peak season for export, while shipping companies cancelled sailings, which undoubtedly signals a tightening of shipping capacity. The reasons why sailings were cancelled are as follows: labor shortages in the U.S. ports due to the COVID-19 pandemic; inspection and quarantine restrictions; the increase in purchases and imports caused by the New Year and the pandemic resulting in much higher trade deals and shipping volumes compared with those of the previous years; and containers including special ones such as refrigerated containers returned to Asia are extremely insufficient. Every year around the New Year's Day, due to the increase in demand for goods brought by Western Christmas and the concentrated exports before China's Spring Festival holiday, the trade volume and shipping volume of China's exports to the United States will increase significantly. This year, however, exports in China will face great challenges brought by huge shortages of containers and congested ports in the United States. The issue involving trade and shipping industries has never been an issue faced by a State alone; Chinese import and export enterprises, therefore, need to think about countermeasures against challenges brought by the COVID-19 pandemic.

[1] "Chairman Michael A. Khouri's Remarks for the Global Maritime Conference", FEDERAL MARITIME COMMISSION, Dec. 8, 2020, at https://www.fmc.gov/chairman-michael-a-khouris-remarks-for-the-global-maritime-conference/ (last visited December 12, 2020)

Table 2 Schedule of Suspended Pick-Ups of Selected Shipping Companies

Shipping Companies	Suspended Pick-Ups	Updated Date
MSK[1]	Week 50: TP2, TP6, AE10, AE6, AE1 route adjustment Week 51: AE5 route adjustment	1 December 2020
CMACGM	Bookings from Asia to North Europe for Weeks 49, 50, and 51 Stop[2]	4 December 2020
Hapag-Lloyd[3]	FP2 suspended in week 49 MD3 suspended in week 51 EC3 suspended in weeks 50 and 52 AL4 suspended in weeks 50 and 53 AL1 suspended in week 53	Last updated on 10 December 2020
YangMing[4]	Same as above (Notice of THE Alliance)	11 November 2020
ONE[5]	Bookings stop from mid-January 2021 to the end of February 2021	8 December 2020

sources: news published by each carrier's website

In addition, the freight rates of trans-Pacific routes need continuous attention. This may contribute to triggering the investigation and is likely to violate the competition standards stipulated by the US Shipping Act. According to the Freight Baltic Indices (FBX) Global Container Index jointly released by the Baltic Shipping Exchange and Freightos, an Israeli digital container freight platform, container freight rates have risen rapidly since May this year. Judging from prices on 18 December, the year of 2020 witnessed an annual price of 3,004 USD/FEU, which is about 110% higher than that of 2019, 1,431 USD/FEU. Compared with the sharp increase in freight rates from China to the east or west coast of the United States, the prices from the east or west coast of the United States to China fluctuate greatly rather than just being on the rise. It is worth noting that prices have gradually stabilized since November.

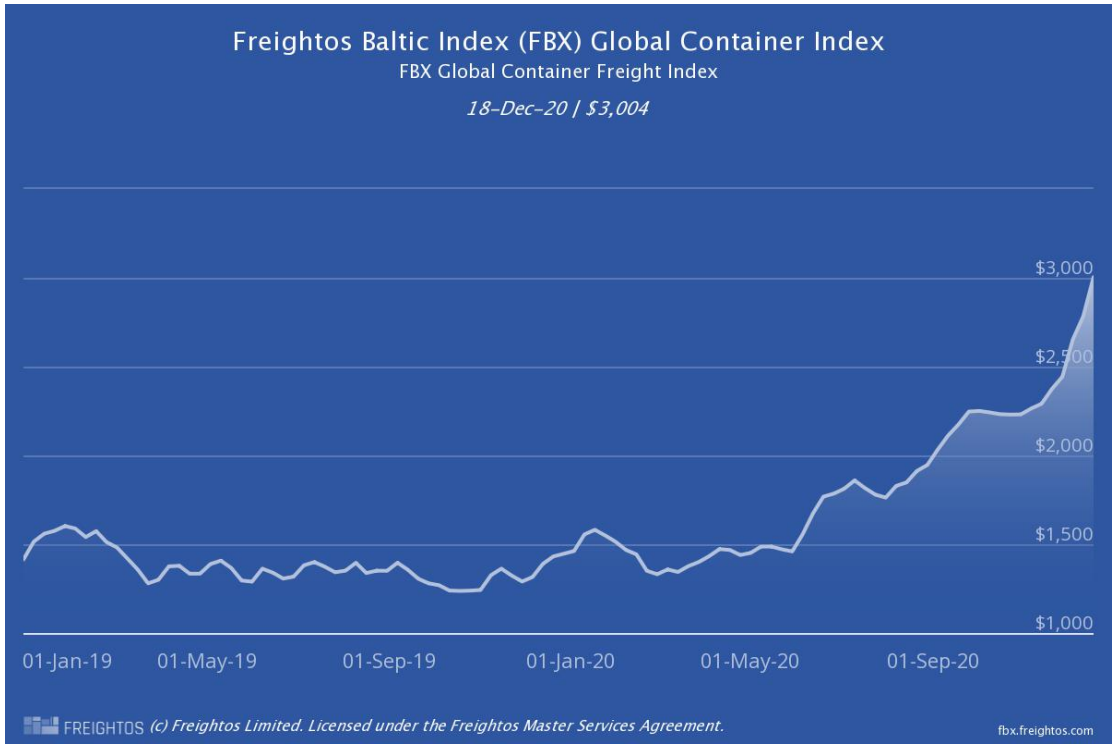
[1] News of MAERSK, at https://www.maersk.com.cn/news/articles/2020/12/01/q4-seasonal-service-adjustments-north-america-to-asia-services-2020 and https://www.maersk.com.cn/news/articles/2020/12/01/q4-seasonal-service-adjustments-asia-to-north-europe-services-2020 (last visited December 12, 2020)

[2] Maritime News, at https://www.joc.com/maritime-news/cma-cgm-puts-hold-asia-europe-bookings_20201204.html (last visited December 12, 2020)

[3] Blank Sailing Section of Hapag-Lloyd, at https://www.hapag-lloyd.com/en/about-us/covid-19-update/overview-blank-sailings.html#tabnav (last visited December 12, 2020)

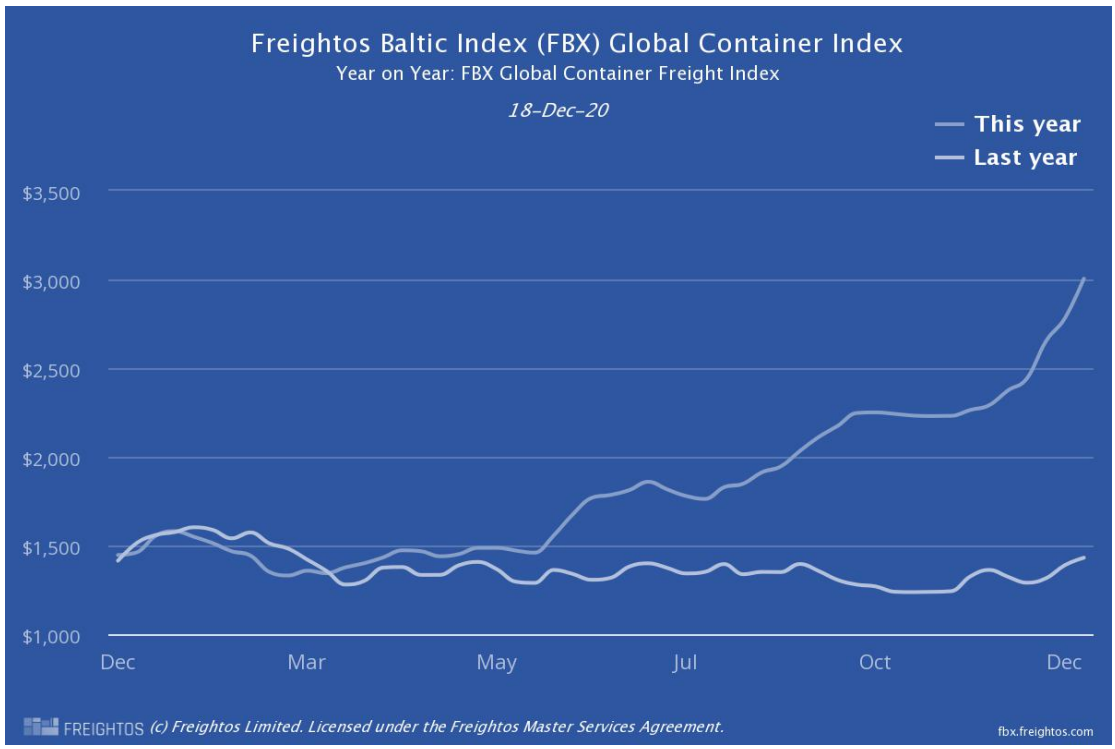
[4] THE Alliance Announces Updated Service Adjustments for December 2020, at https://www.yangming.com/News/press_release/PressContent.aspx?BulletinType=PressRelease&uid=13955&localSiteD= (last visited December 12, 2020)

[5] TEMPORARY SUSPENSION OF CARGO ACCEPTANCE TO SOUTH CHINA DURING CHINESE NEW YEAR, at https://www.one-line.com/sites/g/files/lnzjqr776/files/2020-12/20201208_Temporary%20Suspension%20of%20cargo%20acceptance%20to%20South%20China_Customer%20Advisory-converted.pdf (last visited December 12, 2020)



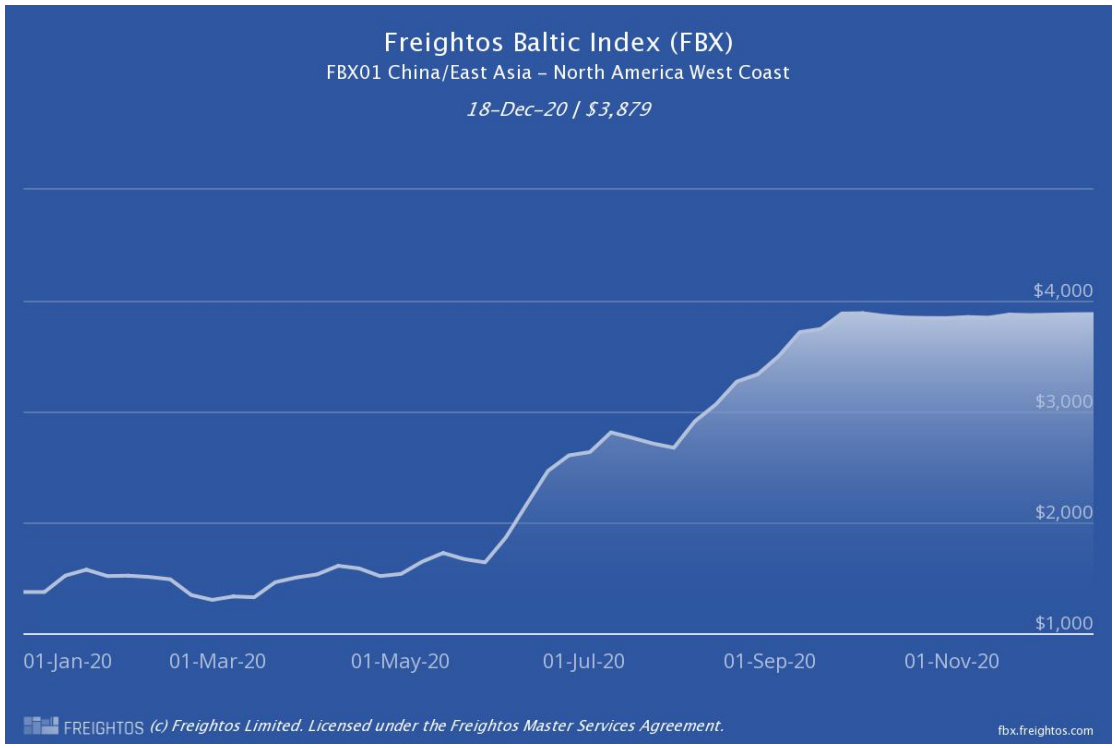
Source: Freightos（Last visited on 19 December 2020）

Figure 2 Global Container Index Trend



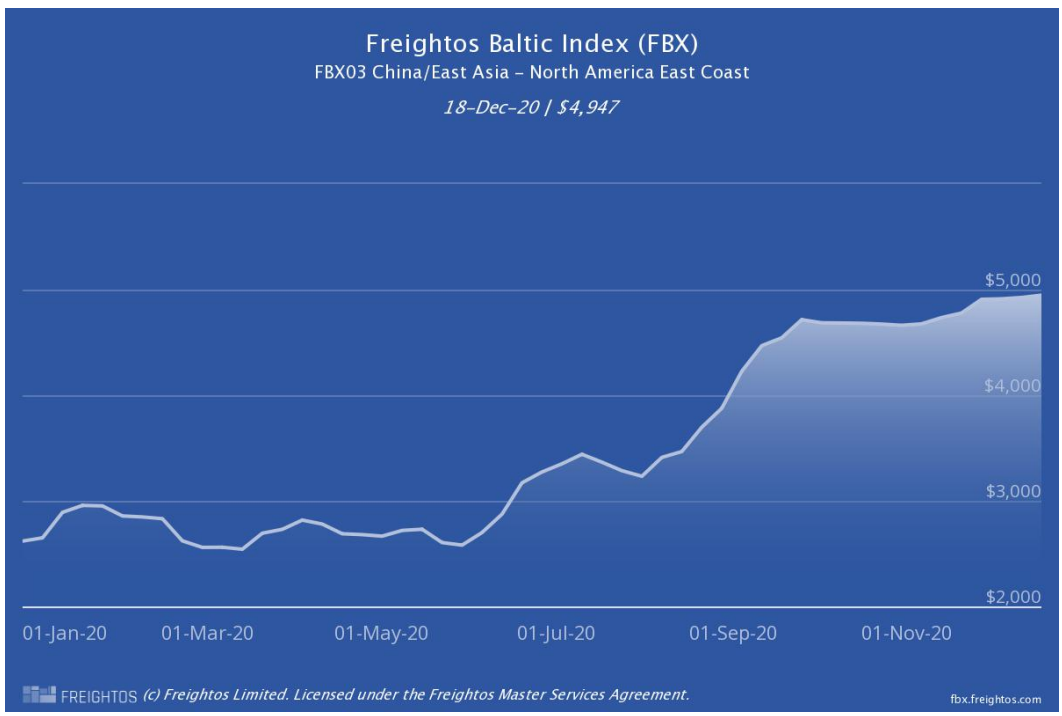
Source: Freightos （Last visited on 19 December 2020）

Figure 3 The Year-on-Year Trend of the Global Container Index Last Year



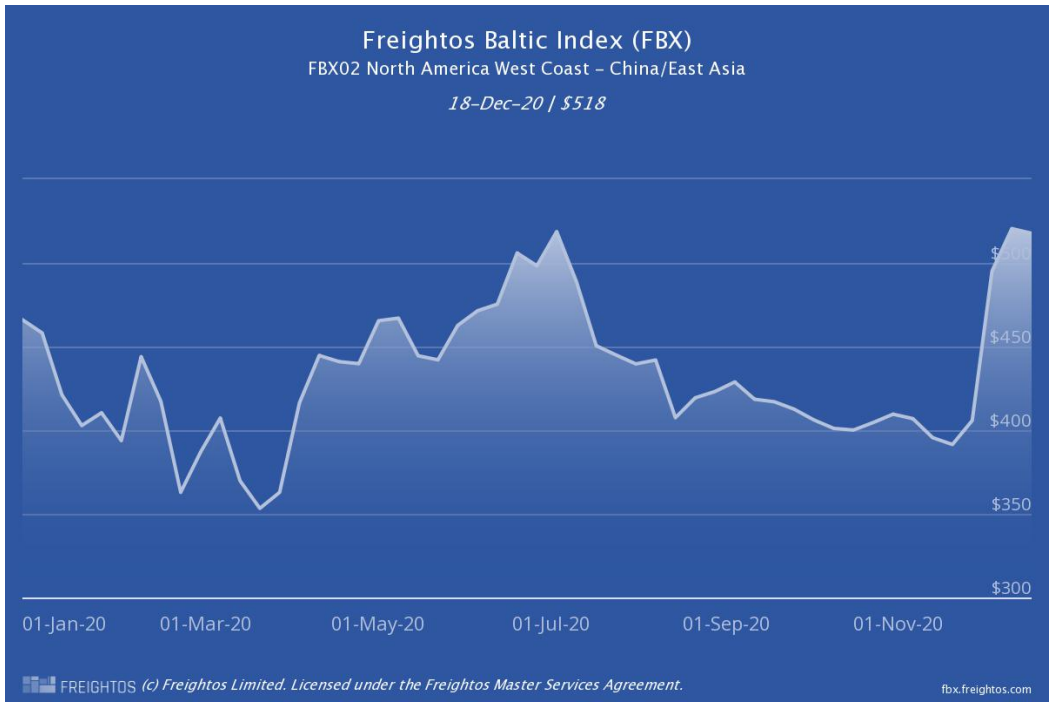
Source： Freightos （Last visited on 19 December 2020）

Figure 4 Freight Index of China/East Asia to North America West Coast



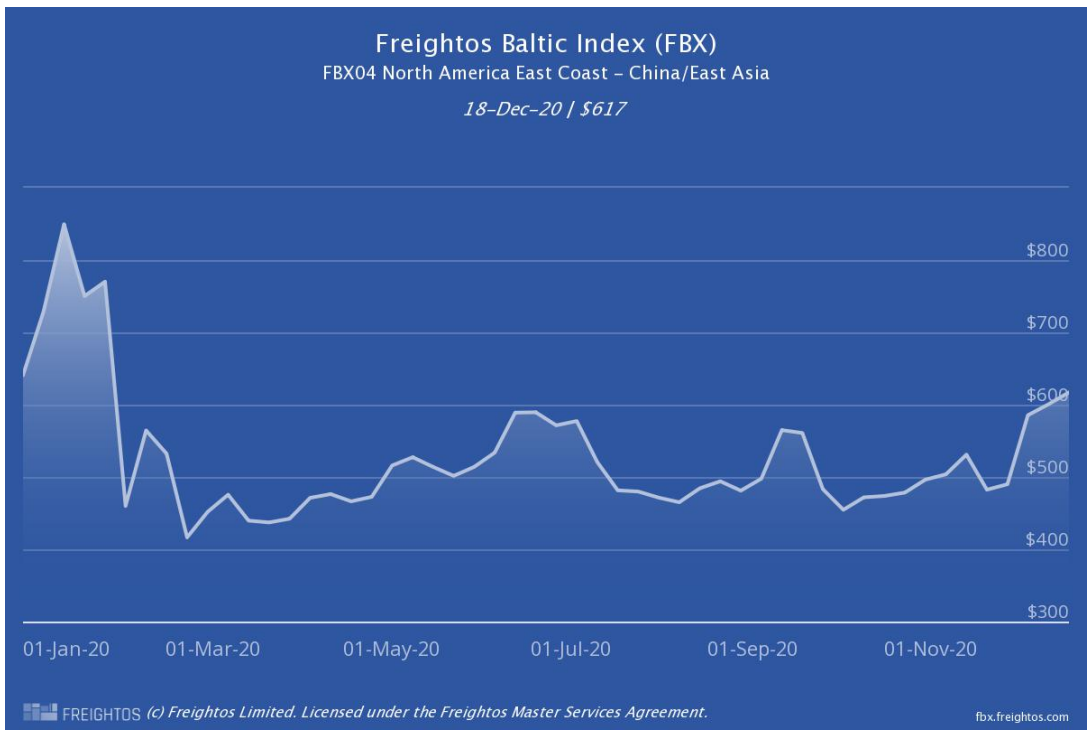
Source： Freightos （Last visited on 19 December 2020）

Figure 5 Freight Index of China/East Asia to North America East Coast



Source： Freightos （Last visited on 19 December 2020）

Figure 6 Freight Index of North America West Coast to China/East Asian



Source： Freightos (Last visited on 19 December 2020)

Figure 7: Freight Index of the East Coast of North America to China/East Asia

In his speech at the 2020 Global Maritime Conference, the chairman of the FMC said when looking out to 2021, "I look for the FMC to continue its focus on opportunities to relax regulatory burdens in the ocean container transportation space that unnecessarily add costs and reduce freight fluidity." Relaxing regulation on international shipping operation and practices is the right trend and direction. The currently known relaxation measures have been recommended in the investigation report. For example, the service agreement can be filed with the FMC within 30 days of agreement's effective date; while it cannot be predicted how the freight rates and the service provided will change during the upcoming negotiation season for freight rates. Whether more relaxed policies and measures will be launched in the future may depend on how the COVID-19 pandemic will develop in the United States.

V. Conclusion

Several important issues can be reflected in the Fact Finding Investigation No. 28 and No. 29. Firstly, the freight rate of trans-Pacific routes has increased sharply; secondly, detention and demurrage charges have occurred, which results from bottlenecks in the supply chain such as the tightening of capacity and insufficient operating capacity of marine terminals, and certain entities might be unreasonably charged; thirdly, the poor circulation of international shipping links affects international trade. These problems are all caused by the COVID-19 pandemic. The established and announced solutions and measures are basically designed to alleviate the current situation, rather than fundamentally solve these problems. However, they are useful and effective, and may have a positive impact on the future practices and regulations of carriers and marine terminal operators. Whether the shipping alliances have violated the law is still uncertain. If they do violate the law, whether the prohibition of further operation of the alliance agreement is beneficial or harmful to the current situation still requires careful evaluation; if they do not violate the law, the petitioner's problem awaits a radical solution. In terms of the fees charged by individual carriers, such as detention and demurrage charges, those fees are always charged in this way. In order to resolve the current problem, it is more practical to strike a balance between parties involving paying and charging than to discuss whether it is legal to charge in this way. In addition, unexpected global incidents may be "force majeure" factors for many problems, but they are also a test of the resilience of a State or some industries. China's strength in this regard is remarkable, and China has shown the world that actively and scientifically reacting to the incident is the best choice. Whether the United States will launch relaxation regulations and measures for the shipping industry should be given continuous attention, because it will affect the shipping policies of the world's major economies to a certain extent. This is also what a State should focus on so as to maintain its competitive position in the world. From China's point of view, the shipping policies of the United States and the European Union could be used as reference when China formulates that of its own. Though the shipping policies in China are inclusive enough and contribute to the development of various industries, some issues still need to be tackled and require the best solution. To name just a few, how to solve the tricky problems occurred in the enforcement of competition law related to shipping enterprises, how to measure the market share and regulate it, and how to legalize relevant policies and make it written in text still need further study.

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反思与探索：海事判决承认与执行的国际统一机制*

王国华**罗雅馨***

摘要：海事判决的承认与执行是外国法院民商事判决承认与执行机制中的重要组成部分，海事判决能否在全球领域内得到全面流通是航运业界高度关切的问题。由于海事判决的承认与执行长期以来缺少国际性统一规则对其加以调整，这使得海事判决的跨域流通度赖执行国的国内法规定，加之各国标准和规定不一，导致海事判决的承认与执行在司法实践中面临诸多障碍。海牙《选择法院协议公约》和《承认与执行外国民商事判决公约》对于部分海事事项均排除适用，或将影响海事判决承认与执行全球性法律体系的构建。现已生效的涉及海事事项承认与执行的国际公约难以满足海事判决全球流通的需求，应坚持开放、包容立场探索外国海事判决承认与执行额国际统一机制的构建进路。

关键词：海事判决；承认与执行；选择法院公约；判决公约

一、问题的提出

随着世界各国间贸易往来日渐频繁，经济全球化趋势不断加深，私法规范与司法制度趋同化发展已成为必然，这对外国法院判决的全球流通程度提出了更高要求。而海事判决作为民商事判决中的重要组成部分，其承认与执行机制却仍主要依赖各国国内法，缺少统一的国际规则对其加以调整。

由于各国国内法对于判决承认与执行的标准不一，加之海事纠纷相较其他民商事纠纷具有一定的专业性与复杂性，这使得海事判决在各国的承认与执行的实践中受到一定的限制，直接影响海事司法的确定性与公信力，不利于国际民商事活动参与者对于自身权利的维护。就目前而言，世界各国对于外国法院判决承认与执行的判定标准不尽相同，虽有部分国际公约对外国海事判决的承认与执行作出了规定，但在实践中往往难以发挥效力。在 2005 年第 20 届海牙外交会议通过并于 2015 年 10 月 1 日起正式生效的《海牙选择法院协议公约》（简称《选择法院公约》）[1]以及在 2019 年 7 月 2 日海牙国际私法会议第 22 届外交大会

* 本文系国家社科基金重大研究专项“新时代海洋强国战略法制保障研究”（18VHQ004）阶段性成果。
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[1] See Convention of 30 June 2005 on Choice of Court Agreements adopted by the Twentieth Session and Explana tory Report by Trevor Hartley &Masato Dogauchi, HCCH Publications. 2007. 公约原文可见海牙国际私法会议网站 h ttps://www.hcch.net/ en/ instruments/conventions/full-text/?cid=98。

上通过的《承认与执行外国民商事判决公约》（简称《海牙判决公约》）[1]均将大量事项排除在公约的适用范围之外，其中就包括了部分海事事项。[2]作为国际司法制度规则的改变者，《选择法院公约》与《海牙判决公约》为外国民商事判决的承认与执行确立了较为统一的新规则，但在海事判决的承认与执行问题上却有所留白。两个公约均排除了部分海事事项的适用，此种安排虽在一定程度上避免了与其他公约的冲突，但却带来了海事判决在全球范围内的流通问题、现行的国际海事公约规定是否能满足多数海事判决的承认与执行的争论。

在构建人类命运共同体和建设“一带一路”等重大理念和方案的推进过程中，中国始终以负责任大国形象助力世界各国共同发展。[3]相应地，在新时代背景下，中国应积极参与到公约的研究中去，开展承认与执行外国海事判决的相关实践，以促进自由贸易的繁荣、推动世界经济发展、保障经济全球化的成果。因此，本文从国际公约入手，对目前已生效且涉及海事事项的国际公约的相关规定进行梳理，比较不同公约所创设的海事判决承认与执行机制，结合公约适用时存在的问题，分析现行海事判决承认与执行机制的利弊，进而期望为海事判决承认与执行的国际统一机制的构建提供思路。

二、国际公约中海事判决承认与执行机制的规范分析

国际统一的海事管辖权规则以及国家间海事判决承认与执行机制是外国海事判决全球流通机制的重要组成部分，但由于各国现行的海事管辖权规则差异较大，难以形成一项接受度较高且同时规定管辖权和判决承认与执行的双重公约。因此，多数国际公约仅对海事管辖权作出规定而并未涉及海事判决承认与执行的内容，只有少数公约在规定海事管辖权的基础上同时还增设了海事判决承认与执行的规定。回顾海事判决全球流通机制的国际立法沿革，其立法模式可以分为三种：单一式、统一式以及混合式。单一式的立法模式针对海事判决的全球流通机制进行专门立法，将海事事项与其他民商法事项进行区分，这种立法模式主要体现在部分国际海事公约中，如 1952 年《统一海船扣押某些规定的国际公约》以及 1978 年《联合国海上货物运输公约》等公约实现了海事管辖权规则在海上运输、海事侵权等领域的国际统一，而 1974 年《海上运输旅客及其行李雅典公约的 2002 年议定书》《国际油污损害民事责任公约》《设立国际油污损害

[1] See Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil and Commer cial Matters. 公约原文可见海牙国际私法会议网站 https://www.hcch.net/en/instruments/conventions/full-text/?c id=137。

[2] 《海牙选择法院协议公约》第 2 条第 2 款将 9 类共 16 种事项排除在外，具体分类参见肖永平等主编：《批准<选择法院协议公约>之考量》，法律出版社 2017 年版，第 33-40 页；《承认与执行外国民商事判决公约》第 2 条第 1 款将 17 种事项排除在公约的适用范围之外。

[3] 参见曲颂等：《中国展现负责任大国形象——国际人士积极评价中国对外工作成果》，《人民日报》2018 年 6 月 22 日，第 3 版。

赔偿基金公约》等公约则在规定海事管辖权的同时还规定了海事判决承认与执行。统一式的立法模式不再单独区分海事事项，将海事事项作为民商事事项的其中一部分进行统一规制，即如《选择法院公约》与《海牙判决公约》。混合式立法模式则是在将海事事项作为民商事事项的其中一部分进行统一规制的基础之上再针对海事事项的特殊性作出特殊的规定，如《布鲁塞尔条例I》以及《卢加诺公约》等公约对部分海事事项的管辖权作出了特别规定。三种立法模式各有利弊，相较之下单一式立法模式更具有针对性但公约的起草难度也最大；统一式立法模式可以提高海事判决承认与执行的国际统一化程度但难以与海事诉讼的特殊性相适配，在实际适用时容易产生冲突；混合式的立法模式更符合实际但实施要求过高，若成员国之间的司法模式与文化传统相差甚远则难以实行。目前海事判决承认与执行机制主要体现在单一式立法模式的国际海事公约中以及混合式立法模式的《布鲁塞尔条例I》中。

（一）国际海事公约中海事判决承认与执行机制

截止至目前，在业已生效的国际海事公约中，有部分公约对外国海事判决的承认与执行作出了规定，详见表 1。

表 1 国际公约中海事判决承认与执行机制一览

序号	公约	条款	规定内容
1	1974 年《海上运输旅客及其行李雅典公约的 2002 年议定书》	第 11 条	公约第 11 条对 1974 年《雅典公约》第 17 条的内容进行了补充，对于承认与执行的条件、审查标准以及拒绝承认与执行的情形作出规定。 1.公约规定应予承认与执行的判决需具备以下条件：（1）作出判决的法院依据公约规定具有管辖权；（2）该判决在原判国是可执行的；（3）该判决为终局判决。满足条件予以承认的判决在原判国履行完所有手续后在被申请国不需再作实质审查即可在所有成员国中得到执行。 2.公约明确了两种判决拒绝承认与执行的情形：（1）欺诈；（2）没有合理地通知被告以及被告未能获得陈述案情的同等机会。 3.公约并未排除其他有关承认与执行公约或国内法的适用，但要求其认定标准不得低于本公约的规定。
2	《国际油污损害民事责任公约》	第 10 条	公约对于承认与执行的条件、审查标准以及拒绝承认与执行的情形作出规定，具体内容与 1974 年《海上运输旅客及其行李雅典公约的 2002 年议定书》基本一致，但未对其他有关承认与执行公约的适用问题作出规定。

序号	公约	条款	规定内容
3	《设立国际油污损害赔偿基金公约》	第 8 条	公约该条仅规定了判决承认与执行的条件。 1.公约要求应予承认与执行的判决应是根据本公约有关分配问题的针对该基金的判决。 2.公约规定应予承认与执行的判决需具备以下条件：（1）作出判决的法院依据公约规定具有管辖权；（2）该判决在原判国是可执行的；（3）该判决为终局判决。满足承认与执行条件的判决可在所有成员国中得到承认与执行。
4	1992 年《设立国际油污损害赔偿基金国际公约的 2003 年议定书》	第 8 条	公约在《设立国际油污损害赔偿基金公约》的基础上将应予承认与执行的判决的范围扩大到对补充基金作出的任何裁决，其他规定仍保持不变。同时增加了有关其他公约相关事项适用问题的规定，公约并不排除其他有关承认与执行公约或国内法的适用，但同时要求其认定标准不得低于本公约的规定。
5	2001 年《国际燃油污染损害民事责任公约》	第 10 条	公约对于承认与执行的条件、审查标准以及拒绝承认与执行的两种情形作出规定，具体规定与 1974 年《海上运输旅客及其行李雅典公约的 2002 年议定书》的规定基本一致。

通过对比上表中涉及海事判决承认与执行的各项国际海事公约的规定可知，各公约对外国海事判决的承认与执行的规定内容较为相近且较为笼统，难以形成较为一套完整的法律体系，缺少具体性、细节性的规定以及相关的判断标准和法律适用依据，仅依靠现行国际海事公约中的规定无法满足海事判决全球流通的实际需求。具体而言，现行的国际海事公约中海事判决的承认与执行机制存在以下问题：

第一，海事判决的确定性要件缺少判断标准。海事判决的确定性要件是其承认与执行的首要条件，但反观表中各项公约却缺少相应的明确规定，表中多数公约采取的措辞是“在原判国是可实施的或可执行的且在该国并非审查的对象”，未区分海事判决的承认以及执行且未规定应依据何国法律判断海事判决的确定

性，缺少确定性要件的审查标准。

第二，拒绝承认与执行理由过少。表中多数公约对于拒绝承认与执行的理由仅有欺诈和原审法院在审判时存在程序性问题两个理由，少数公约未规定拒绝承认与执行的理由。如此规定过于宽泛，一方面不利于当事人权利的保护，另一方面会导致海事判决在申请承认与执行时过度依赖被申请国国内法以及被申请国法院的自由裁量，进而难以形成国际性统一的判决承认与执行规制。

第三，公约规定过于笼统。上表中多数公约仅用概括性的表述对海事判决的承认与执行进行规定，因此在公约实际适用过程中势必会与各国的国内法产生交集，如判决是否在原判国具有执行力，何为“欺诈获得的判决”，何为“合理的通知”等问题都需依据国内法来判断。若被申请国的国内法对于拒绝承认与执行的规定与公约规定不同，可能会导致海事判决无法顺利得到承认与执行，例如在 The“IRINI A”案[1]中，英国法院在依据原判国法律来判断申请承认与执行外国法院判决是否具有确定性（final and conclusive）的同时，还要求该外国法院判决须满足普通法中的规定，即申请承认与执行的判决应为针对金钱给付的判决（judgement must be for a definite sum of money），且不能违反自然主义（contrary to natural justice）与公共政策。

（二）区域性公约中关于海事判决承认与执行的规定

“布鲁塞尔体系”[2]是目前在判决承认与执行领域最为成功的国际合作模式，严格说来，《布鲁塞尔条例 I》实质上是一个区域性公约，是欧盟成员国之间的一次成功的实践。通过该公约实现了判决在欧盟成员国境内自由流动的目标。[3]《布鲁塞尔条例 I》自 2002 年 3 月 1 日生效以来对欧盟各成员国间的民事交往以及民事诉讼制度的发展起到了巨大的促进作用，但随着全球电子商务的不断普及以及其他新兴技术的推广应用，《布鲁塞尔条例 I》也逐渐暴露出一些问题与技术层面的不足。欧盟委员会在 2009 年的报告中指出，经过广泛论证，应启动对《布鲁塞尔条例 I》的修订工作，调整修改其中的部分条款以便于更好地促进民商事判决的流通。后于 2012 年完成了修订并通过了《关于民商事案件管辖权和判决执行的第 1215/2012 号条例（重订）》（《布鲁塞尔条例I（重订）》），并于 2015 年起在所有欧盟成员国生效。[4]

根据《布鲁塞尔条例I（重订）》规定，海事判决的承认与执行可以适用该条例。《布鲁塞尔条例I（重

1 参见 ASCOT COMMODITIES N.V. v.NORTHERN PACIFIC SHIPPING ([1999] 1 Lloyd’s Rep. 196) 。

2 多数学者将 1968 年欧共体成员国签订的《民商事案件管辖权和判决执行公约》（《1968 年布鲁塞尔公约》）和 2000 年欧盟理事会通过的《民商事管辖权与判决承认及执行规则》（《布鲁塞尔条例Ⅰ》）以及 1988 年欧共体成员国与欧洲自由贸易联盟成员国之间签订的《民商事管辖权和判决执行公约》（《卢加诺公约》）还有 2012 年欧洲议会及欧盟理事会通过的《关于民商事案件管辖权和判决执行的第 1215/2012 号条例（重订）》（《布鲁塞尔条例Ⅰ（重订）》）统称为“布鲁塞尔体系”。

3 参见王吉文：《外国判决的承认和执行的国际公约模式研究》，中国政法大学出版社 2010 年版，第 97-98 页。

4 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and enforcement of judgments in civil and commercial matters (recast) , [2012] OJ 351/1.

订）》第 1 条对其适用的实质范围进行了规定，规定公约适用于民商事事项，并排除了部分事项对于公约的适用。[1]由此可见海事事项作为民商事事项的一部分且不属于公约的排除事项因而可以适用该公约的规定。同时，《布鲁塞尔条例I（重订）》第 2 条对予以承认和执行判决的定义和范围进行了规定。广义上的民事判决是指法院根据查明的事实和有关法律的规定，对当事人之间有关民事权利义务的争议，或申请人提出的申请，作出的具有强制约束力的裁判。[2]由于各国的法制差异，“判决”的概念在不同国家法律制度中规定不尽相同，例如在匈牙利，法院就案件事实作出的裁决称为“判决”，就其他事项作出的裁决则称为“命令”。[3]出于上述原因，《布鲁塞尔条例I（重订）》对判决的范围也做出了灵活规定，[4]条例中所指的“判决”不仅包括裁决、命令、决定或执行令状以及由法院书记官就诉讼费或其他费用所作的决定。另外，对案件实体问题具有管辖权的法院或法庭所做出的临时措施（包括保护措施）也属于条例规定的判决的范畴，但不包括该法院或法庭在未传唤被告出庭情况下所做出的临时措施，除非在执行前包含该措施的判决已送达被执行人。基于上述条款设计，从条例的适用范围来看，诸如扣押船舶的决定或命令、设立海事赔偿责任限制基金的裁定等外国法院作出的海事判决都可以依据条例予以承认和执行。

《布鲁塞尔条例I（重订）》对于海事请求事项的管辖权也进行了明确的规定。《布鲁塞尔条例I（重订）》从实质上来看其实是一个双重公约，既规定了法院的直接管辖权同时也对法院的间接管辖权作出了具体要求。基于部分诉讼标的的特殊性，条例对一些特别事项以及特别诉讼形式的特别管辖权规则进行了规定。条例第 7 条第 7 款对法院基于扣押被救助货物以及运费而产生的管辖权进行了规定：在海上货物运输因海难救助报酬或运费支付所发生的争端，可以在货物为担保付款而被扣押地法院以及货物本应被扣押但由于提供了保释金或其他保证而免于扣押的所在地法院被诉，且以主张被告对该货物或运费具有利益或在救助时曾有利益的情况为限。[5]在 1968 年《布鲁塞尔公约》的文本中未对此项内容作出规定，在之后的 1978 年文本的第 5 条第 7 款首次增加了此项规定。[6]《布鲁塞尔条例I（重订）》对于海事请求事项的特别

1 See EU, Regulation (EU) No.1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), Official Journal of European Union L 351/1, 20.12.2012, Article 1.

2 参见徐宏：《国际民事司法协助》，武汉大学出版社 2006 年版，第 223 页。

3 参见徐宏：《国际民事司法协助》，武汉大学出版社 2006 年版，第 224 页。

4 参见《布鲁塞尔条例Ⅰ（重订）》第 2 条规定的“判决”系指某一成员国法院或法庭所作的任何决定，而不论该决定的名称是什么，如裁决、命令、决定或执行令状，以及由法院书记官就诉讼费用或其他费用所作的决定。该条例还进一步规定了公证文书和法院和解书也同样可以予以承认与执行。第 58 条规定：“在诉讼程序中经法院许可，并可在达成和解的成员国国内执行的和解办法，在被请求国也应以与公证文书同样的条件予以执行。许可和解办法成员国法院或有关机构，经利害关系当事人的请求，应该出具符合本规则附件五标准格式的证明文书。”值得注意的是该条未规定公证文书和法院和解书的承认，仅仅规定了执行，该做法被《选择法院公约》所继承并在公约的解释报告中说明此举的原因，See T. C. Hartley & M. Dogauchi, Convention on Choice of Court Agreements: Explanatory Report (First Draft) of May 2006, Paragraphs 210-211.

5 See EU, Regulation (EU) No.1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), Official Journal of European Union L 351/1, 20.12.2012, Article 7(7).

6 See EC, The 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,

管辖权进行明确规定的同时针对部分海事事项还允许成员国国内法作为法院管辖权判断的依据，如条例第 9 条规定若某一成员国法院根据本条例对有关船舶使用或经营责任的相关诉讼享有管辖权，则该法院有权审理有关海事赔偿责任限制纠纷的案件，同时任何依据该成员国国内法为相同目的而建立的其他法院，对有关海事赔偿责任限制的请求也可以行使管辖权。[1]同时《布鲁塞尔条例I（重订）》也确认了对于成员国已加入的其他已生效的国际公约中有关海事事项的特别管辖权规定。条例第 71 条规定，本条例不影响成员国作为成员方涉及特别案件的管辖权或判决承认与执行的公约的效力，即国际公约中的特别管辖权规则具有优先效力。[2]

尽管《布鲁塞尔条例I（重订）》进一步促进了欧盟成员国间民商事判决的流通，但在实践中仍然存在着诸多问题，例如欧盟跨国民事诉讼规则呈现出“碎片化”的状态，每一欧盟成员国参与欧盟统一立法的方式都不同，使得每项立法在不同的成员国内适用情形也都不尽相同。[3]在某些案件中，如 The “WINTER”案[4]等部分被申请国承认与执行判决时会出现与国内法规定相背或超出该国缔结的其他国际公约规定的义务的情形。

本文认为对于外国海事判决的全球流通，布鲁塞尔体系虽不能解决海事判决在世界各国间的承认与执行问题但仍具有一定的借鉴意义。布鲁塞尔体系其本身实质上是一个区域性的公约，无法促进海事判决在全球范围内得到承认与执行，且该体制成功的原因在于欧盟成员国之间高度统一的价值目标和现实基础。如若要提升海事判决在全球范围内的流通程度，势必要平衡各国在管辖权、海事判决的流通性等一系列问题上的不同需求，因此，海事判决承认与执行的国际统一性问题只能依靠国际性的判决承认与执行公约来实现。然而，布鲁塞尔体系或将为今后海事判决承认与执行的国际统一化机制的构建提供一定思路。前文述及布鲁塞尔体系所采用的混合式立法模式既可以提高海事判决承认与执行的国际统一化程度又可以兼顾海事诉讼的特殊性，但缺点是接受度较低。构建海事判决承认与执行的国际统一化机制可以考虑在统一立法模式的基础上，部分引入混合式的立法模式，即在现有承认与执行国际公约的基础上增加海事间接管辖权的规定，同时扩大公约的适用范围，将海事事项全部纳入国际民商法判决承认与执行机制之中。这样既

Official Journal of European Union C27, 26.1.1998, Article 5(7).

1 See EU, Regulation (EU) No.1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), Official Journal of European Union L 351/1, 20.12.2012, Article 9.

2 See EU, Regulation (EU) No.1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), Official Journal of European Union L 351/1, 20.12.2012, Article 71.

3 参见杜涛：《欧盟跨国民事诉讼制度的新发展——评欧盟<布鲁塞尔第一条例>之修订》，载《德国研究》2014 年第 1 期，第 103 页。

4 WINTER MARITIME LTD v. NORTH END OIL LTD LTD. SAME v. MARINE OIL TRADING LTD (THE “WINTER”) ([2000] 2 Lloyd’s Rep. 298).

可以使海事判决承认与执行机制作为国际民商法判决承认与执行机制的一部分，实现二者全球化的协同发展，还可以完善海事判决承认与执行机制自身体系化建设，用更为开放、温和的方式构建一项更易于各国接受的海事判决承认与执行机制。

三、国际统一的期待可能：海牙判决公约体系[1]下的海事判决承认与执行机制

缔结一项全球性的判决承认与执行公约一直是海牙国际私法会议以及世界各国长期以来不断努力的目标之一。作为第一个全球性民商事管辖权和判决公约，《选择法院公约》在历经 13 年的讨论与磋商后于 2005 年第 20 届海牙国际私法会议第 20 次大会上获准通过，并于 2015 年 10 月 1 日起正式生效。[2]该公约对于法院的选择、被选择法院和其他法院的权利与义务以及判决的承认与执行进行了明确的规定。

相较于布鲁塞尔体系，《选择法院公约》作为全球性的管辖权和判决承认与执行的公约其规定更为温和且接受度更高，是司法确定性、法院管辖合理性、判决流通性和当事人权利救济等多种要素平衡之下的结果。在《选择法院公约》的基础之上，2019 年 7 月 2 日海牙国际私法会议第 22 届外交大会上通过的《海牙判决公约》[3]成为第一部全球性多边外国民商事法院判决承认与执行的国际公约，它和《选择法院公约》一起铺设了一条法院判决全球流通的大道。[4]前文已经述及《选择法院公约》和《海牙判决公约》中均通过较为明细的排除清单将包括部分海事事项在内的大量事项排除在公约的适用范围之外，该做法或对外国法院海事判决的承认与执行产生了重要影响。

（一）《选择法院公约》中海事事项排除的规定

《选择法院公约》第 2 条列举了排除公约适用的特殊事项，其中第 2 款第（f）项排除适用全部运输事项，无论运输对象是旅客还是货物，无论运输方式是海上运输、公路运输、铁路运输还是航空运输，或任意三种的组合。[5]在《选择法院公约》修订之初，2004 年产生的公约草案文本《关于排他性选择法院协议的

1 由于《选择法院公约》以及《海牙判决公约》在内容上有较强的关联性，且这两项公约是海牙国际私法会议 1992 年启动“海牙判决计划”以来最为重要的成果，因此本文用“海牙判决公约体系”作为二者的统称，用以描述两项公约中的共通规则与特性。

2 See Convention of 30 June 2005 on Choice of Court Agreements adopted by the Twentieth Session and Explanatory Report by Trevor Hartley & Masato Dogauchi, HCCH Publications. 2007. 公约原文可见海牙国际私法会议网站 https://www.hcch.net/en/instruments/conventions/full-text/?cid=98，2021 年 7 月 7 日访问。

3 See Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. 公约原文可见海牙国际私法会议网站 https://www.hcch.net/en/instruments/conventions/full-text/?cid=137，2021 年 7 月 7 日访问。

4 参见徐国建：《被攻克的最后堡垒：2019 年<海牙判决公约>所涉关键问题评析》，载《上海政法学院学报（法治论丛）》2020 年第 2 期，第 1 页。

5 See HCCH, Convention of 30 June 2005 on Choice of Court Agreements, Art. 2(2).

公约草案》中，仅将海上旅客运输合同以及海上货物运输合同排除在公约适用范围之外。如此安排有两个原因，其一是当时考虑到《海牙——维斯比规则》[1]的缔约国可能不愿意接受提单中的选择法院条款。因为如果该选择法院条款指定具有管辖权的国家不是《海牙——维斯比规则》的缔约国，则可能发生船主规避《海牙——维斯比规则》中的强行法规则的行为，而这不是《海牙——维斯比规则》的缔约国所愿意看到的。第二个原因是该事项已被联合国贸易法委员会列为一个新的立法项目，海牙国际私法会议无意对此项进行重复立法，并且诸如船东责任限制或共同海损这些涉及到社会或第三方利益的诉讼往往可能引发特殊问题，因此海牙国际私法会议认为应当对当事人的意思自治加以限制。[2]公约的第 2 条第 2 款第（g）项还专门排除了五类海事事项：海洋污染、海事赔偿责任限制、共同海损以及紧急拖航和海上救助。[3]公约将上述这些海事事项排除在外的原因在于海牙国际私法会议认为部分国家的国内法就上述这些纠纷在签订选择法院协议时会产生一些问题，[4]但是根据公约的解释报告，如海上保险、非紧急拖航和救助、造船、船舶抵押和留置等海事事项仍属于公约适用的范围。[5]

（二）《海牙判决公约》中海事事项排除的规定

《海牙判决公约》部分沿袭了《选择法院公约》的结构，也在公约的第 2 条列举了排除公约适用的特殊事项，其中第 2 款第（f）项的规定与《选择法院公约》相同，排除适用全部运输事项，[6]无论是旅客运输还是货物运输，无论是海上运输、公路运输、铁路运输还是航空运输，或是以上任意三种的结合。[7]公约的第 2 条第 2 款第（g）项相较于《选择法院公约》有所改变，排除了三类海事事项：三种情况下的海洋污染——跨界海洋污染（transboundary marine pollution）、非国内管辖区域的海洋污染（marine pollution in areas beyond national jurisdiction）以及源于船舶的海洋污染（ship-source marine pollution）以及海事赔偿责任限制和共同海损。[8]根据公约解释报告，《海牙判决公约》对海事事项的排除的做法是由《选择法院公约》引入的。[9]

特别是在海洋污染的问题上，已经有一些与海洋污染相关的公约对于该类判决的承认与执行已经做出

1 “They were adopted in 1924 and were amended by the Brussels Protocol of 1968. They are sometimes called the ‘Hague–Visby Rules’”, see Dogauchi / Hartley Report(Dec 2004), Preliminary Document No 26 of December 2004, p.10, para.25.
2 Dogauchi / Hartley Report(Dec 2004), Preliminary Document No 26 of December 2004, p.11.
3 See HCCH, Convention of 30 June 2005 on Choice of Court Agreements, Art. 2(2).
4 T. Hartley & M. Dogauchi,‘Explanatory Report on the 2005 Hague Choice of Court Convention’, in Proceedings of the Twentieth Session (2005), Tome III, Choice of Court Agreements, 2010, p. 803, para. 59.
5 See Hartley / Dogauchi Report(2007), p. 34 , para. 30.
6 See HCCH, Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgements in Civil Commercial Matters, Article 2(2).
7 See Francisco Garcimartín & Geneviève Saumier, Explanatory Report on the 2019 HCCH Judgments Convention, p. 61 , para. 54.
8 See HCCH, Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgements in Civil Commercial Matters, Article 2(2).
9 See Francisco Garcimartín & Geneviève Saumier, Explanatory Report on the 2019 HCCH Judgments Convention, p. 61, para. 55.

了规定，海牙国际私法会议为避免公约之间在判决承认与执行的适用问题上产生冲突从而将部分海洋污染事项排除在公约的适用范围之外。同时，在第 22 届外交大会之前就该问题各国存在较大的意见分歧，美国认为应将所有类型的海洋污染都纳入公约的适用范围中去，而欧盟的观点则认为仅应排除船舶造成的海洋污染。最终各国在外交大会上达成共识，将对海洋污染事项的排除限制在公约第 2 条第 2 款第（g）项规定的三类海洋污染中，其他的海洋污染仍属于公约的适用范围之内。[1]

与《选择法院公约》不同的是，《海牙判决公约》没有排除紧急拖航和海上紧急救助，《海牙判决公约》的解释报告指出是因为其他公约尚未涵盖这些事项的承认与执行，并且海牙国际私法会议认为有充分的理由去鼓励救助方去提供这些救助，尽管如若未能有效补偿救助方可能会导致其承担风险和承担提供救助的成本的意愿下降，但是值得注意的是由于某些紧急拖航和救助是由国家政府部门负责或根据情况进行的强制性作业，因此某些判决将不符合公约第 2 条规定的民事或商事事项。[2]正因如此，不同国家对紧急拖航和海上紧急救助问题的定性也存在一定的差异，在外交大会之前有部分国家认为该事项属于法律强制性的规定，是一种行政性的强制法而并不属于民商事性质，所以应该被排除出公约的适用范围；但另一种观点认为，尽管该事项具有一定的法律强制性，可在总体上还应认定为民商事性质，不应该排除出公约适用范围。最终公约选择了一个折衷的方案。[3]此外，上述内容除海事赔偿责任限制外，其他海事事项，如海上保险、造船或船舶抵押和留置也都包括在公约的适用范围之内。[4]

（三）海牙判决公约体系为海事判决承认与执行的国际统一带来可能

通过对比《选择法院公约》《海牙判决公约》以及两项公约的解释报告的内容可以得出，海牙判决公约体系如此规定的原因主要有以下几点：第一，避免与其他国际公约产生冲突。海牙国际私法会议认为一些国际公约已经对部分海事事项进行了规定，为了避免公约与其他国际公约在适用问题上产生冲突，因此将其排除。第二，部分海事事项应受专门公约调整。在公约的制定过程中有一些国家认为如海洋污染、紧急拖航等部分海事事项属于专门的法律领域，应受专门的国际公约管辖，从而应将其完全排除，因此公约

1 See “Note on reconsidering ‘marine pollution and emergency towage and salvage’within the scope of the draft Convention on the recognition and enforcement of foreign judgments in civil or commercial matters”, Prel. Doc. No 12 of June 2019 for the attention of the Twenty-Second Session on the Recognition and Enforcement of Foreign Judgments (18 June–2 July 2019) (hereinafter, “Prel. Doc. No 12 of June 2019”), para. 10.

2 See HCCH, Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgements in Civil Commercial Matters, Art. 1(1) of the Convention; see Prel. Doc. No 12 of June 2019, para. 76.

3 参见徐国建：《被攻克的最后堡垒：2019 年<海牙判决公约>所涉关键问题评析》，载《上海政法学院学报（法治论丛）》2020 年第 2 期，第 29 页。

4 Hartley / Dogauchi Report, para. 59. For an explanation of the scope of the terms “limitation of liability for maritime claims”, see P. Schlosser, “Report on the Convention of 9 October 1978 on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice”, Official Journal of the European Communities, 5.3.1979, No C 59/71, Luxembourg, 1979 (hereinafter, “Schlosser Report”), paras 124-130.

把这部分内容排除在公约适用范围之外。第三，为避免就海事诉讼管辖权专门立法。若公约的缔约国未加入国际海事公约，如不将相关海事事项排除则需要对海事诉讼管辖权进行专门立法，因此将其排除。第四，避免重复立法。联合国贸易法委员会已将公约涉及到的部分海事事项列为新的立法项目，海牙国际私法会议为避免重复立法故将其排除。

对于上述问题，本文认为，《海牙判决公约》相较于《选择法院公约》已经扩大了部分海事事项的适用范围，根据公约的解释报告，海牙国际私法会议在制定《海牙判决公约》的过程中也逐渐意识到了海事判决承认与执行的重要性，但是出于海牙判决公约体系的立法目的，增加公约的接受度，仍有部分存在争议的海事事项最终被公约排除在外。而根据前文所述，现已生效的涉及海事事项的国际公约在实践中是否能得到适用还要依据各缔约国国内法的规定进行判断，因此若将海事事项全部纳入海牙判决公约体系未必会与其他国际公约产生冲突。最后，由于海事诉讼的特殊性，在公约的制定过程中，是否在某种程度上过于放大海事事项的专业性而忽略了海事判决承认与执行规则应具备的国际统一性，这也是影响外国海事判决流通性提升的关键因素之一。

随着各国民商事交往日益频繁，世界各国对于全球性民商事判决承认与执行的公约的需求度逐渐加深，然而在一向被认为统一化程度最高的海事领域，海事判决承认与执行的国际统一化规则却一直缺失。虽然近年来联合国贸易法委员会与国际海事委员会也通过新增立法项目、制定专门性公约来调整海事判决的承认与执行问题，但此种做法针对性较强，对于部分特殊类型的海事诉讼的全球性流通或有所助益，但对于多数外国海事判决的承认与执行助力较小。如若可以将海事判决的承认与执行纳入到海牙判决公约体系中去，不仅可以有力助推海事判决承认与执行国际统一机制的建立，还可以与现有的国际海事公约以及其他联合国立法项目互相补充，形成一套较为完善的全球性海事判决承认与执行制度体系。

因此，本文认为，今后海事判决承认与执行国际统一机制的构建可以从下述几个方面入手：

首先，可考虑逐步将全部海事事项纳入海牙判决公约体系，先扩大《海牙判决公约》对于海事事项的适用范围。基于上文所述，海牙国际私法会议认为将海事事项纳入到海牙判决公约体系可能存在的问题其实在一定程度上都可以得到解决。海牙判决公约体系对国际民商事判决承认与执行机制的影响不言而喻，它进一步明确了国际民商事判决承认与执行的规则，填补了国际民商事法律中的空白。现行的国际海事公约中有关海事判决承认与执行的规定具有一定的滞后性，已经不能满足目前海事判决全球流通的需求，如若可以将海牙判决公约体系的适用范围扩大至所有海事事项，可以更好地推动海事判决在世界各国间的流通。

其次，增加海事事项间接管辖权的规定。海牙判决公约体系适用范围内的海事事项中目前还缺少对应的特别管辖权规定，容易导致部分依据海事特殊管辖权规则作出的判决无法在海牙判决公约体系下得到承认与执行。因此，可将涉及海牙判决公约体系适用范围内海事事项的国际海事公约中的海事管辖权规则作为审查原判国法院是否具有管辖权的审查依据，如此还可以避免就海事诉讼管辖权作出专门规定，同时还能兼顾到海事诉讼管辖权的特殊性。

《选择法院公约》的生效与《海牙判决公约》的通过对于外国海事判决的流通起到了一定的促进作用，也为学界带来了更多的思考。海牙判决公约体系在运行过程中产生的争议问题虽然在公约自身框架中得到了一定的解决，但有关问题仍值得进行深入探讨。如何在海牙判决公约体系的基础之上构建完备的海事判决承认与执行的国际统一性规则、如何将国际公约的规定与专门性公约的内容相融合等问题都需要学界进行深入探究。正如《海牙判决公约》所希冀的，在与《选择法院公约》相互补充之下，未来海事判决实现全球流通，构建较为完善的国际统一机制将具有广泛的期待可能性，以海事判决承认与执行的国际统一机制为代表的国际法制度与规则也必将在全球治理中凸显更加重要的地位和作用，为我们在新时代应对全球性挑战、推动构建人类命运共同体创造有利条件。

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Reflection and Exploration: An International Unified Mechanism for the Recognition and Enforcement of Maritime Judgments*

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Abstract: Recognition and enforcement of maritime judgments forms an important part of the recognition and enforcement mechanisms followed for civil and commercial judgments in foreign courts. Whether maritime judgments can be circulated globally is a matter of great concern to the shipping industry. Due to a lack of uniform international rules governing the recognition and enforcement of maritime judgments, their enforcement across jurisdictions is determined by the domestic law of the executing state. The fact that these enforcement laws vary from state to state causes further obstacles to the circulation process. Two prominent international conventions, the *Hague Convention on Choice of Court Agreements* and the *Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, exclude the application of certain maritime matters – which impedes the establishment of a uniform global legal system in this regard. The existing international conventions concerning recognition and enforcement of maritime matters are insufficient to meet the needs of global circulation of such judgments. Therefore, it is paramount to adopt an inclusive and flexible position allowing exploration of an international unified mechanism for recognition and enforcement of foreign maritime judgments.

Keywords: maritime judgments; recognition and enforcement; *Convention on Choice of Court Agreements*; *Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*

I.The Presentation of Problems

With the proliferation of international trade and deepening economic integration between States, the standardization of private law and assimilation of the judicial system has become inevitable. Maritime judgments are an important subset of civil and commercial judgments. However, their recognition and enforcement relies

* This article is a phased achievement of a major research project of the National Social Science Fund "Research on the Strategic Legal System Guarantee of a Marine Power in the New Era" (18VHQ004).
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largely on the domestic laws of various countries, with no uniform international rules available to regulate them.

Due to differing domestic legal requirements for recognition and enforcement, and the fact that maritime disputes are often more complex than civil and commercial disputes, maritime judgments are subjected to additional restrictions in the context of recognition and enforcement. This directly affects the credibility and certainty of maritime justice, and is not conducive to the endeavour to protect the rights of those partaking in international commercial transactions. Presently, most countries have different standards for the recognition and enforcement of foreign court judgments. Although some international conventions provide for the recognition and enforcement of foreign maritime judgments, their provisions are often difficult to execute in practice. The *Hague Convention on Choice of Court Agreements* (hereinafter referred to as the *Convention on Choice of Court*)[1], which was adopted at the 20th Hague Diplomatic Session in 2005 and came into force on October 1, 2015, and the *Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* (hereinafter referred to as the *Hague Judgments Convention*)[2], which was adopted at the 22nd Diplomatic Session of the Hague Conference on Private International Law on July 2, 2019, exclude a number of matters, including some maritime matters, from the scope of application of the conventions.[3] The *Convention on Choice of Court* and *Hague Judgments Convention* have established relatively unified rules for the recognition and enforcement of foreign civil and commercial judgments, however, they remain indifferent to the recognition and enforcement of maritime judgments. The exclusion of maritime matters avoids conflict with other conventions to a certain extent, but ignites the debate over whether international maritime conventions, in their present form, can keep up with the evolving requirements of circulation of most maritime judgments.

By advancing proposals such as the "Belt and Road", and visions of shaping a community with a shared future for all mankind, China has been at the heart of the endeavour to help all countries develop together.[4] Correspondingly, while leading a new era, China should actively participate in the study of conventions and carry

[1] See Convention of 30 June 2005 on Choice of Court Agreements adopted by the Twentieth Session and Explanatory Report by Trevor Hartley &Masato Dogauchi, HCCH Publications. 2007. The original text of the convention can be found on the website of the Hague Conference on Private International Law (https://www.hcch.net/en/instruments/conventions/full-text/?cid=98).

[2] See Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. The original text of the convention can be found on the website of the Hague Conference on Private International Law (https://www.hcch.net/en/instruments/conventions/full-text/?cid=137).

[3] Article 2 (2) of the Hague Convention on Choice of Court Agreements excludes 16 matters in 9 categories. For specific categories, see XIAO Yongping et al., Consideration on the Approval of the Convention on Choice of Court Agreements, Law Press, 2017, p. 33-40; Article 2 (1) of the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters excludes 17 matters from the scope of application of the Convention.

[4] See QU Song, et al.: China Shows Its Image as a Responsible Power-International People Positively Evaluate China's Foreign Work Achievements, People's Daily, June 22, 2018, 3rd edition.

out relevant practices in the recognition and enforcement of foreign maritime judgments in order to enhance the prosperity of free trade, foster development of the world economy, and cultivate the benefits of economic globalization. This paper begins by evaluating the relevant provisions of existing international conventions involving maritime matters, followed by a comparison between the recognition and enforcement mechanisms under various conventions; and thereafter, an analysis of the advantages and disadvantages of the current enforcement regime and the difficulties in its application. Lastly, the paper will suggest a way forward for the construction of an international unified mechanism for recognition and enforcement of maritime judgments.

II.Normative Analysis of the Recognition and Enforcement Mechanism of Maritime Judgments in International Conventions

Due to the incongruencies of maritime jurisdiction rules of various countries, it is difficult to formulate a convention that is widely acceptable, provides for uniform jurisdiction, and encompasses rules for recognition and enforcement of maritime judgments. As a result of this dissonance, most international conventions provide only for maritime jurisdiction, and do not include recognition and enforcement of maritime judgments. Only a few conventions provide for the recognition and enforcement of maritime judgments on the basis of maritime jurisdiction. A review of the evolution of international legislation surrounding global circulation of maritime judgments indicates that it can be categorized into three legislative types: first, the single type; second, the unified type; and third, the mixed type. With the single type, legislation is specially made for the global circulation mechanism of maritime judgments, and clearly distinguishes maritime matters from other civil and commercial matters. This model is mainly reflected in some international maritime conventions. For example, the *International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships* in 1952 and the *United Nations Convention on the Carriage of Goods by Sea* in 1978 realize the international unification of maritime jurisdiction rules in the fields of maritime transport, maritime tort, and more; and the *Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, International Convention on Civil Liability for Oil Pollution Damage,* and *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage* in 1974 provide for maritime jurisdiction as well as the recognition and enforcement of maritime judgments. The legislative model classified as the unified type no longer

distinguishes between maritime matters; rather it regulates maritime matters as a part of civil and commercial matters. Examples of the unified type include the *Convention on Choice of Cour*t and the *Hague Judgments Convention.* The mixed type legislative model makes special provisions according to the particularity of maritime matters by classifying maritime matters alongside civil and commercial matters. Two examples of the mixed type include the *Brussels Convention I* and the *Lugano Convention*.

The three legislative models have their own advantages and disadvantages. To illustrate, the single type legislative model is more focused on this field but entails the most difficulty while drafting the convention; the unified type legislative model has the potential to improve the degree of international uniformity in recognition and enforcement of maritime judgments, but is difficult to adapt to the particularity of maritime litigation and often produces conflicts in practical application. Lastly, the mixed type legislative model is more practical but is hard to implement especially when the judicial model and cultural tradition between member States differs greatly from one another. At present, the recognition and enforcement mechanism of maritime judgment is mainly embodied in international maritime conventions following the single legislative model, and the *Brussels Convention I* which follows the mixed legislative model.

A.Recognition and Enforcement Mechanism of Maritime Judgments in International Maritime Conventions

As encapsulated in Table 1, only some international maritime conventions have, till date, made provisions on the recognition and enforcement of foreign maritime judgments.

Table 1 List of Recognition and Enforcement Mechanisms of Maritime Judgments contained in International Conventions

Number	Convention	Clause	Content
			Article 11 of the Convention complements Article 17 of the Athens Convention of 1974 by providing for conditions and review criteria for recognition and

1	Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea,1974	Article 11	enforcement, as well as circumstances for denial of recognition and enforcement: 1. For a judgment to be recognized and enforced under the Convention, the following conditions must be met: (1) The court that gave the judgment should have jurisdiction in accordance with the provisions of the Convention; (2) The judgment should be enforceable in the country of origin; and (3) The judgment should be final. A judgment that meets the conditions for recognition can be enforced in all member states, without substantive re-examination by the state where it is sought to be enforced, provided that all formalities have been completed in the country of origin. 2. The Convention specifies two situations in which judgments may not be recognized and enforced: (1) where the judgment was obtained by fraud; (2)where the defendant was not given reasonable notice and a fair opportunity to present the case. The Convention does not exclude the application of other relevant recognition and enforcement conventions or domestic laws, but it requires that the standard of determination shall not be lower than the

			provisions of the Convention.
2	*International Convention on Civil Liability for Oil Pollution Damage*	Article 10	The Convention provides for conditions and review criteria for recognition and enforcement, as well as circumstances for denial of recognition and enforcement, the specific content of which is fundamentally the same as the *Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea* in 1974. However, it does not provide for the application of other issues related to recognition and enforcement of the Convention.
3	International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage	Article 8	This article of the Convention only provides conditions for recognition and enforcement of judgments: 1. The judgment required by the Convention to be recognized and enforced shall be a judgment against the fund in accordance with the relevant distribution issues of this Convention. For a judgment to be recognized and enforced under the Convention, the following conditions must be met: (1) The court that made the judgment should have jurisdiction in accordance with the provisions of the Convention; (2) The judgment should be enforceable in the

			country of origin; (3) The judgment should be final. Judgments that meet the conditions for recognition and enforcement may be recognized and enforced in all member states.
4	*Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage*, *1992*	Article 8	The Convention shall extend the recognition and enforcement of judgments on the basis of the *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage,* and other provisions remain unchanged. At the same time, regulations on the application of other convention-related matters have been included. The Convention does not exclude the application of other relevant recognition and enforcement conventions or domestic laws, but it requires that the standard of determination shall not be lower than the provisions of this Convention.
5	*International Convention on Civil Liability for Bunker Oil Pollution Damage*, *2001*	Article 10	The Convention provides for conditions and review criteria for recognition and enforcement, as well as circumstances for denial of recognition and enforcement, the specific content of which is largely the same as the *Protocol of 2002 to the Athens Convention relating to the Carriage*

			of Passengers and their Luggage by Sea in 1974.

By comparing the provisions of various international maritime conventions related to the recognition and enforcement of maritime judgments in the above table, it can be seen that the provisions of these conventions are fairly similar and general, indicating that it is difficult to form a relatively complete legal system. There is a lack of specific and detailed regulation, uniform standards for enforceable judgements, and clear basis of legal application. Relying solely on the regulations contained in existing international maritime conventions precludes the ability to meet the actual needs of global circulation of maritime judgments. Within the existing legal regime, the following problems with the recognition and enforcement mechanism of maritime judgments may be ascertained:

Firstly, the deterministic elements of maritime judgments lack criteria for judgment. The deterministic element of maritime judgment is the foundation for its recognition and enforcement. However, the various conventions outlined in the table lack clear corresponding provisions. Most conventions in the table clarify that "the judgment is enforceable in the country of origin and it is not subject to review in the country". There is no distinction between the recognition and enforcement of maritime judgments, or provisions indicating the national law under which the certainty of maritime judgments may be determined, demonstrating a lack of criteria for review of deterministic elements.

Secondly, the reasons for denial of recognition and enforcement are inadequate. As seen in the table, the reasons for the denial of recognition and enforcement are largely only fraud and procedural issues encountered in the original court at the first instance. Some conventions do not even provide reasons for denial of recognition and enforcement. Such provisions cause more harm than good as they are not conducive to protecting the rights of parties. Moreover, they result in excessive reliance on the domestic law and discretion of courts of the applied country while applying for recognition and enforcement. This, in turn, makes it difficult to formulate a set of unified regulations for the recognition and enforcement of judgments internationally.

Thirdly, the provisions of the conventions are imprecise. Most conventions highlighted in the above table use general expressions even while providing for the recognition and enforcement of maritime judgments. Therefore, while applying these provisions in practice, an overlap with various domestic laws is inevitable. Questions such as whether the judgment could be enforceable in the country of origin; the meaning of "judgment obtained by fraud";

and the understanding of "reasonable notice" are all issues that need to be judged in accordance with domestic laws. If the domestic law of the applicant country differs from the provisions of the conventions regarding denial of recognition and enforcement, smooth recognition and enforcement of maritime judgments would be obstructed. For example, in the case of "IRINI A"[1], while judging whether the application for recognition and enforcement of foreign court judgments is final, conclusive, and in compliance with the laws of the country of origin, British courts also required the foreign courts' judgments to meet the requirements of common law. That is, the judgment applying for recognition and enforcement must be for a definite sum of money, and should not be contrary to natural justice and public policy.

B.Provisions on the Recognition and Enforcement of Maritime Judgments in Regional Conventions

The "Brussels System"[2] is currently the most successful international cooperation model in the field of recognition and enforcement of judgments. Strictly speaking, the *Brussels Convention I* is a regional convention and an example of successful practice among EU member states. Through this convention, the goal of executing freely enforceable judgments within EU member states has been achieved.[3] Since the *Brussels Convention I* came into force on March 1, 2002, it has substantially promoted the development of civil exchanges and civil litigation systems among EU member states. However, with the growing popularization of global e-commerce and the introduction of numerous emerging technologies, cracks have gradually appeared within the framework of the *Brussels Convention I.* In its 2009 report, the European Commission suggested that the revision of the *Brussels Convention I* should be initiated with adjustment of some provisions in order to promote the circulation of civil and commercial judgments. The European Commission's suggestion was adhered to: in 2012, an amendment was made in the form of *Regulation No. 1215/2012 on the Jurisdiction and Enforcement of Judgments in Civil and*

[1] See ASCOT COMMODITIES N.V. v. NORTHERN PACIFIC SHIPPING ([1999] 1 Lloyd's Rep. 196).

[2] Most scholars refer to the Convention on the Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (1968 Brussels Convention) signed by the Member States of the European Community in 1968, the Rules on the Recognition and Enforcement of Jurisdiction and Judgments in Civil and Commercial Matters (Brussels Convention I) adopted by the Council of The European Union in 2000, the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Lugano Convention) signed between the member states of the European Community and the member states of the European Free Trade Association in 1988, and the Regulation No. 1215/2012 on the Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Revision) (Brussels Convention I (Revision)) adopted by the European Parliament and the Council of the European Union in 2012, collectively as the "Brussels System".

[3] See WANG Jiwen: Research on the International Convention Modes for the Recognition and Enforcement of Foreign Judgments, China University of Political Science and Law Press, 2010 edition, p. 97-98.

Commercial Matters (Revised) (Brussels Convention I (Revised)), which entered into force in the EU in 2015.[1]

According to the *Brussels Convention I (Revised),* the regulations can be applied to the recognition and enforcement of maritime judgments. Article 1 of the *Brussels Convention I (Revised)* provides for the substantive scope of its application, stipulating that the Convention applies to civil and commercial matters, while excluding certain other matters from the application of the Convention[2]. It can be seen that maritime matters are part of civil and commercial matters and are not excluded from the Convention, so the provisions of the Convention can be applied. At the same time, Article 2 of the *Brussels Convention I (Revised)* elucidates the definition and scope of recognition and enforcement of judgments: broadly, a civil judgment refers to a binding judgment made by a court on a dispute over civil rights and obligations between parties, or on an application submitted by an applicant based on the facts ascertained, and provisions of relevant laws.[3] Due to the variations in legal systems of countries, the concept of "judgment" differs across domestic legal systems. For example, in Hungary, the court's rulings on the facts of the case are called "judgments", while decisions on other matters are called "orders".[4] For this reason, the *Brussels Convention I (Revised)* contains flexible provisions regarding the scope of the term "judgment".[5] In the Convention, "judgment" includes not only rulings, orders, decisions, or execution writs, but also decisions made by court clerk on litigation fees or other expenses. Additionally, interim measures (including protective measures) made by courts or tribunals possessing the requisite substantive jurisdiction also fall within the scope of "judgments" provided by the Convention. However, the Convention caveats the scope of "judgment" by providing that interim measures may not be included if the measure was issued without summoning the defendant to appear in court – unless a judgment containing such measures had been served on the said person prior to execution.

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[1] See Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and enforcement of judgments in civil and commercial matters (recast), [2012] OJ 351/1.

[2] See EU, Regulation (EU) No.1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), Official Journal of European Union L 351/1, 20.12.2012, Article 1.

[3] See XU Hong: International Civil Judicial Assistance, Wuhan University Press, 2006 edition, p. 223.

[4] See XUHong: International Civil Judicial Assistance, Wuhan University Press, 2006 edition, p. 224.

[5] See Article 2 of the Brussels Convention I (Revised): "judgment" means any decision made by a court or tribunal of a certain member state, regardless of the name of the decision, such as rulings, orders, decisions or execution writs, and decisions made by court clerk on litigation fees or other expenses. The Convention further stipulates that notarized documents and court settlement documents can also be recognized and enforced. Article 58: "The settlement measures approved by the court in the litigation procedure and enforceable in the country where the settlement is reached shall also be enforced in the requested country under the same conditions as the notarized document. The courts or relevant agencies of the member states of the Licensing Settlement Measures shall, upon the request of the interested parties, issue a certification document conforming to the standard format of Annex V of the rules." It is worth noting that this article does not provide for the recognition of notarized documents and court settlement documents, but only provides for enforcement. This practice is inherited by the Convention on Choice of Court and the reasons for this are explained in the Convention's interpretation report. See T. C. Hartley & M. Dogauchi, Convention on Choice of Court Agreements: Explanatory Report (First Draft) of May 2006, Paragraphs 210-211.

Considering the design of the above clauses and the wide scope of application of the Convention, maritime judgments made by foreign courts – decisions to arrest ships, rulings on the establishment of a maritime liability limitation funds, and more – can be recognized and enforced in accordance with the Convention.

The *Brussels Convention I (Revised)* also outlines the jurisdiction of maritime claims. The *Brussels Convention I (Revised)* is a dual convention in essence: it not only stipulates the direct jurisdiction of the court, but also sets forth requirements for the indirect jurisdiction of the court. Based on the particularity of the subject matter of litigation, the Convention stipulates special jurisdiction rules for certain matters and forms of litigation. For example, Article 7(7) of the Convention indicates the jurisdiction of the court based on the seizure of rescued goods and freight. It states that disputes arising from the payment of salvage remuneration or freight in the carriage of goods by sea, may be litigated at the court where the goods were seized for guarantee payment, or at the local court where the goods should have been seized but were exempted from seizure due to the provision of bail or other guarantees. It further enumerates that it should be limited to situations in which the defendant has an interest in the goods or freight, or had an interest in the rescue[1]. These provisions were not present in the text of the 1968 *Brussels Convention* – they were added for the first time in Article 5(7) of the subsequent 1978 text.[2] The *Brussels Convention I (Revised)* clearly lays down the special jurisdiction of maritime claims, and also allows the domestic laws of member states to be used as the basis for ascertaining the court's jurisdiction in some maritime matters. For example, Article 9 of the Convention stipulates that if a court of a certain member state has jurisdiction over litigation related to ship use or operating liability in accordance with this Convention, then that court would have the right to hear cases related to the limitation of maritime claims liability. At the same time, any other court established for the same purpose in accordance with the domestic law of the member state would also be able to exercise jurisdiction over requests for limitation of liability for maritime claims.[3] The *Brussels Convention I (Revised)* also identifies the special jurisdictional provisions on maritime matters contained in other international conventions entered into force to which member states have joined. According to Article 71 of the Convention, special jurisdiction rules contained in international conventions would take precedence, and

[1] See EU, Regulation (EU) No.1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), Official Journal of European Union L 351/1, 20.12.2012, Article 7(7).

[2] See EC, The 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Official Journal of European Union C27, 26.1.1998, Article 5(7).

[3] See EU, Regulation (EU) No.1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), Official Journal of European Union L 351/1, 20.12.2012, Article 9.

that the Convention would not affect the validity of jurisdiction of member states involved in special cases or recognition and enforcement of judgments.[1]

Although the *Brussels Convention I (Revised)* has greatly eased the circulation of civil and commercial judgments among EU member states, there are still many problems in practice. For example, the EU's transnational civil procedure rules are showing a state of "fragmentation": each EU member state participates in the EU's unified legislation in a different way, rendering each piece of legislation in various member states to be applied differently.[2] In some cases, such as the "WINTER" case[3], when the applicant country recognizes and enforces the judgment, situations may arise which are contrary to the provisions of domestic law or eclipse the obligations stipulated in other international conventions ratified by the country.

This paper believes that while the Brussels system cannot solve the problem of global circulation, recognition, and enforcement of foreign maritime judgments, it is still a model worth referring to. The Brussels System is a regional convention and is therefore unable to promote recognition and enforcement of maritime judgments on a global scale – the reason for its success is the highly unified values and judicial foundations of EU member states. In order to improve the global circulation of maritime judgments, it is expedient to strike a balance between the needs of various countries, pertaining to issues such as jurisdiction and the circulation of maritime judgments. Therefore, international uniformity of the recognition and enforcement of maritime judgments can only be attained by relying on international conventions that deal with recognition and enforcement of judgments. The Brussels System may provide some ideas for the construction of an international unified mechanism for the recognition and enforcement of maritime judgments in the future. As mentioned above, the legislative model with mixed type, as adopted by the Brussels System, can not only improve the international uniformity of recognition and enforcement of maritime judgments, but also take into account the particularity of maritime litigation. However, its acceptance rates are low. To construct an international unified mechanism for the recognition and enforcement of maritime judgments, it is possible to consider partly introducing the legislative model with a mixed type on the basis of a unified legislative model. In other words, the provisions of indirect maritime jurisdiction should be added on the basis of the existing

[1] See EU, Regulation (EU) No.1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), Official Journal of European Union L 351/1, 20.12.2012, Article 71.

[2] See DU Tao: The New Development of the European Union's Transnational Civil Litigation System-Comment on the Brussels Convention I (Revised), German Studies, 2014(1), p. 103.

[3] WINTER MARITIME LTD v. NORTH END OIL LTD LTD. SAME v. MARINE OIL TRADING LTD (THE "WINTER") ([2000] 2 Lloyd's Rep. 298).

recognition and enforcement of international conventions, and the scope of application of the conventions should be expanded to include all maritime matters into the existing mechanisms for recognition and enforcement of international civil and commercial judgments. In this way, a harmonized development of the regime for circulation of maritime judgments can be achieved by juxtaposing it with that of judgments of a civil and commercial nature. A widely acceptable model of recognition and enforcement of maritime judgments can also be achieved by improving construction of the system for the same. Also, it is possible to improve the systemic construction of recognition and enforcement mechanism of maritime judgments so as to construct a recognition and enforcement mechanism of maritime judgments that is more acceptable to all countries in a more open and gentle way.

III. Analyzing the Likelihood of International Unity: Mechanism for the Recognition and Enforcement of Maritime Judgments under the Hague Judgments Convention System[1]

Formulating an internationally acceptable convention on recognition and enforcement of judgments has always been one of the goals of the Hague Conference on Private International Law, as driven by the sustained efforts of states. As the first global convention on jurisdiction and judgment in civil and commercial matters, the *Convention on Choice of Court* was adopted at the 20th Session of the 20th Hague Conference on Private International Law, 2005 after 13 years of discussion and consultation, and officially entered into force on October 1, 2015[2]. The Convention prescribes the principles governing choice of courts, the rights and obligations of courts, and the recognition and enforcement of judgments.

Compared with the Brussels System, the *Convention on Choice of Court,* contains less stringent provisions and is more widely accepted. This acceptance may be credited to the outcome of the Convention's success in striking a balance between factors such as judicial certainty, reasonableness of court jurisdiction, circulation of judgments, and relief of parties' rights. On the basis of the *Convention on Choice of Court,* the *Hague Judgments*

[1] The *Convention on Choice of Court* and the *Hague Judgments Convention* are closely related in content, and these two conventions are the most important achievements since the Hague Conference on Private International Law launched the Hague Judgment Plan in 1992, so this paper uses the Hague Judgments Convention System as the collective term for the two to describe the common rules and characteristics of the two conventions.

[2] See Convention of 30 June 2005 on Choice of Court Agreements adopted by the Twentieth Session and Explanatory Report by Trevor Hartley & Masato Dogauchi, HCCH Publications. 2007. The original text of the convention can be found on the website of the Hague Conference on Private International Law (https://www.hcch.net/en/instruments/conventions/full-text/?cid=98), visited on July 7, 2021.

Convention[1] (as adopted at the 22nd Diplomatic Session of the Hague Conference on Private International Law on July 2, 2019) is the first international multilateral convention on recognition and enforcement of judgments of foreign civil and commercial courts. Together with the *Convention on Choice of Court,* it paved a way for the global circulation of court judgments.[2] As mentioned above, both the *Convention on Choice of Court* and the *Hague Judgments Convention* have adopted a detailed list excluding a large number of matters, including some maritime matters, from the scope of application of the conventions. This practice may significantly impact the recognition and enforcement of maritime judgments by foreign courts.

A. The Exclusion of Maritime Matters in the *Convention on Choice of Court*

Article 2 of the *Convention on Choice of Court* lists special matters that exclude the application of the Convention: paragraph 2(f) excludes the application of all transportation-related matters, regardless of whether the object of transportation is passengers or goods, and whether the mode of transportation is at sea, road, rail or air, or any combination of the three.[3] At the beginning of the revision process of the *Convention on Choice of Court*, in the draft text of the *Convention on the Exclusive Choice of Court Agreements* produced in 2004, only contracts for the carriage of passengers by sea and contracts for the carriage of goods by sea were excluded from the scope of the Convention. Two reasons may be posited for this exclusion: first, that it was believed that the contracting states of the *Hague-Visby Rules*[4] might not be willing to accept the choice of court clause in the bills of lading. Hypothetically, if the country with jurisdiction designated by the choice of court clause was not a party to the *Hague-Visby Rules*, then a shipowner may manage to evade the coercive power of the *Hague-Visby Rules* – an unfavourable outcome for states which are parties to the *Hague-Visby Rules*. Secondly, this matter has been listed as a new legislative item by the United Nations Commission on International Trade Law. The Hague Conference on Private International Law does not intend to create repetitive legislation on this question, and lawsuits involving social or third-party interests, such as a shipowner's limitation of liability or general average, may often cause unique problems. Therefore, the Hague Conference on Private International Law propounds the belief that party

[1] See Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. The original text of the convention can be found on the website of the Hague Conference on Private International Law (https://www.hcch.net/en/instruments/conventions/full-text/?cid=137), visited on July 7, 2021.

[2] See XU Guojian: The Last Fortress Conquered: A Review of Key Issues Involved in the 2019 Hague Judgments Convention, Journal of Shanghai University of Political Science and Law (Rules of Law), 2020(2), p. 1.

[3] See HCCH, Convention of 30 June 2005 on Choice of Court Agreements, Art. 2(2).

[4] "They were adopted in 1924 and were amended by the Brussels Protocol of 1968. They are sometimes called the 'Hague–Visby Rules'", see Dogauchi / Hartley Report (Dec 2004), Preliminary Document No 26 of December 2004, p.10, para. 25.

autonomy should be restricted in this regard.[1] Article 2(2)(g) of the Convention also excludes five types of maritime matters: marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage at sea.[2] This exclusion is a result of the Hague Conference on Private International Law's belief that some municipal laws would likely cause issues while signing choice of court agreements on the abovementioned disputes.[3] However, a reading of the interpretation report of the Convention indicates that maritime matters such as marine insurance, non-emergency towing and salvage, shipbuilding, and ship mortgage and lien still fall within the scope of application of the Convention.[4]

B. The Exclusion of Maritime Matters in the *Hague Judgments Convention*

The *Hague Judgments Convention* partly follows the structure of the *Convention on Choice of Court*, and also lists special matters that exclude the application of the Convention in Article 2 of the Convention. Among them, the provisions of Paragraph 2(f) are the same as the *Convention on Choice of Court*, excluding the application of all transportation matters[5], regardless of whether the object of transportation is passengers or goods and notwithstanding the mode of transportation being sea, road, rail or air, or any combination of the three.[6] Article 2(2)(g) of the Convention, however, differs from the *Convention on Choice of Court*, insofar as it excludes three types of maritime matters: transboundary marine pollution; marine pollution in areas beyond national jurisdiction and ship-source marine pollution; and the limitation of liability for maritime claims and general average.[7] According to the interpretation report of the Convention, the exclusion of maritime matters in the *Hague Judgments Convention* was introduced by the *Convention on Choice of Court*.[8]

Some conventions dealing with marine pollution also make provisions for the recognition and enforcement of such judgments. The Hague Conference on Private International Law excluded certain marine pollution matters from the scope of application of the Convention in order to avoid conflicts surrounding applications for recognition and enforcement of judgments. Before the 22nd Diplomatic Session, states vastly differed in their

[1] Dogauchi / Hartley Report (Dec 2004), Preliminary Document No 26 of December 2004, p.11.
[2] See HCCH, Convention of 30 June 2005 on Choice of Court Agreements, Art. 2(2).
[3] T. Hartley & M. Dogauchi, Explanatory Report on the 2005 Hague Choice of Court Convention, in Proceedings of the Twentieth Session (2005), Tome III, Choice of Court Agreements, 2010, p. 803, para. 59.
[4] See Hartley / Dogauchi Report (2007), p. 34, para. 30.
[5] See HCCH, Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgements in Civil Commercial Matters, Article 2(2).
[6] See Francisco Garcimartín & Geneviève Saumier, Explanatory Report on the 2019 HCCH Judgments Convention, p. 61, para. 54.
[7] See HCCH, Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgements in Civil Commercial Matters, Article 2(2).
[8] See Francisco Garcimartín & Geneviève Saumier, Explanatory Report on the 2019 HCCH Judgments Convention, p. 61, para. 55.

opinions on this issue. The United States of America believed that all types of marine pollution should be included in the scope of application of the Convention, whereas the European Union is of the view that only marine pollution caused by ships should be excluded. The consensus, finally, was to limit the exclusion of marine pollution matters to the three types of marine pollution specified in Article 2(2)(g) of the Convention, while retaining a provision that other forms of marine pollution would continue within the scope of application of the Convention.[1]

Unlike the *Convention on Choice of Court*, the *Hague Judgments Convention* does not exclude emergency towing and emergency rescue at sea. As the interpretation report of the *Hague Judgments Convention* points out, this is because other conventions do not include the recognition and enforcement of these matters, and in the view of the Hague Conference on Private International Law, there is sufficient reason to encourage rescuers to provide such aid. Although failure to effectively compensate the rescuer may lower the rescuer's willingness to bear the risk and costs of providing rescue, it is worth noting that emergency towing and rescue is, to a large extent, within the domain of the national government or state authorities, as the case may be mandatory operations carried out according to the situation. Therefore, certain judgments will not be in compliance with the civil or commercial matters stipulated in Article 2 of the Convention.[2] As a result, various countries encounter differences while determining emergency towing and rescue issues. Before the Diplomatic Session, some countries believed this matter to be legally compulsory as an administrative compulsory law rather than a civil and commercial one, and should therefore be excluded from the scope of application of the Convention. Another point of view was that despite the matter's mandatory legal nature, it would be apt to regard it as a civil and commercial matter in general, and hence not be excluded from the scope of application of the Convention. In the end, the Convention chose the middle path.[3] In addition to the limitation of liability for maritime claims, other maritime matters such as marine insurance, shipbuilding or ship mortgage and lien are also included in the scope of application of the Convention.[4]

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[1] See "Note on reconsidering 'marine pollution and emergency towage and salvage'within the scope of the draft Convention on the recognition and enforcement of foreign judgments in civil or commercial matters", Prel. Doc. No 12 of June 2019 for the attention of the Twenty-Second Session on the Recognition and Enforcement of Foreign Judgments (18 June–2 July 2019) (hereinafter, "Prel. Doc. No 12 of June 2019"), para. 10.

[2] See HCCH, Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgements in Civil Commercial Matters, Art. 1(1) of the Convention; see Prel. Doc. No 12 of June 2019, para. 76.

[3] See XU Guojian: The Last Fortress Conquered: A Review of Key Issues Involved in the 2019 Hague Judgments Convention, Journal of Shanghai University of Political Science and Law (Rules of Law), 2020(2), p. 29.

[4] Hartley / Dogauchi Report, para. 59. For an explanation of the scope of the terms "limitation of liability for maritime claims", see P. Schlosser, "Report on the Convention of 9 October 1978 on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice", Official Journal of the European Communities,

C. The Hague Judgments Convention Evokes the Possibility of International Unification of the System for Recognition and Enforcement of Maritime Judgments

A comparison of the *Convention on Choice of Court* with the *Hague Judgments Convention* and their corresponding interpretation reports would demonstrate four main reasons for the Hague Judgments Convention system:

First, the Hague Judgments Convention system endeavours to avoid conflict with other international conventions. Following the belief of the Hague Conference on Private International Law, matters in the Hague Judgments Convention, which overlap with maritime matters related to issues of application as contained in international conventions, have been excluded in order to avoid conflicting provisions.

Second, some states propounded the opinion that certain maritime matters – such as marine pollution and emergency towing – merited regulation by special conventions in light of their unique nature. Such matters are therefore excluded from the scope of application of the conventions.

Third, special legislation on maritime litigation jurisdiction should be avoided. In the case that the contracting States to the conventions have not acceded to the international maritime conventions, if relevant maritime matters are not excluded, special legislation on maritime litigation jurisdiction is required, so it is excluded.

Fourth, in furtherance of the Hague Judgments Convention's aim to avoid conflict, the Hague Conference on Private International Law excludes the maritime matters which have been listed by the United Nations Commission on International Trade Law as new legislative items. This prevents repetitive and overlapping legislation.

Regarding the above issues, this paper argues that the *Hague Judgments Convention* has expanded the scope of application of some maritime matters when compared with the *Convention on Choice of Court*. According to the interpretation report of the *Hague Judgments Convention*, the Hague Conference on Private International Law has gradually become aware of the importance of the recognition and enforcement of maritime judgments in the process of formulating the *Hague Judgments Convention*. However, from a legislative perspective, there are still

5.3.1979, No C 59/71, Luxembourg, 1979 (hereinafter, "Schlosser Report"), paras 124-130.

some disputed maritime matters which have been finally excluded from the scope of the Convention. Therefore, the question of whether international conventions, which have come into force and involve maritime matters, can be practically applied remains to be determined by the municipal laws of a contracting state. As a result, incorporating all maritime matters into the Hague Judgments Convention System may not be in conflict with other international conventions. Finally, another key factor obstructing uninterrupted circulation of foreign maritime judgments is the issue stemming from the particularity of maritime litigation: that the widening of applicable range of maritime matters led to legislators ignoring the international uniformity of rules for recognition and enforcement of such judgments.

With the increasing frequency of civil and commercial exchanges in various countries, the demand for the recognition and enforcement of global civil and commercial judgments in the world has gradually increased. However, in the maritime field, which has always been regarded as the most unified, the international unified rules for the recognition and enforcement of maritime judgments have been missing. In recent years, both the United Nations Commission on International Trade Law and the International Maritime Commission have further updated the recognition and enforcement of maritime judgments through new legislative items and the formulation of special conventions. However, this measure has been specifically made – which may ameliorate the global circulation of certain types of maritime litigation, but ends up being less helpful with recognition and enforcement of most foreign maritime judgments. If recognition and enforcement of maritime judgments could be incorporated into the Hague Judgments Convention system, it would not only promote the establishment of an international unified mechanism for recognition and enforcement of maritime judgments, but also complement existing international maritime conventions and other UN legislative projects, so as to form a relatively complete global system for recognition and enforcement of maritime judgments.

Therefore, this paper argues that a way forward for formulating an international unified mechanism for the recognition and enforcement of maritime judgments can start from the following aspects:

First, all maritime matters may be gradually integrated into the Hague Judgments Convention System, therefore enabling the *Hague Judgments Convention* to apply to maritime matters as well. In this regard, the Hague Conference on Private International Law has reckoned that the potential problems of incorporating maritime matters into the Hague Judgments Convention System can actually be mitigated or largely resolved. The impact of

the Hague Judgments Convention System on the recognition and enforcement mechanism of international civil and commercial judgments is self-evident: it clarifies the rules for recognition and enforcement, and fills the gaps in international civil and commercial law. The regulations on recognition and enforcement of maritime judgments in existing international maritime conventions are predominantly outdated, and can no longer meet the needs of the current global circulation regime and the endeavour to improve ease of doing business. Therefore, if the scope of application of the Hague Judgments Convention System were to be extended to all maritime matters, the global circulation of maritime judgments would be more effectively promoted.

Second, it is necessary to increase the provision of indirect jurisdiction over maritime matters. The maritime matters within the scope of the Hague Judgments Convention System still lack corresponding special jurisdiction provisions, which lead to judgments made under the maritime special jurisdiction rules not being recognizable and enforceable under the Hague Judgments Convention System. Therefore, in the event of an overlap between the Hague Judgments Convention System and other international maritime conventions, the relevant maritime jurisdiction rules contained in the international conventions can be taken as the basis for examining whether the courts of the original country have jurisdiction. This would ensure that special provisions on the jurisdiction of maritime litigation can be avoided while taking into account the particularity of the maritime litigation jurisdiction.

The entry into force of the *Convention on Choice of Court* and the adoption of the *Hague Judgments Convention* have played a critical role in promoting the circulation of foreign maritime judgments and furthering debate amidst the academic community. Although disputes arising from the operation of the Hague Judgments Convention System have been resolved to a certain extent within the framework of the conventions, there are still pertinent issues worthy of nuanced discussion. It requires detailed reflection and exploration by academics on how to build a set of complete, internationally uniform rules for the recognition and enforcement of maritime judgments on the basis of the Hague Judgments Convention System, and how to integrate the provisions of international conventions with the content of specialized conventions. If states endeavour to harmonize the *Hague Judgments Convention* and *Convention on Choice of Court* with other international conventions in order to create a unified mechanism – the world economy may finally see the possibility (and benefits) of seamless circulation of maritime judgments around the world. Such a mechanism will assume an important role in the international legal system: it will enable stronger governance, enhance the ease of doing business, create a favourable environment for responding to evolving challenges, and help nurture a community with a shared future for all mankind.

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大连旅顺滨海船舶修造有限公司与中国人民财产保险股份有限公司大连市分公司营业部、中国人民财产保险股份有限公司大连市分公司船舶修理合同纠纷案

案例摘要

一、案件信息

（一）基本信息

案由：船舶修理责任保险纠纷，案号：（2016）辽 72 民初 629 号、（2018）辽民终 400 号

原告：大连旅顺滨海船舶修造有限公司

被告：中国人民财产保险股份有限公司大连市分公司营业部、中国人民财产保险股份有限公司大连市分公司

裁判时间：一审：2017 年 12 月 26 日、二审：2018 年 6 月 28 日

（二）案件事实

滨海公司与大连人保营业部签订修船责任保险协议书，约定由大连人保营业部承保滨海公司的修船责任险。2010 年 12 月 25 日，滨海公司承接捷盛公司“捷盛 6”轮的常规保养检修工程，最终验收前发生事故，导致“捷盛 6”轮损坏。

大连人保公司理赔中心向滨海公司发来保险拒赔通知书，以事故不属于保险责任为由拒绝赔偿。

二、争议焦点

案涉“捷盛 6”轮机损事故所造成的主机机器本身损坏是否属于修船责任保险协议书第三条第一项约定的保险责任范围。

三、法院观点

修船责任保险协议书第三条第一项对保险责任范围的约定为：“按修船合同及有关协议、法律规定应由被保险人负责的，由于修船工人或技术人员的过失而引起的火灾事故或船舶机损对承修船舶所造成的直接损失，但机器本身的损坏不予负责。”滨海公司主张该条款为格式条款，应作有利于被保险人的解释。大连

人保营业部及大连人保公司主张该协议第三条第一项不是格式条款。但上述修船责任保险协议书系人保公司为重复使用而预先拟定的。大连人保营业部及大连人保公司虽称其在订立协议时与滨海公司进行过协商，但未能提供证据加以证明。修船责任保险协议书属于格式合同，该协议书第三条保险责任范围第一项，属于格式条款。

依照《中华人民共和国保险法》第三十条的规定，采用保险人提供的格式条款订立的保险合同，保险人与被保险人对合同条款有争议的，应按照通常理解予以解释；对合同条款有两种以上解释的，人民法院应当作出有利于被保险人的解释。“但机器本身的损坏不予负责”可理解为因修理行为对被修机器造成的损坏不予赔偿，亦可理解为被修船舶机器在修理前就已经存在的原有损坏和因机器固有的材质缺陷单独或与其他因素叠加引起的损坏不予赔偿。当事人各方对但书条款存在两种不同解释，均具有合理性，由于修船责任保险协议书系被告大连人保营业部提供的格式合同，该协议书第三条第一项为格式条款，应作出有利于被保险人滨海公司的解释，即“但机器本身的损坏不予负责”应解释为被修船舶机器在修理前就已经存在的原有损坏和因机器固有的材质缺陷单独或与其他因素叠加引起的损坏不予赔偿。案涉机损事故系因滨海公司修理工作人员操作失误而引发，造成了主机机器的损坏，属于修船责任保险协议书第三条第一项约定的保险责任范围。

关于滨海公司提出的“但机器本身的损坏不予负责”属于免责条款，且大连人保营业部未对该免责条款履行提示及明确说明义务，导致该条款无效的主张。在修船责任保险中，保险人可以承保被保险人的全部修船责任，也可以承保部分修船责任。修船责任保险的范围由保险人和被保险人在修船责任保险协议书中约定。案涉修船责任保险协议书第三条保险责任范围第一项，系对保险赔偿责任范围的约定，“机器本身的损坏不予负责”是对保险赔偿责任范围界定的条件，不属于免责条款。

四、小结

随着我国海洋经济的稳步发展，船舶保有量不断提升，船舶修理事故时有发生，修船责任保险作为船舶修理企业规避事故风险的有效措施被广泛使用。在保险事故发生时，保险人与被保险人对保险条款常有不同理解，通常涉及格式条款、免责条款的认定。

本案争议焦点为“捷盛 6”轮机损事故所造成的主机机器本身损坏是否属于修船责任保险协议书第三条第一项约定的保险责任范围。该争议焦点涉及三个问题：1.关于修船责任保险协议书第三条第一项对保险责任范围的约定是否为格式条款。依据《中华人民共和国合同法》第三十九条第二款对格式合同的规定，结合对修船责任保险协议书的页眉名称、印章、内容的分析，认定修船责任保险协议书系人保公司为重复使用而预先拟定的格式合同；2.对“机器本身的损坏不予负责”这句合同条款的理解。在保险人和被保险人对

格式条款有不同理解的情况下，被保险人的理解只要是合理的通常理解，即应做出有利于被保险人的解释；3.关于“机器本身的损坏不予负责”是否属于免责条款。该条款列在修船责任保险协议书第三条第一项中，而修船责任保险协议书第三条第一项系对保险范围的约定“机器本身的损坏不予负责”是对保险赔偿责任范围界定的条件，不属于免责条款。

在了解本案后，广大船舶修理企业在选择投保修船责任保险时应当对保险责任范围等保险条款加以关注，避免发生纠纷，以更好地维护自身合法权益。

案例提供者：大连海事法院海事庭法官王敏

责任编辑：杨伟

Dispute over Contract for Ship Repair Between Dalian Lvshun Binhai Shipping Building and Repairing Co., Ltd. and PICC Property and Casualty Company Limited Dalian Branch Business Office, PICC Property and Casualty Company Limited Dalian Branch

Case Summary

I. Case Information

A. Basic Information

Cause of Action: Ship repair liability insurance dispute

Case Number: First instance： No. 629 [2016], First, Civil Division, 72, Liaoning; Second instance: No. 400 [2018], Final, Civil Division, Liaoning

Plaintiff: Dalian Lvshun Binhai Shipping Building and Repairing Co., Ltd.

Defendants: PICC Property and Casualty Company Limited Dalian Branch Business Office; PICC Property and Casualty Company Limited Dalian Branch

Judgment Time: First instance: December 26, 2017; Second instance: June 28, 2018

B. Facts

Dalian Lvshun Binhai Shipping Building and Repairing Co., Ltd. (hereinafter referred to as "Binhai Company") signed a Liability Insurance Agreement for ship repair (hereinafter referred to as "Agreement") with PICC Property and Casualty Company Limited Dalian Branch Business Office (hereinafter referred to as "Dalian PICC Business Office"), stipulating that Dalian PICC Business Office shall underwrite the liability insurance for ship repair of Binhai Company. On December 25, 2010, Binhai Company undertook the routine maintenance and overhaul project of "JIE SHENG 6" of Zhejiang Jiesheng Channel Project Ltd. (hereinafter referred to as "Jiesheng Company"), and an accident occurred before the final inspection and acceptance, resulting in the damage to "JIE SHENG 6". The claim center of PICC Property and Casualty Company Limited Dalian Branch (hereinafter referred to as "Dalian PICC Company") sent a notice of insurance refusal

to Binhai Company, refusing to pay compensation on the grounds that the accident did not warrant insurance liability.

II. Disputed Issues

The case is about whether the damage to the main engine machine itself, caused by the "JIE SHENG 6" engine damage accident, falls within the insurance scope agreed upon in Article 3(1) of the Agreement.

III. Court's Opinion

Article 3(1) of the Agreement stipulates the following: "According to the ship repair contract, relevant agreements, and legal provisions, the insured shall be responsible for direct losses caused by accidental fire or damage to the ship due to negligence of ship repair workers or technicians; however, the insured is not responsible for the damage to the machine itself." Binhai Company claims that this clause is a Standard Term, so it should therefore be interpreted in favor of the insured. Dalian PICC Business Office and Dalian PICC Company claim that Article 3(1) of the Agreement is not a Standard Term. However, the above-mentioned Agreement for ship repair was drawn up in advance and intended for repeated use by the PICC Company. Dalian PICC Business Office and Dalian PICC Company claimed that they had consulted with Binhai Company when they entered into the Agreement, but they were unable to provide evidence to prove this. The Agreement belongs to Standard Contract, and the first item regarding the scope of insurance in Article 3 of this Agreement belongs to Standard Term.

Article 30 of the Insurance Law of the People's Republic of China stipulates that, where there is any dispute between the insurer and the insured over any clause of an insurance contract concluded using the Standard Terms of the insurer, the clause shall be interpreted as it is commonly understood. If there are two or more different interpretations of the clause, the people's court shall interpret the clause in favor of the insured and beneficiary. "But it is not responsible for the damage to the machine itself," since what is stipulated in the Agreement can be interpreted in two ways: (1) the repair of the damage caused by the machine shall not be compensated; (2) the original damage to the repaired ship machine existed before repair and the damage caused by the inherent material defect of the machine alone or in combination with other factors shall not be compensated. The parties have two different interpretations of the proviso, both of which are reasonable. Article 3(1)

of this Agreement is a Standard Term because the Agreement is a Standard Contract provided by Dalian PICC Business Office, which shall be interpreted in favor of the insured, Binhai Company. That is, the clause that states "But it is not responsible for the damage of the machine itself" shall be applied to the second explanation. The machine damage accident in this case resulted from an operational error by the repair staff of Binhai Company, which resulted in the damage to the main engine machine, and that falls within the insurance scope agreed upon in Article 3(1) of the Agreement.

The clause "But it is not responsible for the damage to the machine itself," which was proposed by Binhai Company, belongs to the exemption clause, and Dalian PICC Business Office has not fulfilled its obligation to present and clearly explain the exemption clause, which leads to invalidation of the clause. In the liability insurance for ship repair, the insurer may underwrite all of the insured's liability for ship repair, or they can underwrite just part of the liability for ship repair. The scope of liability insurance for ship repair shall be stipulated in the agreement between the insurer and the insured. In this case, the first item of Article 3 of the ship repair liability insurance agreement is about the agreement on the scope of insurance compensation liability. The clause "But it is not responsible for the damage of the machine itself" is the condition for defining the scope of insurance liability, and it does not belong to the exemption clause.

IV. Summary

With the steady development of China's marine economy, the number of ships is increasing. When a ship repair accident happens, ship repair liability insurance is widely used as an effective measure for ship repair enterprises to avoid accident risk. In the event of an insurance accident, the insurer and the insured often have different understandings of the insurance clauses, which usually involve the confirmation of Standard Terms and exemption clauses.

The focus of the dispute in this case is whether the damage to the main engine, caused by the "JIE SHENG 6" engine damage accident, is within the scope of the insurance liability agreed upon in Article 3(1) of the Agreement. The focus of the dispute involves three issues: 1. Whether the agreed scope of insurance liability as stipulated in Article 3(1) of the Agreement is a Standard Term. According to the second paragraph of Article 39 of the Contract Law of the People's Republic of China on the Standard Contract, combined with the analysis of the header name, seal and content

of the Agreement, it is determined that the Agreement is a Standard contract that was prepared by the company in advance and intended for repeated use. 2. Understanding of the contract clause “no responsibility for damage to the machine itself”. In cases where the insurer and the insured have different understandings of the Standard Terms, the clauses should be interpreted in favor of the insured, as long as his/her understanding is reasonable and common. 3. Whether “not responsible for the damage of the machine itself” belongs to the exemption clause. This clause is listed in Article 3(1) of the Agreement, which is the agreement regarding the scope of insurance. “Not responsible for the damage to the machine itself” is the condition for defining the scope of insurance liability, and it does not belong to the exemption clause.

After analyzing this case, it is clear that the majority of ship repair enterprises should pay close attention to the insurance clauses when purchasing insurance coverage, such as the scope of insurance liability, so as to avoid disputes and better protect their legitimate rights and interests.

Case provider: WANG Min,
Judge of Maritime Division of Dalian Maritime Court
Translator: BAI Xue
Editor(English): John Karl Martin
Executive editor: YANG Wei

新鑫海航运有限公司与深圳市鑫联升国际物流有限公司、大连凯斯克有限公司海上货物运输合同纠纷案

案例摘要

一、案件信息

（一）基本信息

案由：海上货物运输合同纠纷案

案号：（2018）辽 72 民初 758 号

原告：新鑫海航运有限公司

被告：深圳市鑫联升国际物流有限公司

裁判时间：2019 年 12 月 6 日

（二）案件事实

新鑫海航运有限公司（NEW GOLDEN SEA SHIPPING PTE. LTD.，以下简称新鑫海公司）分别于 2017 年 2 月 2 5 日、2017 年 3 月 3 日签发两份涉案提单，提单载明托运人深圳市鑫联升国际物流有限公司（以下简称鑫联升公司），装货港中国大连，卸货港印度那瓦舍瓦，提单背面条款同时约定了首要条款、法律适用条款。截止判决作出前，其中一个提单下的 6 个 40FL 集装箱货物仍堆存在码头，在印度海关监管之下，无人提货。另一个提单下的 6 个 40FL 集装箱已于 2019 年 2 月 15 日空箱返还承运人。

二、争议焦点

（一）法律适用；

（二）法律关系；

（三）适用外国法时集装箱超期使用费的合理计算期间。

三、法院观点

（一）关于法律适用问题

法院认为，涉外合同的当事人可以选择处理合同争议所适用的法律。按照涉案两份提单的背面条款第 26 条约定，海牙规则在起运国中国未实施，则适用目的地国印度的相应法规，但若印度无相应强制法规，则应适用海牙规则的条款。该条款强调的是与海牙规则相应的强制法规，本案争议焦点问题在海牙规则中没有规定，印度法律中即使存在与海牙规则相应的强制法规，也不适用于本案。鑫联升公司出具的电放申请保函表明，鑫联升公司同意将提单的背面条款作为运输合同的一部分，在鑫联升公司未举证证明提单背

面条款同鑫联升公司和新鑫海公司签订的运输合同内容不同的情况下，鑫联升公司与新鑫海公司就适用提单背面条款第 27 条约定的新加坡法律达成了一致的意思表示，本案应适用新加坡法律。

（二）关于法律关系问题

法院认为，依照查明的新加坡《海上货物运输法》第三条，签发而被接受的提单是当事人之间签订海上货物运输合同的凭证。涉案两份提单均记载托运人为鑫联升公司，表明承运人新鑫海公司签发的提单被鑫联升公司接受，能够证明作为托运人的鑫联升公司与作为承运人的新鑫海公司存在提单证明的海上货物运输合同关系，该合同关系依法成立并有效。新鑫海公司主张大连凯斯克有限公司（以下简称凯斯克公司）为实际托运人，但未提交充分证据证明凯斯克公司是在装货港向承运人新鑫海公司交付货物的托运人，无法确定新鑫海公司与凯斯克公司之间存在海上货物运输合同关系。故新鑫海公司有权要求鑫联升公司给付卸货港滞箱费等合理费用。

（三）关于适用外国法时集装箱超期使用费的合理计算期间问题

法院认为，本案适用新加坡法律，新加坡在海商法上承继英国法，在本国法就涉案争议没有先例的情况下，适用英国等普通法国家的判例，故本案参考相似的英国 MSC Mediterranean Shipping Company S.A. v Cottonex Anstalt 案。滞箱费从提单约定的托运人的免费使用期（免费使用期从集装箱卸下货轮时起算）结束开始计算，到合同目的落空（即托运人不能归还集装箱）或者托运人放弃履行合同（即托运人不再履行归还集装箱义务）时结束，不能无限期计算。考虑到英国上诉法院在上述判例中支持的集装箱超期使用时间虽然接近 8 个月，但其按照承运人提供的集装箱超期使用费率计算，集装箱超期使用费大约是集装箱价值的 1.7 倍，与我国司法实践将滞箱费控制在 1 至 2 倍集装箱价值范围内的裁量标准基本一致。因此法院充分考虑了英国判例的裁判结果，合理酌定了集装箱超期使用费的计算期间。

四、小结

本案的争议焦点为法律适用、法律关系以及适用外国法时集装箱超期使用费的合理计算期间。

关于法律适用，法院认为，涉外海上货物运输合同下签发的提单存在多个法律选择条款的，应依据条款是否是合同当事人的约定，以及约定的公约、惯例或外国法律对案件争议是否适用来确定当事人之间应当适用的准据法。依据案件事实及提单背面条款的约定，本案应适用新加坡法。

关于法律关系，法院认为，依照查明的新加坡法，结合提单的签发、接受情况，可以认定托运人鑫联升公司与承运人新鑫海公司存在提单证明的海上货物运输合同关系，该合同关系依法成立并有效。新鑫海公司有权要求鑫联升公司给付卸货港滞箱费等合理费用。

关于适用外国法时集装箱超期使用费的合理计算期间，法院认为，集装箱超期使用费在目的港无人提货时不能无限期计算，本案参照英国 MSC Mediterranean Shipping Company S.A. v Cottonex Anstalt 案，根据案情合理酌定集装箱超期使用费的计算期间，对于审理适用外国法律的案件具有类案参考价值。

案例提供者：孙　光

闫婧茹

责任编辑：杨伟

Dispute over Contract for Carriage of Goods by Sea Between New Golden Sea Shipping Pte. Ltd. and Advance Union International Logistics Company Ltd., Dalian Casco Co., Ltd

Case Summary

I. Case Information

A. Basic Information

Cause of Action: dispute over contract for carriage of goods by sea

Case Number: No. 758 [2018], First, Civil Division, 72, Liaoning

Plaintiff: New Golden Sea Shipping Pte. Ltd.

Defendant: Advance Union International Logistics Company Ltd.

Judgment Time: December 6, 2019

B. Facts

New Golden Sea Shipping Pte. Ltd. (hereinafter referred to as "New Golden Sea Company") issued two bills of lading (B/L)on February 25, 2017 and March 3, 2017, stating the shipper as Advance Union International Logistics Company Ltd. (hereinafter referred to as "Advance Union Company"), the Port of Loading as Dalian, China, and the Port of Discharge as Nhava Sheva, India. The clauses on the back of the bill of lading also stipulated the first clause and the applicable law clause. Before the judgement, six 40FL containers of one B/L were still stacked at the dock under Indian customs supervision. Six 40FL containers from another B/L were returned empty to the carrier on February 15, 2019.

II. Disputed Issues

A. Application of law

B. Legal relation

C. The reasonable period for calculating the container overdue fees in application to foreign law.

III. The Court's Opinion

A. Application of law

The court held that the parties to a foreign-related contract could choose the law applicable to the settlement of a contractual dispute. According to Article 26, on the reverse side of the two BS/L, the Hague Rules is not applicable in the country of dispatch that is, the People's Republic of China, so the relevant regulations in the country of destination, India should be applied. But if India, does not have the relevant mandatory regulations, the provisions of the Hague Rules should be applied. This article emphasizes the mandatory regulations corresponding to the Hague Rules. The disputed issue in this case is the absence of such provisions in the Hague Rules. Even if there are mandatory regulations corresponding to the Hague Rules in Indian laws, it cannot be applied to this case. The Letter of Guarantee for Telex Release issued by Advance Union Company shows that Advance Union Company agreed to take the clauses on the back of the B/L as a part of the transport contract. Advance Union Company and New Golden Sea Company have reached an agreement on the application of Singaporean laws (as agreed in Article 27 on the back of the B/L) in the case that Advance Union Company has not provided proof that the clauses on the back of the BS/L are different from the clauses of the contract of carriage signed between them. Therefore, the law of Singapore shall be applied in this case.

B. Legal relation

The court held that a bill of lading issued and accepted under Article 3 of the Carriage of Goods by Sea Act of Singapore was a document of a contract of goods by sea between the parties. The two BS/L in the case both record the shipper as Advance Union Company, indicating that the B/L issued by the carrier, New Golden Sea Company, was accepted by Advance Union Company. This can prove that Advance Union Company as shipper, and New Golden Sea Company as carrier have a contract relationship of carriage of goods by sea as evidenced by the bill of lading, and the contract relationship is thus legally established and valid. New Golden Sea Company claimed that Dalian Casco Co., Ltd. (hereinafter referred to as Casco Company) was the actual shipper, but did not submit sufficient evidence to prove that Casco Company was the shipper who delivered the goods to carrier New Golden Sea Company at the loading port, so the contract relationship of carriage of goods by sea between New

Golden Sea Company and Casco Company cannot be determined. Therefore, New Golden Sea Company has the right to demand Advance Union Company, pay reasonable expenses such as container detention charges at the discharge port.

C. The reasonable period for calculating the container overdue fees in application of foreign law.

The court held that Singaporean laws can be applied to this case. Singapore's maritime law is rooted in English law, and applies the precedents of common law countries like the United Kingdom (UK) when there is no precedent in its own law for the dispute resolution at play. This case in its assessment and merit draws similarity with a similar Case, MSC Mediterranean Shipping Company S.A. v Cottonex Anstalt in England. Container detention charges shall be calculated from the end of the free use period (the free use period starts when the container is discharged from the ship) of the shipper as stipulated in the bill of lading and shall end when the purpose of the contract is lost (the shipper cannot return the container) or the shipper abandons the performance of the contract (the shipper is no longer obligated to return the container). It cannot be calculated indefinitely. Taking into account that the British Appellate Court in the above-mentioned case upheld the use of containers for almost eight months, it calculated on the basis of the rates provided by the carrier for the extended use of containers. The extended use fee of a container is about 1.7 times of the value of the container, which is consistent with the standard of our country's judicial practice to control the container detention charges in the range of 1-2 times of the value of the container. Therefore, the court took full account of the decision of the British case law, and reasonably determined the calculation period of the container overdue use fees.

IV. Summary

The disputed issues are the application of law, legal relations and the reasonable period for calculating the container overdue fees in application of foreign law.

As for the applicable law, the court held that if there are multiple choice of law clauses in the bill of lading issued under the contract of carriage of foreign goods by sea, the applicable law between the parties should be determined according to whether the clauses are agreed by the parties to the contract, and whether the agreed

convention, practice or foreign law is applicable to the case dispute. Depending on the facts of the case and the clauses on the back of the bill of lading, Singaporean law shall be applied in this case.

As for the legal relationship, the court held that in accordance with Singaporean laws and the issuance and acceptance of the B/L, the shipper, Advance Union Company and the carrier New Golden Sea Company had a contractual relationship of carriage of goods by sea as evidenced by the bill of lading, and the contractual relationship was established and valid according to law. New Golden Sea Company has the right to demand Advance Union Company to pay reasonable expenses such as container detention charges at the discharge port.

As for the reasonable period for calculating the container overdue fees in application to foreign law, the court held that the container overdue fees cannot be calculated indefinitely when there is no delivery at the port of destination. The case referred to MSC Mediterranean Shipping Company S.A. V Cottonex Anstalt, and according to the facts of the case, the reasonable calculation period of the container overdue fee is of reference value for the trial of cases applying foreign laws.

Case Provider: SUN Guang

YAN Jingru

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大连真源海洋新能源科技有限公司与大连九头山水产品开发有限公司海域使用权纠纷案

案例摘要

一、案件信息

（一）基本信息

案由：海域使用权纠纷

案号：（2019）辽 72 民初 1077 号、（2020）辽民终 360 号

原告：大连真源海洋新能源科技有限公司

被告：大连九头山水产品开发有限公司

裁判时间：一审 2019 年 12 月 23 日、二审 2020 年 7 月 9 日

（二）案件事实

2018 年 6 月 20 日，真源公司与九头山公司签订《关于租赁袁家沟村九头山外海域的协议》，约定九头山公司向真源公司出租大连市旅顺口区北海街道袁家沟村九头山外 100 米海域，海域面积 10 亩，每台发电站占海面面积 360 平方米；每台发电站每年租费是 2 万元，计划 2018 年承建第一台发电站，2019 年承建 19 台发电站，2020 年承建 20 台发电站；租赁时间自 2018 年 7 月 1 日起至 2027 年 6 月 30 日止。2018 年 6 月 28 日，真源公司向九头山公司支付了租金 2 万元。随后，真源公司陆续将设备、材料、器械等器材运至上述海域岸边堆放，包括海上加工平台一个、钢轨两根、PE 给水管 8 根、氧气瓶、橡皮艇、工具箱等。另查明，上述租赁海域处于斑海豹国家级自然保护区实验区。

二、争议焦点

在一审过程中，双方争议的焦点为：（一）案涉合同是否有效；（二）九头山公司是否有权留置真源公司堆放在海域边的现场器材和设备。

在二审过程中，双方的争议焦点增加了：（三）原审判令九头山公司承担返还现场器材及设备是否妥当。

三、法院观点

（一）关于案涉合同是否有效

一审法院认为，真源公司与九头山公司签订的租赁协议系双方真实意思表示，不违反法律法规的强制性规定，租赁合同合法有效。虽然在自然保护区实验区内的建设项目施工需经国家相关行政部门审批，但该条件不构成合同无效的法定情形。

（二）关于九头山公司是否有权留置真源公司的现场器材及设备

一审法院认为：九头山公司不予返还的主要理由为留置，但是在租赁合同关系中，法律并未赋予出租人留置权，故九头山公司无权主张留置，应予返还。

（三）关于原审判令九头山公司承担返还现场器材及设备是否妥当

二审法院认为：《中华人民共和国物权法》第三十九条规定：“所有权人对自己的不动产或者动产，依法享有占有、使用、收益和处分的权利。”第二百三十条规定：“债务人不履行到期债务，债权人可以留置已经合法占有的债务人的动产，并有权就该动产优先受偿。”根据上述规定，所有权人依法享有占有、使用、收益和处分自己财产的权利；债务人不履行到期债务，债权人可以留置已经合法占有的债务人的动产。本案中，真源公司为建设发电站租赁了九头山公司享有海域使用权的案涉海域，双方意思表示真实，协议合法有效。真源公司为建设发电站，根据案涉协议约定将建设发电站所用的施工材料运至租赁场地，九头山公司亦未否认案涉租赁场地的施工材料系真源公司放置的。故可以认定真源公司为案涉器材和设备的权利人，其有权就案涉器材主张权利。因九头山公司干涉不准真源公司运走案涉器材和设备，侵犯了真源公司处置自身财产的权利，原审法院依据真源公司的诉请判令九头山公司返还案涉器材并无不当。至于九头山公司上诉所提，其有权对案涉器材行使留置权的理由。因真源公司系根据约定利用案涉海域建设发电站将施工器材和设备放置在案涉租赁场地及周边的，并未将案涉器材交付给九头山公司，九头山公司也未通过其他合法的方式获取案涉器材和设备，故九头山公司不存在以合法手段占有案涉器材和设备的事实，不享有《中华人民共和国物权法》第二百三十条规定的留置权。

四、小结

伴随着科学技术的进步，人类利用海洋能力的不断增强，利用方式也多样化。真源公司租赁案涉海域就是想进行发电站的建设，但在行政审批的过程中却发现该海域处于斑海豹国家级自然保护区实验区。从合同效力的角度，双方在签订合同时均是真实意思的表示，也没有违反法律法规的强制性规定，因此合同有效。在一审判决后，双方当事人对此观点均认可。合同签订后，真源公司在案涉海域堆放器材设备，并不是交付于九头山公司，九头山公司并未合法占有上述器材，故无论是一审还是二审判决，均认定九头山对于案涉器材设备没有留置权。近年来关于海域使用权的纠纷不断增多，但是保护海洋生物的多样性、实

现海洋资源有序开发利用、发展“蓝色经济”是海事审判一直坚守的原则。

案例提供者：陈晨

责任编辑：杨伟

Case Summary of Disputes over Maritime Right of Use between Dalian Zhenyuan Marine New Energy Technology Co., Ltd and Dalian Jiutoushan Aquatic Product Development Co., Ltd

I. Case Summary

A. Basic Information

Case: Disputes over Maritime Right of Use, Case No.: (2019) Liao 72 MinChu No.1077; (2020) Liao MinZhong No. 360

Plaintiff: Dalian Zhenyuan Marine New Energy Technology Co., Ltd

Defendant: Dalian Jiutoushan Aquatic Product Development Co., Ltd

Date of Adjudication: First Instant: December 23, 2019. Second Instant: July 9, 2020

B. Facts

On June 20, 2018, Dalian Zhenyuan Marine New Energy Technology Co., Ltd (hereinafter referred to as Zhenyuan Company) and Dalian Jiutoushan Aquatic Product Development Co., Ltd (hereinafter referred to as Jiutoushan Company) signed the Agreement on Lease of the Outer Sea Area of Jiutou Mountain, Yuanjiagou Village (hereinafter referred to as the Agreement). The Agreement stipulated that Jiutoushan Company would rent to Zhenyuan Company, a sea area of ten mus(0.667 hectares) - 100 meters away from Jiutou Mountain, Yuanjiagou Village, Beihai Street, Lvshunkou District, Dalian City. According to the Agreement, each power station will cover 360 square metres of sea area and will cost ¥20,000 a year to rent. The plan as intimated by the Agreement was to build the first power station in 2018, nineteen (19) in 2019 and twenty (20) more in 2020. The lease term as agreed is to run from July 1, 2018 to June 30, 2027. On June 28, 2018, Zhenyuan Company paid ¥20,000 to Jiutoushan Company for rent. Subsequently, Zhenyuan Company successively transported to the sea area as stipulated in the Agreement the equipment, materials and instruments including one offshore processing platform, two steel rails, eight polyethylene feeders, oxygen cylinders, rubber boats, tool boxes and so on. In addition, the above leased sea area is in the experimental area of Dalian Spotted Seal National Nature Reserve.

II. Issue

The focus of the dispute between the two parties per the court of first instance are: (I) Whether the Agreement involved is valid; (II) Whether the Jiutoushan Company can claim a lien for the on-site instruments and equipment piled up in the sea area by Zhenyuan Company.

The court of second instance brings out one more case point: (III) Whether the original trial that made Jiutoushan Company assume responsibility for the return of on-site instruments and equipment was appropriate.

III. Rationale & Holding

A. Whether the Agreement Involved is Valid.

The court of First Instance held that the lease agreement signed by Zhenyuan Company and Jiutoushan Company showed that the true intention of both parties, did not violate the mandatory provisions of laws and regulations, and was legally valid. Although the construction project in the experimental area of the nature reserve is subject to the approval of the relevant state administrative departments, this condition does not constitute the legal situation of an invalid agreement.

B. Whether the Jiutoushan Company can claim a lien for the on-site instruments and equipment piled up in the sea area by Zhenyuan Company.

The court of First Instance held that Jiutoushan Company did not return the equipment of Zhenyuan Company on the ground of lien, but the law did not endow the lessor with lien in the lease agreement relationship, therefore Jiutoushan Company had no right to claim lien and should return the instruments and equipment.

C. Whether the original trial that made Jiutoushan Company assume responsibility for the return of on-site instruments and equipment is appropriate.

The court of Second Instance held that Article 38 of the Property Law of the People's Republic of China stipulates: "The owner of a realty or chattel is entitled to possess, utilize, seek profits from and dispose of the realty or chattel in accordance with law." Article 230 further states: "Where an obligor fails to pay off its due debts, the obligee may take lien of the chattels that are owned by the obligor and lawfully occupied by the obligee, and has the right to seek preferred payments from such chattels." In accordance with the above provisions, the owner shall have the right to possess, use, profit from and dispose of his property and if the obligor fails to perform the debts due, the obligee may take lien of the chattels of the obligor lawfully. In this case, Zhenyuan Company leased the sea area involved in the case where Jiutoushan Company had the maritime right of use for the construction of power stations. Both parties expressed their true intentions and the agreement was legal and valid. In order to build

power stations, Zhenyuan Company transported construction materials to the leased site according to the agreement involved in the case. Jiutoushan Company did not deny that the construction materials on the leased site involved in the case were placed by Zhenyuan Company. Therefore, it can be identified that Zhenyuan Company is the obligee of the instruments and equipment involved in the case, and it has the right to claim rights on the equipment involved in the case. Jiutoushan Company interfered and obstructed Zhenyuan Company's removal of the instruments and equipment involved in the case, thereby violating the right of Zhenyuan Company to dispose of its own property. Therefore, the court of First Instance ordered Jiutoushan Company to return the equipment involved in the case based on the request of Zhenyuan Company, which was justifiable. Jiutoushan Company appealed, however, claiming it had a right of lien on the equipment. In accordance with the agreement, Zhenyuan Company used the sea area involved in the case to build power stations and placed construction instruments and equipment on and around the leased site involved in the case. Zhenyuan Company did not deliver the equipment involved in the case to Jiutoushan Company, and Jiutoushan Company also did not obtain the instrument and equipment involved in the case through other legal means. Therefore, the fact that the Jiutoushan Company possessed the instrument and equipment involved in the case by legal means does not exist and not subject to a lien under Article 230 of the Property Law of the People's Republic of China. Therefore, the fact that the Jiutoushan Company possessed the instruments and equipment involved in the case by legal means does not exist, and Jiutoushan Company is not entitled to lien under Article 230 of the Property Law of the People's Republic of China.

IV. Summary

With the development of science and technology, the ability of mankind to utilize the ocean is constantly being with gradual diversification regarding the utility of the ocean space in general. Zhenyuan Company originally leased the area for the purpose of building power stations, but when applying for administrative approval, found that the area was in the experimental area of Dalian Spotted Seal National Nature Reserve. When it comes to the validity of the contract, both parties expressed their true intentions when signing the contract and did not violate the mandatory provisions of laws and regulations. Therefore, the contract is valid. After the judgment of first instance, both parties agreed on this point of view. After the signing of the contract, Zhenyuan Company packed the equipment in the sea area involved in the case, but did not deliver them to Jiutoushan Company. Jiutoushan Company thus did not legally possess the equipment mentioned above. Therefore, both the first

instance and the second instance judgments determined that Jiutoushan Company had no lien on the equipment involved in the case. In recent years, disputes over maritime right of use have been increasing, with the protection of the diversity of marine life, the realization of the orderly development and utilization of marine resources, and the development of the “blue economy”, all principles that trials concerning the maritime domain always adhere to.

Case-collector: CHEN Chen

Translator: CHEN Ze

Editor(English): Godfred Sowah Khartey

Executive editor: YANG Wei

石勇与嘉德海运有限公司船员劳务合同纠纷案

案例摘要

一、案件信息

（一）基本信息

案由：船员劳务合同纠纷

案号：（2020）辽 72 民初 601 号

原告：石勇

被告：嘉德海运有限公司

裁判时间：2020 年 9 月 29 日

（二）案件事实（主要为涉外纠纷）

2019 年 5 月 9 日，石勇与香港注册的嘉德海运有限公司（以下简称嘉德公司）签署《海员就业协议》，约定了由嘉德公司雇佣石勇担任其公司登记所有“嘉德”轮船长，雇佣期限 8 个月，每月基本工资 5400 美元，工资起算日 2019 年 5 月 9 日；其他协议条款见附件《海员就业集体协商协议》等事宜。2019 年 5 月 18 日下午，因菜品采购问题石勇和船上厨师王某产生纠纷，后因此事与二副王某某产生肢体冲突。6 月 23 日，石勇向石岛派出所报案，石岛派出所就上述纠纷对当事人和船上人员进行了询问并制作询问笔录。同日，嘉德公司向石勇发出《解除劳动合同通知》，提出解除双方协议；6 月 25 日，嘉德公司结清石勇在船工资后，石勇在石岛下船。

二、争议焦点

（一）关于涉外船员劳务合同纠纷法律适用？

（二）关于法官是否需要就依法认定的法律关系向当事人进行释明？

三、法院观点

（一）涉外船员劳务合同纠纷中，当事人依照法律规定可以明示选择适用中华人民共和国法律，双方之间签订的合同系双方当事人真实意思表示，双方之间形成船员劳务合同关系，不属于船员劳动合同，不适用《中华人民共和国劳动合同法》（以下简称《劳动合同法》）。

（二）原告当事人主张的法律关系为船员劳动合同关系纠纷，与法院认定的船员劳务法律关系不一致，

对此，法官应将双方系何种关系作为争议焦点充分审理，无需就其认定的法律关系向原告进行释明，如原告未变更诉讼请求，应驳回诉讼请求。

四、小结

（一）关于涉外船员劳务合同纠纷法律关系认定？

《最高人民法院关于民事诉讼证据的若干规定》中规定了船员劳务合同纠纷，实践中将此类纠纷分为船员劳动合同关系和雇佣关系。本案中，双方当事人无论主体资格或主体关系都更倾向于船员劳动合同关系，双方并非平等关系的平等主体，但因境外的企业不属于我国《劳动合同法》调整主体，适用合同法仍是不得已而为之。

关于涉外船员利益保护已然是老生常谈的问题之一，在司法实践中对于船员和域外企业订立的劳务合同关系只能认定为雇佣关系，并不利于对船员合法权益进行保护。因此亟待制定法律以规范涉外企业与船员直接签订合同的情形，或者通过船员协会制定集体协议的方式保护船员权益，同时也是完善社会主义法治，避免司法审判中出现法律适用捉襟见肘的困境。当下，船员在与涉外企业订立合同时，也应基于雇佣关系维护好自身合法权益。

（二）关于法官是否需要就依法认定的法律关系向当事人进行释明？

《最高人民法院关于民事诉讼证据的若干规定（2019 修正）》第五十三条的规定[1]是对 2001 年《证据规定》第三十五条[2]作出的适当修改，面对当事人主张的法律关系与法院根据案件事实认定的法律关系不一致的情形，取消了法官的“告知”义务和责任，一方面有利于坚持司法审判中立原则，提升司法审判效率，法官释明实质上是司法审判对法律事实的判定，在未作出判决之前透露司法判定，不符合法理和情理；另一方面庭审环节法院就双方系何种法律关系进行充分的质证、辩论和询问的过程中，当事人已经能够清楚认识到争议焦点的利害关系，是否变更诉讼请求，实质上也是当事人对自身诉讼权益的选择。法官释明的内容只能限于诉讼程序，如果过于涉及实体内容，本身就有违司法公正。[3]

[1]《最高人民法院关于民事诉讼证据的若干规定（2019 修正）》第五十三条规定：“诉讼过程中，当事人主张的法律关系性质或者民事行为效力与人民法院根据案件事实作出的认定不一致的，人民法院应当将法律关系性质或者民事行为效力作为焦点问题进行审理。但法律关系性质对裁判理由及结果没有影响，或者有关问题已经当事人充分辩论的除外。存在前款情形，当事人根据法庭审理情况变更诉讼请求的，人民法院应当准许并可以根据案件的具体情况重新指定举证期限”。

[2]《最高人民法院关于民事诉讼证据的若干规定（2001）》第三十五条：诉讼过程中，当事人主张的法律关系的性质或者民事行为的效力与人民法院根据案件事实作出的认定不一致的，不受本规定第三十四条规定的限制，人民法院应当告知当事人可以变更诉讼请求。当事人变更诉讼请求的，人民法院应当重新指定举证期限。

[3] 熊承星.当事人主张的法律关系性质与法院认定不一致时，法院将不再释明[OL].
https://www.sohu.com/a/388022018_305502

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Case Summary of the Crew Labor Contract Dispute between Shi Yong and Jia De Marine Shipping Co., Ltd.

I. Case Information

A. Basic Information

Case: Crew Labor Contract Dispute

Case No.: (2020) Liao 72 Minchu No. 601

Defendant: Shi Yong

Plaintiff: Jia De Marine Shipping Co., Ltd

Date of Adjudication: Sept. 29, 2020

B. Facts (mainly foreign-related disputes)

On May 9, 2019, Shi Yong signed a *Seaman Employment Agreement* with Jia De Marine Shipping Co., Ltd (hereinafter referred to as Jia De Company), a company registered in Hong Kong. The Agreement stipulates that Shi Yong shall be employed by Jia De Company as the captain of the ship "MV. JIADE" registered by the company. The employment period shall be 8 months, with the basic salary of $5,400 per month, starting from May 9, 2019. The agreement also stipulates that other terms and conditions of the agreement are set forth in the attached *Collective Agreement for the Employment of Seafarers*. In the afternoon of May 18, 2019, a dispute arose between Shi Yong and the ship's chef, surnamed Wang, over the procurement of dishes. He later had a physical conflict with the second officer, Wang Jianguo, because of this matter. On June 23, Shi Yong reported the case to Shi Dao Police Station. Shi Dao Police Station questioned the parties and the persons on the vessel in connection with the above-mentioned dispute and made a record of the questioning. On the same day, Jia De Company issued a *Notification of Termination of Employment Contract* to Shi Yong, proposing to terminate the agreement between the parties. On June 25, Shi Yong disembarked from the ship at Shi Dao after Jia De Company settled his wages on board.

II. Issue

A. How should the law be applied in disputes concerning foreign crew labor contracts?

B. Is the judge required to explain to the parties the legal relationship determined by law?

III. Rationale & Holding

A. In a dispute concerning a crew's employment contract involving foreign elements, the parties concerned may, in accordance with the provisions of the law, expressly choose to apply the law of the People's Republic of China. The contract signed by both parties is the true intention of both parties. The formation of the crew labor contract relationship between the parties does not belong to the crew labor contract, and *Law on Employment Contracts of the People's Republic of China* (hereinafter referred to as *Employment Contract Law*) is not applicable.

B. The legal relationship claimed by the plaintiff is the dispute of crew labor contract relationship, which is inconsistent with the legal relationship of crew labor service affirmed by the court. In this regard, the judge should take the relationship between the two parties as the focus of the dispute to fully hear, without explaining the legal relationship to the plaintiff. If the plaintiff does not change the claim, the claim shall be rejected.

IV. Summary

A. On the Identification of Legal Relationship in the Foreign-related Dispute of Crew Labor Contract

Several Provisions of the Supreme People's Court on Evidence in Civil Procedures provides guidance for disputes over crew labor contract, and in actual practice, it divides such disputes into crew labor contract and employment relationship. In this case, both parties are more inclined to crew labor contract relationship, regardless of subject qualification or subject relationship, and both parties are not equal subjects of equal relationship. However, overseas enterprises are not subject to the adjustment of China's *Employment Contract Law*, so it is not applicable to this case.

The protection of seafarers' interests in foreign-related disputes is one of the most common problems in China. In judicial practice, the labor contract relationship between crew and foreign enterprises can only be regarded as an employment relationship, which is not conducive to the protection of crews' legitimate rights and interests. Therefore, it is urgent to formulate relevant laws to regulate the situation of foreign-related enterprises directly signing contracts with seafarers, or to formulate collective agreements through seafarers' associations to protect the rights and interests of seafarers. At the same time, it is possible to perfect the socialist rule of law and avoid the predicament in which the law cannot be applied to some cases in the judicial trial. At present,

Chinese seamen should also protect their own legal rights and interests, based on the employment relationship, when they enter into contracts with foreign-related enterprises.

B. Is the judge required to explain to the parties the legal relationship determined by law? With appropriate amendments to Article 35[1] of S*everal Provisions of the Supreme People's Court on Evidence in Civil Procedures 2001*, Section 53[2] of *Several Provisions of the Supreme People's Court on Evidence in Civil Procedures (2019 Amendment)* provides that, when the legal relationship claimed by the parties is inconsistent with the legal relationship determined by the court, according to the facts of the case, the obligation and responsibility of the judge to "inform" is canceled. On the one hand, it is conducive to upholding the principle of judicial neutrality and enhancing judicial efficiency. In essence, the judge's explanation is the judgment of the legal facts in the judicial trial. It is unreasonable to reveal the judicial judgment before the judgment is made. On the other hand, in the process of full cross-examination, debate and inquiry of the legal relationship between the parties, the parties have been able to clearly understand the interests of the focus of the dispute. Therefore, whether to change the claim, in essence, is also the choice of the parties to their own litigation rights and interests. The content of the judge's explanation can only be limited to the litigation procedure, and if it involves the entity content too much, it will violate the law.[3]

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ZHENG Linlin

Translator: CHEN Ze

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Executive editor: YANG Wei

[1] Article 35 of *Several Provisions of the Supreme People's Court on Evidence in Civil Procedures 2001* states that: If, in the process of litigation, the nature of the legal relations alleged by the parties concerned or the validity of the civil acts are inconsistent with the findings of fact made by the people's court on the basis of the facts of the case, the provisions of Article 34 of the present Provisions shall not be applicable, and the people's court shall inform the parties concerned that the allegations litigation may be changed.

[2] Article 53 of *Several Provisions of the Supreme People's Court on Evidence in Civil Procedures(2019 Amendment)* Stipulates that: If, in the process of litigation, the nature of the legal relations alleged by the parties concerned or the validity of the civil acts are inconsistent with the findings of fact made by the people's court on the basis of the facts of the case, the nature of the legal relationship or the validity of civil act shall be the focus of the trial. Except where the nature of the legal relationship has no effect on the reasons and results of the judgment, or the relevant issues have been fully debated by the parties concerned. Where any of the circumstances aforementioned exists and the parties concerned change their allegations of litigation according to the court hearing, the people's court shall grant permission and may prescribe the time period for producing evidences anew according to the specific circumstances of the case.

[3] Xiong Chengxing. If the nature of the legal relations alleged by the parties concerned are inconsistent with the findings of fact made by the people's court on the basis of the facts of the case, the court will no longer interpret it. [OL]

威海润佳服饰有限公司诉大连裕铭航运代理有限公司海上货运代理合同纠纷及海上货物运输合同纠纷案

案例摘要

一、案件信息

（一）基本信息

案由：海上货运代理合同纠纷及海上货物运输合同纠纷

案号：（2017）辽 72 民初 11 号、（2017）辽民终 1316 号

原告：威海润佳服饰有限公司

被告：大连裕铭航运代理有限公司

裁判时间：2018 年 3 月 25 日

（二）案件事实

威海润佳服饰有限公司（以下简称润佳公司）委托大连裕铭航运代理有限公司（以下简称裕铭公司）办理信用证项下货物自大连港出口至韩国的货运代理业务。裕铭公司同时也是信用证记载 FOB 韩国买方指定的无船承运人 IMEX 公司（未证明资质）在装货港指定的货运代理人。操作过程中，裕铭公司向润佳公司披露，其签单章英文名称与信用证要求不符。在信用证最终未做相应修改的情况下，润佳公司明确要求在提单上注明承运人为 IMEX 公司，并接受了裕铭公司签单章的提单样式。货物到达韩国后，IMEX 公司依据海运提单向实际承运人提取了货物，润佳公司向裕铭公司支付了货运代理费用。润佳公司将运输单证提交信用证议付行审核，被提示与信用证存有不符点，但润佳公司不要求更改运输单证，并指示议付行将运输单证寄交开证行承兑付款。开证行以提单签单人与信用证要求不符为由，发出拒付通知。润佳公司与裕铭公司就案涉货款损失承担发生争议，润佳公司同时基于海上货运代理合同关系与海上货物运输合同关系向裕铭公司提出索赔。

二、争议焦点

（一）不同法律关系项下，润佳公司起诉是否超过诉讼时效；

（二）不同法律关系项下，裕铭公司有无过错；

（三）润佳公司诉称的损失与裕铭公司行为之间有无因果关系。

三、法院观点

（一）关于诉讼时效

法院认为，本案是润佳公司因未收到货款而向其货运代理人裕铭公司主张违约责任的货运代理合同纠纷，同时，润佳公司也以裕铭公司违反海上货物运输合同为由要求裕铭公司支付其货款损失。前者时效期间为二年，后者时效期间为一年。润佳公司行使诉讼权利均在一年内，均未超过诉讼时效期间。

（二）关于过错认定

法院认为：1.关于海上货运代理合同关系。以 IMEX 公司作为无船承运人，是润佳公司与贸易相对方共同确定的结果。对于无船承运人的选定，裕铭公司既无受托义务，亦未实际实施，故即使 IMEX 公司没有无船承运人资质，裕铭公司对此结果没有过错。2.关于海上货物运输合同关系。裕铭公司作为无船承运人 IMEX 公司指定的签单人，签发了无船承运人提单，并作为 IMEX 公司的货运代理人向海运承运人办理了订舱，并将海运提单交付无船承运人的操作均符合无船承运业务的操作流程，不存在过错。在签单环节中，裕铭公司的英文名称是否注册，不影响其使用自己名称的权利，且不应受他人影响或限制。信用证中对签单人名称的要求，对裕铭公司没有约束力，润佳公司无权要求裕铭公司修改其签单章，亦无强制性法律规范要求签单人必须使其签单章与信用证要求一致。同样，裕铭公司作为签单人也没有要求开证人修改信用证的法定权利，其在操作中进行提示及协调均不代表其享有相应的权利或负有相应的义务；润佳公司通过对提单样本的确认，表明其接受了签单人名称与信用证要求不符的结果和风险，故在签单环节裕铭公司没有过错。

（三）关于因果关系

法院认为，在运输法律关系项下，IMEX 公司作为无船承运人凭海运提单提取并占有货物并无不当，润佳公司仍可凭正本提单向 IMEX 公司提货或行使托运人权利。但案涉业务中，润佳公司选择 IMEX 公司作为无船承运人又作为进口商，其结果是货物装上船舶时即完成了向进口商（买方）的实际交付，必然产生提单丧失持有人控制货物交付的权能属性导致损失的商业风险，润佳公司诉请的损失即因前述风险所致。裕铭公司的代理行为及签单行为，对该风险的形成及损害结果的发生均不具有原因力。

四、小结

本案系一起较为少见的在同一诉讼请求下，当事人之间海上货运代理合同关系和海上货物运输合同关系并存的涉外海商案件。案件涉及无船承运的操作流程、货代提单和船东提单的流转评判、跟单信用证的拒付风险，以及托运人货物控制权丧失的责任承担等海运热点问题，对于海运贸易出口的风险防范和同类

案件的审理裁判具有较高的借鉴价值和指导意义。

案例提供者：大连海事法院海事庭法官助理 郝志鹏

大连海事法院海事庭庭长 信 鑫

责任编辑：杨伟

Contract Disputes of Marine Freight Forwarder and Carriage of Goods by Sea: Weihai Runjia Garments Co., Ltd. v. Dalian Yuming Shipping Agency Co., Ltd.

I. Case Summary

A. Basic Information

Case: Contract Disputes of Freight Forwarder and Contract Disputes of Carriage of Goods by Sea

Case No.: (2017) Liao 72 Minchu No. 11、(2017) Liao Minzhong No. 1316

Plaintiff: Weihai Runjia Garment Co., Ltd.

Defendant: Dalian Yuming Shipping Agency Co., Ltd.

Date of Adjudication: March 25, 2018

B. Facts

Weihai Runjia Garments Co., Ltd. (hereinafter referred to as Runjia Company) entrusts Dalian Yuming Shipping Agency Co., Ltd. (hereinafter referred to as Yuming Company) with the business of forwarding the goods covered by the L/C exported from Port of Dalian to South Korea. Yuming is also the forwarding agent appointed at the port of loading by IMEX Company, the Non-Vessel Operating Common Carrier (without approval of qualification) appointed by the buyer with the FOB, South Korea as stated in the L/C. In the course of operation, Yuming Company disclosed to Runjia Company that its English mark and seal was inconsistent with the requirements of the L/C. In the case that the L/C was not modified accordingly in the end, Runjia Company explicitly requested to indicate the carrier as IMEX Company on the B/L, and accepted the B/L sample signed by Yuming Company. After the goods arrived in South Korea, IMEX picked them up from the actual carrier according to the marine B/L, and Runjia Company paid the freight forwarding charges to Yuming Company. Runjia Company submitted the transport documents to the negotiating bank of the L/C for examination and was informed that the transport documents were inconsistent with the L/C. However, Runjia Company did not require any alteration of the transport documents and instructed the negotiating bank to send the transport documents to the issuing bank for acceptance and payment. The issuing bank subsequently issues a rejection notice on the ground that the mark and seal of the B/L is not in conformity with the requirements of the L/C. Runjia Company

and Yuming Company disputed over the loss of the goods in question, and Runjia Company, on the basis of contracts of maritime freight forwarding and carriage of goods by sea filed a claim against Yuming Company.

II. Issue

A. Whether the lawsuit filed by Runjia Company is time-barred under different legal relationships;

B. Whether Yuming Company is at fault under different legal relationships;

C. Whether there is a causal relationship between the damages claimed by Runjia Company and the actions of Yuming Company.

III. Rationale & Holding

A. On time-bar

The court held that the case was a freight forwarding contract dispute in which Runjia Company claimed damages for breach of contract by its freight agent Yuming Company for not receiving the payment for the goods. At the same time, Runjia Company demanded Yuming Company to pay for the loss of the goods on the grounds that it violated the marine cargo transportation contract. As for the time-bar of the two contracts, the former has a limitation period of two years, while the latter has a limitation period of one year. Runjia Company exercised its litigation rights within one year and did not exceed the limitation of action.

B. On Fault Determination

The court held that: 1. On the maritime freight forwarding contract relationship. IMEX Company as NVOCC is the result of mutual agreement between Runjia Company and the other party. For the selection of NVOCC, Yuming Company had neither fiduciary duty nor actual implementation, so even if IMEX did not gain NVOCC qualification, Yuming Company was not at fault for the result. 2. On the contractual relationship of carriage of goods by sea. Yuming Company, as the designated signatory of NVOCC IMEX Company, issued NVOCC B/L, booked shipping space with the marine carrier as IMEX Company's freight agent, and delivered the B/L to NVOCC in accordance with the operating procedures of NVOCC business without any fault. In the signing process, the registration of the English name of Yuming Company does not affect its right to use its own name and should not be influenced or restricted by others. The requirements on the name of the signatory in the L/C shall not be binding on Yuming Company, and Runjia Company shall not have the right to request Yuming Company to

amend its signature. What's more, there is also no mandatory legal regulation requiring the signatory to make its signature consistent with the requirements of the credit. Similarly, Yuming Company as a signatory does not require the issuer to amend the legal rights of the L/C, its promptings and coordination in the operation does not represent its corresponding rights or obligations; Runjia company through the bill of lading samples confirmed its acceptance of the name of the signer and the letter of Credit does not meet the requirements of the results and risks, so Yuming Company bears no fault here. Likewise, as a signatory, Yuming Company does not have the legal right to require the issuer to amend the L/C, and its promptings and coordination in operation do not mean that it enjoys the corresponding right or has the corresponding obligation. The confirmation of the B/L sample indicates that Runjia Company has accepted the consequences and risks which may be caused by the inconsistency between the signatory's name and the requirements of the L/C, so Yuming Company was not at fault during the signing process.

C. On Cause and Effect

The court held that IMEX Company was justified as an NVOCC to take delivery and possession of the goods under the legal relationship of transportation. Runjia Company may still take delivery of the goods or exercise its shipper's rights to IMEX Company on the strength of the original B/L. However, in the case of the business involved, Runjia chose IMEX Company as both NVOCC and importer. This resulted in the actual delivery of the goods to the importer (buyer) as soon as they were loaded onto the ship, which inevitably led to the loss of the rights and powers of the holder of B/L to control the delivery of the goods and resulted in the commercial risk of loss. The loss claimed by Runjia Company is caused by the aforementioned risks. Yuming Company's agency and signing of the B/L have no causal force on the formation of the risk and the occurrence of the damage results.

IV. Summary

This case is a rare foreign maritime case in which the maritime freight forwarder contractual relationship and the maritime carriage of goods contractual relationship coexist between the parties under the same litigation claim. The case involves a number of hot maritime issues, including the operating procedures of NVOCC, the assessment of the circulation of B/L made by freight forwarders and shipowners, the risk of non-payment of documentary L/C, and the assumption of the shipper's liability for loss of control of the goods. Therefore, the case has high reference value and guiding significance for the risk prevention of seaborne trade export and the adjudication of similar cases.

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新发展与新文献 (Recent Developments and Documents)

《中华人民共和国海南自由贸易港法》

中华人民共和国主席令

（第八十五号）

《中华人民共和国海南自由贸易港法》已由中华人民共和国第十三届全国人民代表大会常务委员会第二十九次会议于 2021 年 6 月 10 日通过，现予公布，自公布之日起施行。

中华人民共和国主席　习近平

2021 年 6 月 10 日

中华人民共和国海南自由贸易港法

（2021 年 6 月 10 日第十三届全国人民代表大会常务委员会第二十九次会议过）

目　　录

第一章　总　　则

第一条　为了建设高水平的中国特色海南自由贸易港，推动形成更高层次改革开放新格局，建立开放型经济新体制，促进社会主义市场经济平稳健康可持续发展，制定本法。

第二条　国家在海南岛全岛设立海南自由贸易港，分步骤、分阶段建立自由贸易港政策和制度体系，实现贸易、投资、跨境资金流动、人员进出、运输来往自由便利和数据安全有序流动。

海南自由贸易港建设和管理活动适用本法。本法没有规定的，适用其他有关法律法规的规定。

第三条　海南自由贸易港建设，应当体现中国特色，借鉴国际经验，围绕海南战略定位，发挥海南优势，推进改革创新，加强风险防范，贯彻创新、协调、绿色、开放、共享的新发展理念，坚持高质量发展，坚持总体国家安全观，坚持以人民为中心，实现经济繁荣、社会文明、生态宜居、人民幸福。

第四条　海南自由贸易港建设，以贸易投资自由化便利化为重点，以各类生产要素跨境自由有序安全便捷流动和现代产业体系为支撑，以特殊的税收制度安排、高效的社会治理体系和完备的法治体系为保障，持续优化法治化、国际化、便利化的营商环境和公平统一高效的市场环境。

第五条　海南自由贸易港实行最严格的生态环境保护制度，坚持生态优先、绿色发展，创新生态文明体制机制，建设国家生态文明试验区。

第六条　国家建立海南自由贸易港建设领导机制，统筹协调海南自由贸易港建设重大政策和重大事项。国务院发展改革、财政、商务、金融管理、海关、税务等部门按照职责分工，指导推动海南自由贸易港建设相关工作。

国家建立与海南自由贸易港建设相适应的行政管理体制，创新监管模式。

海南省应当切实履行责任，加强组织领导，全力推进海南自由贸易港建设各项工作。

第七条　国家支持海南自由贸易港建设发展，支持海南省依照中央要求和法律规定行使改革自主权。国务院及其有关部门根据海南自由贸易港建设的实际需要，及时依法授权或者委托海南省人民政府及其有关部门行使相关管理职权。

第八条　海南自由贸易港构建系统完备、科学规范、运行有效的海南自由贸易港治理体系，推动政府机构改革和职能转变，规范政府服务标准，加强预防和化解社会矛盾机制建设，提高社会治理智能化水平，完善共建共治共享的社会治理制度。

国家推进海南自由贸易港行政区划改革创新，优化行政区划设置和行政区划结构体系。

第九条　国家支持海南自由贸易港主动适应国际经济贸易规则发展和全球经济治理体系改革新趋势，积极开展国际交流合作。

第十条　海南省人民代表大会及其常务委员会可以根据本法，结合海南自由贸易港建设的具体情况和实际需要，遵循宪法规定和法律、行政法规的基本原则，就贸易、投资及相关管理活动制定法规（以下称海南自由贸易港法规），在海南自由贸易港范围内实施。

海南自由贸易港法规应当报送全国人民代表大会常务委员会和国务院备案；对法律或者行政法规的规定作变通规定的，应当说明变通的情况和理由。

海南自由贸易港法规涉及依法应当由全国人民代表大会及其常务委员会制定法律或者由国务院制定行政法规事项的，应当分别报全国人民代表大会常务委员会或者国务院批准后生效。

第二章　贸易自由便利

第十一条　国家建立健全全岛封关运作的海南自由贸易港海关监管特殊区域制度。在依法有效监管基础上，建立自由进出、安全便利的货物贸易管理制度，优化服务贸易管理措施，实现贸易自由化便利化。

第十二条　海南自由贸易港应当高标准建设口岸基础设施，加强口岸公共卫生安全、国门生物安全、食品安全、商品质量安全管控。

第十三条　在境外与海南自由贸易港之间，货物、物品可以自由进出，海关依法进行监管，列入海南自由贸易港禁止、限制进出口货物、物品清单的除外。

前款规定的清单，由国务院商务主管部门会同国务院有关部门和海南省制定。

第十四条　货物由海南自由贸易港进入境内其他地区（以下简称内地），原则上按进口规定办理相关手续。物品由海南自由贸易港进入内地，按规定进行监管。对海南自由贸易港前往内地的运输工具，简化进口管理。

货物、物品以及运输工具由内地进入海南自由贸易港，按国内流通规定管理。

货物、物品以及运输工具在海南自由贸易港和内地之间进出的具体办法由国务院有关部门会同海南省制定。

第十五条　各类市场主体在海南自由贸易港内依法自由开展货物贸易以及相关活动，海关实施低干预、高效能的监管。

在符合环境保护、安全生产等要求的前提下，海南自由贸易港对进出口货物不设存储期限，货物存放地点可以自由选择。

第十六条　海南自由贸易港实行通关便利化政策，简化货物流转流程和手续。除依法需要检验检疫或者实行许可证件管理的货物外，货物进入海南自由贸易港，海关按照有关规定径予放行，为市场主体提供通关便利服务。

第十七条　海南自由贸易港对跨境服务贸易实行负面清单管理制度，并实施相配套的资金支付和转移制度。对清单之外的跨境服务贸易，按照内外一致的原则管理。

海南自由贸易港跨境服务贸易负面清单由国务院商务主管部门会同国务院有关部门和海南省制定。

第三章　投资自由便利

第十八条　海南自由贸易港实行投资自由化便利化政策，全面推行极简审批投资制度，完善投资促进和投资保护制度，强化产权保护，保障公平竞争，营造公开、透明、可预期的投资环境。

海南自由贸易港全面放开投资准入，涉及国家安全、社会稳定、生态保护红线、重大公共利益等国家实行准入管理的领域除外。

第十九条　海南自由贸易港对外商投资实行准入前国民待遇加负面清单管理制度。特别适用于海南自由贸易港的外商投资准入负面清单由国务院有关部门会同海南省制定，报国务院批准后发布。

第二十条　国家放宽海南自由贸易港市场准入。海南自由贸易港放宽市场准入特别清单（特别措施）由国务院有关部门会同海南省制定。

海南自由贸易港实行以过程监管为重点的投资便利措施，逐步实施市场准入承诺即入制。具体办法由海南省会同国务院有关部门制定。

第二十一条　海南自由贸易港按照便利、高效、透明的原则，简化办事程序，提高办事效率，优化政务服务，建立市场主体设立便利、经营便利、注销便利等制度，优化破产程序。具体办法由海南省人民代表大会及其常务委员会制定。

第二十二条　国家依法保护自然人、法人和非法人组织在海南自由贸易港内的投资、收益和其他合法权益，加强对中小投资者的保护。

第二十三条　国家依法保护海南自由贸易港内自然人、法人和非法人组织的知识产权，促进知识产权创造、运用和管理服务能力提升，建立健全知识产权领域信用分类监管、失信惩戒等机制，对知识产权侵权行为，严格依法追究法律责任。

第二十四条　海南自由贸易港建立统一开放、竞争有序的市场体系，强化竞争政策的基础性地位，落实公平竞争审查制度，加强和改进反垄断和反不正当竞争执法，保护市场公平竞争。

海南自由贸易港的各类市场主体，在准入许可、经营运营、要素获取、标准制定、优惠政策等方面依法享受平等待遇。具体办法由海南省人民代表大会及其常务委员会制定。

第四章　财政税收制度

第二十五条　在海南自由贸易港开发建设阶段，中央财政根据实际，结合税制变化情况，对海南自由贸易港给予适当财政支持。鼓励海南省在国务院批准的限额内发行地方政府债券支持海南自由贸易港项目建设。海南省设立政府引导、市场化方式运作的海南自由贸易港建设投资基金。

第二十六条　海南自由贸易港可以根据发展需要，自主减征、免征、缓征除具有生态补偿性质外的政府性基金。

第二十七条　按照税种结构简单科学、税制要素充分优化、税负水平明显降低、收入归属清晰、财政收支基本均衡的原则，结合国家税制改革方向，建立符合需要的海南自由贸易港税制体系。

全岛封关运作时，将增值税、消费税、车辆购置税、城市维护建设税及教育费附加等税费进行简并，在货物和服务零售环节征收销售税；全岛封关运作后，进一步简化税制。

国务院财政部门会同国务院有关部门和海南省及时提出简化税制的具体方案。

第二十八条　全岛封关运作、简并税制后，海南自由贸易港对进口征税商品实行目录管理，目录之外的货物进入海南自由贸易港，免征进口关税。进口征税商品目录由国务院财政部门会同国务院有关部门和海南省制定。

全岛封关运作、简并税制前，对部分进口商品，免征进口关税、进口环节增值税和消费税。

对由海南自由贸易港离境的出口应税商品，征收出口关税。

第二十九条　货物由海南自由贸易港进入内地，原则上按照进口征税；但是，对鼓励类产业企业生产的不含进口料件或者含进口料件在海南自由贸易港加工增值达到一定比例的货物，免征关税。具体办法由国务院有关部门会同海南省制定。

货物由内地进入海南自由贸易港，按照国务院有关规定退还已征收的增值税、消费税。

全岛封关运作、简并税制前，对离岛旅客购买免税物品并提货离岛的，按照有关规定免征进口关税、进口环节增值税和消费税。全岛封关运作、简并税制后，物品在海南自由贸易港和内地之间进出的税收管理办法，由国务院有关部门会同海南省制定。

第三十条　对注册在海南自由贸易港符合条件的企业，实行企业所得税优惠；对海南自由贸易港内符合条件的个人，实行个人所得税优惠。

第三十一条　海南自由贸易港建立优化高效统一的税收征管服务体系，提高税收征管服务科学化、信息化、国际化、便民化水平，积极参与国际税收征管合作，提高税收征管服务质量和效率，保护纳税人的合法权益。

第五章　生态环境保护

第三十二条　海南自由贸易港健全生态环境评价和监测制度，制定生态环境准入清单，防止污染，保护生态环境；健全自然资源资产产权制度和有偿使用制度，促进资源节约高效利用。

第三十三条　海南自由贸易港推进国土空间规划体系建设，实行差别化的自然生态空间用途管制，严守生态保护红线，构建以国家公园为主体的自然保护地体系，推进绿色城镇化、美丽乡村建设。

海南自由贸易港严格保护海洋生态环境，建立健全陆海统筹的生态系统保护修复和污染防治区域联动机制。

第三十四条　海南自由贸易港实行严格的进出境环境安全准入管理制度，加强检验检疫能力建设，防范外来物种入侵，禁止境外固体废物输入；提高医疗废物等危险废物处理处置能力，提升突发生态环境事件应急准备与响应能力，加强生态风险防控。

第三十五条　海南自由贸易港推进建立政府主导、企业和社会参与、市场化运作、可持续的生态保护补偿机制，建立生态产品价值实现机制，鼓励利用市场机制推进生态环境保护，实现可持续发展。

第三十六条　海南自由贸易港实行环境保护目标责任制和考核评价制度。县级以上地方人民政府对本级人民政府负有环境监督管理职责的部门及其负责人和下级人民政府及其负责人的年度考核，实行环境保护目标完成情况一票否决制。

环境保护目标未完成的地区，一年内暂停审批该地区新增重点污染物排放总量的建设项目环境影响评价文件；对负有责任的地方人民政府及负有环境监督管理职责的部门的主要责任人，一年内不得提拔使用或者转任重要职务，并依法予以处分。

第三十七条　海南自由贸易港实行生态环境损害责任终身追究制。对违背科学发展要求、造成生态环境严重破坏的地方人民政府及有关部门主要负责人、直接负责的主管人员和其他直接责任人员，应当严格追究责任。

第六章　产业发展与人才支撑

第三十八条　国家支持海南自由贸易港建设开放型生态型服务型产业体系，积极发展旅游业、现代服务业、高新技术产业以及热带特色高效农业等重点产业。

第三十九条　海南自由贸易港推进国际旅游消费中心建设，推动旅游与文化体育、健康医疗、养老养生等深度融合，培育旅游新业态新模式。

第四十条　海南自由贸易港深化现代服务业对内对外开放，打造国际航运枢纽，推动港口、产业、城市融合发展，完善海洋服务基础设施，构建具有国际竞争力的海洋服务体系。

境外高水平大学、职业院校可以在海南自由贸易港设立理工农医类学校。

第四十一条　国家支持海南自由贸易港建设重大科研基础设施和条件平台，建立符合科研规律的科技创新管理制度和国际科技合作机制。

第四十二条　海南自由贸易港依法建立安全有序自由便利的数据流动管理制度，依法保护个人、组织与数据有关的权益，有序扩大通信资源和业务开放，扩大数据领域开放，促进以数据为关键要素的数字经济发展。

国家支持海南自由贸易港探索实施区域性国际数据跨境流动制度安排。

第四十三条　海南自由贸易港实施高度自由便利开放的运输政策，建立更加开放的航运制度和船舶管理制度，建设“中国洋浦港”船籍港，实行特殊的船舶登记制度；放宽空域管制和航路限制，优化航权资源配置，提升运输便利化和服务保障水平。

第四十四条　海南自由贸易港深化人才发展体制机制改革，创新人才培养支持机制，建立科学合理的人才引进、认定、使用和待遇保障机制。

第四十五条　海南自由贸易港建立高效便利的出境入境管理制度，逐步实施更大范围适用免签入境政策，延长免签停留时间，优化出境入境检查管理，提供出境入境通关便利。

第四十六条　海南自由贸易港实行更加开放的人才和停居留政策，实行更加宽松的人员临时出境入境政策、便利的工作签证政策，对外国人工作许可实行负面清单管理，进一步完善居留制度。

第四十七条　海南自由贸易港放宽境外人员参加职业资格考试的限制，对符合条件的境外专业资格认定，实行单向认可清单制度。

第七章　综合措施

第四十八条　国务院可以根据海南自由贸易港建设的需要，授权海南省人民政府审批由国务院审批的农用地转为建设用地和土地征收事项；授权海南省人民政府在不突破海南省国土空间规划明确的生态保护红线、永久基本农田面积、耕地和林地保有量、建设用地总规模等重要指标并确保质量不降低的前提下，按照国家规定的条件，对全省耕地、永久基本农田、林地、建设用地布局调整进行审批。

海南自由贸易港积极推进城乡及垦区一体化协调发展和小城镇建设用地新模式，推进农垦土地资产化。

依法保障海南自由贸易港国家重大项目用海需求。

第四十九条　海南自由贸易港建设应当切实保护耕地，加强土地管理，建立集约节约用地制度、评价标准以及存量建设用地盘活处置制度。充分利用闲置土地，以出让方式取得土地使用权进行开发的土地，超过出让合同约定的竣工日期一年未竣工的，应当在竣工前每年征收出让土地现值一定比例的土地闲置费。具体办法由海南省制定。

第五十条　海南自由贸易港坚持金融服务实体经济，推进金融改革创新，率先落实金融业开放政策。

第五十一条　海南自由贸易港建立适应高水平贸易投资自由化便利化需要的跨境资金流动管理制度，分阶段开放资本项目，逐步推进非金融企业外债项下完全可兑换，推动跨境贸易结算便利化，有序推进海南自由贸易港与境外资金自由便利流动。

第五十二条　海南自由贸易港内经批准的金融机构可以通过指定账户或者在特定区域经营离岸金融业务。

第五十三条　海南自由贸易港加强社会信用体系建设和应用，构建守信激励和失信惩戒机制。

第五十四条　国家支持探索与海南自由贸易港相适应的司法体制改革。海南自由贸易港建立多元化商事纠纷解决机制，完善国际商事纠纷案件集中审判机制，支持通过仲裁、调解等多种非诉讼方式解决纠纷。

第五十五条　海南自由贸易港建立风险预警和防控体系，防范和化解重大风险。

海关负责口岸和其他海关监管区的常规监管，依法查缉走私和实施后续监管。海警机构负责查处海上走私违法行为。海南省人民政府负责全省反走私综合治理工作，加强对非设关地的管控，建立与其他地区的反走私联防联控机制。境外与海南自由贸易港之间、海南自由贸易港与内地之间，人员、货物、物品、运输工具等均需从口岸进出。

在海南自由贸易港依法实施外商投资安全审查制度，对影响或者可能影响国家安全的外商投资进行安全审查。

海南自由贸易港建立健全金融风险防控制度，实施网络安全等级保护制度，建立人员流动风险防控制度，建立传染病和突发公共卫生事件监测预警机制与防控救治机制，保障金融、网络与数据、人员流动和公共卫生等领域的秩序和安全。

第八章　附则

第五十六条　对本法规定的事项，在本法施行后，海南自由贸易港全岛封关运作前，国务院及其有关部门和海南省可以根据本法规定的原则，按照职责分工，制定过渡性的具体办法，推动海南自由贸易港建设。

第五十七条　本法自公布之日起施行。

《中华人民共和国海上交通安全法》

中华人民共和国主席令

（第七十九号）

《中华人民共和国海上交通安全法》已由中华人民共和国第十三届全国人民代表大会常务委员会第二十八次会议于 2021 年 4 月 29 日修订通过，现予公布，自 2021 年 9 月 1 日起施行。

中华人民共和国主席　习近平

2021 年 4 月 29 日

中华人民共和国海上交通安全法

（1983 年 9 月 2 日第六届全国人民代表大会常务委员会第二次会议通过　根据 2016 年 11 月 7 日第十二届全国人民代表大会常务委员会第二十四次会议《关于修改〈中华人民共和国对外贸易法〉等十二部法律的决定》修正　2021 年 4 月 29 日第十三届全国人民代表大会常务委员会第二十八次会议修订）

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第一章　总　　则

第一条　为了加强海上交通管理，维护海上交通秩序，保障生命财产安全，维护国家权益，制定本法。

第二条　在中华人民共和国管辖海域内从事航行、停泊、作业以及其他与海上交通安全相关的活动，适用本法。

第三条　国家依法保障交通用海。

海上交通安全工作坚持安全第一、预防为主、便利通行、依法管理的原则，保障海上交通安全、有序、畅通。

第四条　国务院交通运输主管部门主管全国海上交通安全工作。

国家海事管理机构统一负责海上交通安全监督管理工作，其他各级海事管理机构按照职责具体负责辖区内的海上交通安全监督管理工作。

第五条　各级人民政府及有关部门应当支持海上交通安全工作，加强海上交通安全的宣传教育，提高全社会的海上交通安全意识。

第六条　国家依法保障船员的劳动安全和职业健康，维护船员的合法权益。

第七条　从事船舶、海上设施航行、停泊、作业以及其他与海上交通相关活动的单位、个人，应当遵守有关海上交通安全的法律、行政法规、规章以及强制性标准和技术规范；依法享有获得航海保障和海上救助的权利，承担维护海上交通安全和保护海洋生态环境的义务。

第八条　国家鼓励和支持先进科学技术在海上交通安全工作中的应用，促进海上交通安全现代化建设，提高海上交通安全科学技术水平。

第二章　船舶、海上设施和船员

第九条　中国籍船舶、在中华人民共和国管辖海域设置的海上设施、船运集装箱，以及国家海事管理机构确定的关系海上交通安全的重要船用设备、部件和材料，应当符合有关法律、行政法规、规章以及强制性标准和技术规范的要求，经船舶检验机构检验合格，取得相应证书、文书。证书、文书的清单由国家海事管理机构制定并公布。

设立船舶检验机构应当经国家海事管理机构许可。船舶检验机构设立条件、程序及其管理等依照有关船舶检验的法律、行政法规的规定执行。

持有相关证书、文书的单位应当按照规定的用途使用船舶、海上设施、船运集装箱以及重要船用设备、部件和材料，并应当依法定期进行安全技术检验。

第十条　船舶依照有关船舶登记的法律、行政法规的规定向海事管理机构申请船舶国籍登记、取得国籍证书后，方可悬挂中华人民共和国国旗航行、停泊、作业。

中国籍船舶灭失或者报废的，船舶所有人应当在国务院交通运输主管部门规定的期限内申请办理注销国籍登记；船舶所有人逾期不申请注销国籍登记的，海事管理机构可以发布关于拟强制注销船舶国籍登记的公告。船舶所有人自公告发布之日起六十日内未提出异议的，海事管理机构可以注销该船舶的国籍登记。

第十一条　中国籍船舶所有人、经营人或者管理人应当建立并运行安全营运和防治船舶污染管理体系。

海事管理机构经对前款规定的管理体系审核合格的，发给符合证明和相应的船舶安全管理证书。

第十二条　中国籍国际航行船舶的所有人、经营人或者管理人应当依照国务院交通运输主管部门的规定建立船舶保安制度，制定船舶保安计划，并按照船舶保安计划配备船舶保安设备，定期开展演练。

第十三条　中国籍船员和海上设施上的工作人员应当接受海上交通安全以及相应岗位的专业教育、培训。

中国籍船员应当依照有关船员管理的法律、行政法规的规定向海事管理机构申请取得船员适任证书，并取得健康证明。

外国籍船员在中国籍船舶上工作的，按照有关船员管理的法律、行政法规的规定执行。

船员在船舶上工作，应当符合船员适任证书载明的船舶、航区、职务的范围。

第十四条　中国籍船舶的所有人、经营人或者管理人应当为其国际航行船舶向海事管理机构申请取得海事劳工证书。船舶取得海事劳工证书应当符合下列条件：

（一）所有人、经营人或者管理人依法招用船员，与其签订劳动合同或者就业协议，并为船舶配备符合要求的船员；

（二）所有人、经营人或者管理人已保障船员在船舶上的工作环境、职业健康保障和安全防护、工作和休息时间、工资报酬、生活条件、医疗条件、社会保险等符合国家有关规定；

（三）所有人、经营人或者管理人已建立符合要求的船员投诉和处理机制；

（四）所有人、经营人或者管理人已就船员遣返费用以及在船就业期间发生伤害、疾病或者死亡依法应当支付的费用提供相应的财务担保或者投保相应的保险。

海事管理机构商人力资源社会保障行政部门，按照各自职责对申请人及其船舶是否符合前款规定条件进行审核。经审核符合规定条件的，海事管理机构应当自受理申请之日起十个工作日内颁发海事劳工证书；不符合规定条件的，海事管理机构应当告知申请人并说明理由。

海事劳工证书颁发及监督检查的具体办法由国务院交通运输主管部门会同国务院人力资源社会保障行政部门制定并公布。

第十五条　海事管理机构依照有关船员管理的法律、行政法规的规定，对单位从事海船船员培训业务进行管理。

第十六条　国务院交通运输主管部门和其他有关部门、有关县级以上地方人民政府应当建立健全船员境外突发事件预警和应急处置机制，制定船员境外突发事件应急预案。

船员境外突发事件应急处置由船员派出单位所在地的省、自治区、直辖市人民政府负责，船员户籍所在地的省、自治区、直辖市人民政府予以配合。

中华人民共和国驻外国使馆、领馆和相关海事管理机构应当协助处置船员境外突发事件。

第十七条　本章第九条至第十二条、第十四条规定适用的船舶范围由有关法律、行政法规具体规定，或者由国务院交通运输主管部门拟定并报国务院批准后公布。

第三章　海上交通条件和航行保障

第十八条　国务院交通运输主管部门统筹规划和管理海上交通资源，促进海上交通资源的合理开发和有效利用。

海上交通资源规划应当符合国土空间规划。

第十九条　海事管理机构根据海域的自然状况、海上交通状况以及海上交通安全管理的需要，划定、调整并及时公布船舶定线区、船舶报告区、交通管制区、禁航区、安全作业区和港外锚地等海上交通功能区域。

海事管理机构划定或者调整船舶定线区、港外锚地以及对其他海洋功能区域或者用海活动造成影响的安全作业区，应当征求渔业渔政、生态环境、自然资源等有关部门的意见。为了军事需要划定、调整禁航区的，由负责划定、调整禁航区的军事机关作出决定，海事管理机构予以公布。

第二十条　建设海洋工程、海岸工程影响海上交通安全的，应当根据情况配备防止船舶碰撞的设施、设备并设置专用航标。

第二十一条　国家建立完善船舶定位、导航、授时、通信和远程监测等海上交通支持服务系统，为船舶、海上设施提供信息服务。

第二十二条　任何单位、个人不得损坏海上交通支持服务系统或者妨碍其工作效能。建设建筑物、构筑物，使用设施设备可能影响海上交通支持服务系统正常使用的，建设单位、所有人或者使用人应当与相关海上交通支持服务系统的管理单位协商，作出妥善安排。

第二十三条　国务院交通运输主管部门应当采取必要的措施，保障海上交通安全无线电通信设施的合理布局和有效覆盖，规划本系统（行业）海上无线电台（站）的建设布局和台址，核发船舶制式无线电台执照及电台识别码。

国务院交通运输主管部门组织本系统（行业）的海上无线电监测系统建设并对其无线电信号实施监测，会同国家无线电管理机构维护海上无线电波秩序。

第二十四条　船舶在中华人民共和国管辖海域内通信需要使用岸基无线电台（站）转接的，应当通过依法设置的境内海岸无线电台（站）或者卫星关口站进行转接。

承担无线电通信任务的船员和岸基无线电台（站）的工作人员应当遵守海上无线电通信规则，保持海上交通安全通信频道的值守和畅通，不得使用海上交通安全通信频率交流与海上交通安全无关的内容。

任何单位、个人不得违反国家有关规定使用无线电台识别码，影响海上搜救的身份识别。

第二十五条　天文、气象、海洋等有关单位应当及时预报、播发和提供航海天文、世界时、海洋气象、海浪、海流、潮汐、冰情等信息。

第二十六条　国务院交通运输主管部门统一布局、建设和管理公用航标。海洋工程、海岸工程的建设单位、所有人或者经营人需要设置、撤除专用航标，移动专用航标位置或者改变航标灯光、功率等的，应当报经海事管理机构同意。需要设置临时航标的，应当符合海事管理机构确定的航标设置点。

自然资源主管部门依法保障航标设施和装置的用地、用海、用岛，并依法为其办理有关手续。

航标的建设、维护、保养应当符合有关强制性标准和技术规范的要求。航标维护单位和专用航标的所有人应当对航标进行巡查和维护保养，保证航标处于良好适用状态。航标发生位移、损坏、灭失的，航标维护单位或者专用航标的所有人应当及时予以恢复。

第二十七条　任何单位、个人发现下列情形之一的，应当立即向海事管理机构报告；涉及航道管理机构职责或者专用航标的，海事管理机构应当及时通报航道管理机构或者专用航标的所有人：

（一）助航标志或者导航设施位移、损坏、灭失；

（二）有妨碍海上交通安全的沉没物、漂浮物、搁浅物或者其他碍航物；

（三）其他妨碍海上交通安全的异常情况。

第二十八条　海事管理机构应当依据海上交通安全管理的需要，就具有紧迫性、危险性的情况发布航行警告，就其他影响海上交通安全的情况发布航行通告。

海事管理机构应当将航行警告、航行通告，以及船舶定线区的划定、调整情况通报海军航海保证部门，并及时提供有关资料。

第二十九条　海事管理机构应当及时向船舶、海上设施播发海上交通安全信息。

船舶、海上设施在定线区、交通管制区或者通航船舶密集的区域航行、停泊、作业时，海事管理机构应当根据其请求提供相应的安全信息服务。

第三十条　下列船舶在国务院交通运输主管部门划定的引航区内航行、停泊或者移泊的，应当向引航机构申请引航：

（一）外国籍船舶，但国务院交通运输主管部门经报国务院批准后规定可以免除的除外；

（二）核动力船舶、载运放射性物质的船舶、超大型油轮；

（三）可能危及港口安全的散装液化气船、散装危险化学品船；

（四）长、宽、高接近相应航道通航条件限值的船舶。

前款第三项、第四项船舶的具体标准，由有关海事管理机构根据港口实际情况制定并公布。

船舶自愿申请引航的，引航机构应当提供引航服务。

第三十一条　引航机构应当及时派遣具有相应能力、经验的引航员为船舶提供引航服务。

引航员应当根据引航机构的指派，在规定的水域登离被引领船舶，安全谨慎地执行船舶引航任务。被引领船舶应当配备符合规定的登离装置，并保障引航员在登离船舶及在船上引航期间的安全。

引航员引领船舶时，不解除船长指挥和管理船舶的责任。

第三十二条　国务院交通运输主管部门根据船舶、海上设施和港口面临的保安威胁情形，确定并及时发布保安等级。船舶、海上设施和港口应当根据保安等级采取相应的保安措施。

第四章　航行、停泊、作业

第三十三条　船舶航行、停泊、作业，应当持有有效的船舶国籍证书及其他法定证书、文书，配备依照有关规定出版的航海图书资料，悬挂相关国家、地区或者组织的旗帜，标明船名、船舶识别号、船籍港、载重线标志。

船舶应当满足最低安全配员要求，配备持有合格有效证书的船员。

海上设施停泊、作业，应当持有法定证书、文书，并按规定配备掌握避碰、信号、通信、消防、救生等专业技能的人员。

第三十四条　船长应当在船舶开航前检查并在开航时确认船员适任、船舶适航、货物适载，并了解气象和海况信息以及海事管理机构发布的航行通告、航行警告及其他警示信息，落实相应的应急措施，不得冒险开航。

船舶所有人、经营人或者管理人不得指使、强令船员违章冒险操作、作业。

第三十五条　船舶应当在其船舶检验证书载明的航区内航行、停泊、作业。

船舶航行、停泊、作业时，应当遵守相关航行规则，按照有关规定显示信号、悬挂标志，保持足够的富余水深。

第三十六条　船舶在航行中应当按照有关规定开启船舶的自动识别、航行数据记录、远程识别和跟踪、通信等与航行安全、保安、防治污染相关的装置，并持续进行显示和记录。

任何单位、个人不得拆封、拆解、初始化、再设置航行数据记录装置或者读取其记录的信息，但法律、行政法规另有规定的除外。

第三十七条　船舶应当配备航海日志、轮机日志、无线电记录簿等航行记录，按照有关规定全面、真实、及时记录涉及海上交通安全的船舶操作以及船舶航行、停泊、作业中的重要事件，并妥善保管相关记录簿。

第三十八条　船长负责管理和指挥船舶。在保障海上生命安全、船舶保安和防治船舶污染方面，船长有权独立作出决定。

船长应当采取必要的措施，保护船舶、在船人员、船舶航行文件、货物以及其他财产的安全。船长在其职权范围内发布的命令，船员、乘客及其他在船人员应当执行。

第三十九条　为了保障船舶和在船人员的安全，船长有权在职责范围内对涉嫌在船上进行违法犯罪活动的人员采取禁闭或者其他必要的限制措施，并防止其隐匿、毁灭、伪造证据。

船长采取前款措施，应当制作案情报告书，由其和两名以上在船人员签字。中国籍船舶抵达我国港口后，应当及时将相关人员移送有关主管部门。

第四十条　发现在船人员患有或者疑似患有严重威胁他人健康的传染病的，船长应当立即启动相应的应急预案，在职责范围内对相关人员采取必要的隔离措施，并及时报告有关主管部门。

第四十一条　船长在航行中死亡或者因故不能履行职责的，应当由驾驶员中职务最高的人代理船长职务；船舶在下一个港口开航前，其所有人、经营人或者管理人应当指派新船长接任。

第四十二条　船员应当按照有关航行、值班的规章制度和操作规程以及船长的指令操纵、管理船舶，保持安全值班，不得擅离职守。船员履行在船值班职责前和值班期间，不得摄入可能影响安全值班的食品、药品或者其他物品。

第四十三条　船舶进出港口、锚地或者通过桥区水域、海峡、狭水道、重要渔业水域、通航船舶密集的区域、船舶定线区、交通管制区，应当加强瞭望、保持安全航速，并遵守前述区域的特殊航行规则。

前款所称重要渔业水域由国务院渔业渔政主管部门征求国务院交通运输主管部门意见后划定并公布。

船舶穿越航道不得妨碍航道内船舶的正常航行，不得抢越他船船艏。超过桥梁通航尺度的船舶禁止进入桥区水域。

第四十四条　船舶不得违反规定进入或者穿越禁航区。

船舶进出船舶报告区，应当向海事管理机构报告船位和动态信息。

在安全作业区、港外锚地范围内，禁止从事养殖、种植、捕捞以及其他影响海上交通安全的作业或者活动。

第四十五条　船舶载运或者拖带超长、超高、超宽、半潜的船舶、海上设施或者其他物体航行，应当采取拖拽部位加强、护航等特殊的安全保障措施，在开航前向海事管理机构报告航行计划，并按有关规定

显示信号、悬挂标志；拖带移动式平台、浮船坞等大型海上设施的，还应当依法交验船舶检验机构出具的拖航检验证书。

第四十六条　国际航行船舶进出口岸，应当依法向海事管理机构申请许可并接受海事管理机构及其他口岸查验机构的监督检查。海事管理机构应当自受理申请之日起五个工作日内作出许可或者不予许可的决定。

外国籍船舶临时进入非对外开放水域，应当依照国务院关于船舶进出口岸的规定取得许可。

国内航行船舶进出港口、港外装卸站，应当向海事管理机构报告船舶的航次计划、适航状态、船员配备和客货载运等情况。

第四十七条　船舶应当在符合安全条件的码头、泊位、装卸站、锚地、安全作业区停泊。船舶停泊不得危及其他船舶、海上设施的安全。

船舶进出港口、港外装卸站，应当符合靠泊条件和关于潮汐、气象、海况等航行条件的要求。

超长、超高、超宽的船舶或者操纵能力受到限制的船舶进出港口、港外装卸站可能影响海上交通安全的，海事管理机构应当对船舶进出港安全条件进行核查，并可以要求船舶采取加配拖轮、乘潮进港等相应的安全措施。

第四十八条　在中华人民共和国管辖海域内进行施工作业，应当经海事管理机构许可，并核定相应安全作业区。取得海上施工作业许可，应当符合下列条件：

（一）施工作业的单位、人员、船舶、设施符合安全航行、停泊、作业的要求；

（二）有施工作业方案；

（三）有符合海上交通安全和防治船舶污染海洋环境要求的保障措施、应急预案和责任制度。

从事施工作业的船舶应当在核定的安全作业区内作业，并落实海上交通安全管理措施。其他无关船舶、海上设施不得进入安全作业区。

在港口水域内进行采掘、爆破等可能危及港口安全的作业，适用港口管理的法律规定。

第四十九条　从事体育、娱乐、演练、试航、科学观测等水上水下活动，应当遵守海上交通安全管理规定；可能影响海上交通安全的，应当提前十个工作日将活动涉及的海域范围报告海事管理机构。

第五十条　海上施工作业或者水上水下活动结束后，有关单位、个人应当及时消除可能妨碍海上交通安全的隐患。

第五十一条　碍航物的所有人、经营人或者管理人应当按照有关强制性标准和技术规范的要求及时设置警示标志，向海事管理机构报告碍航物的名称、形状、尺寸、位置和深度，并在海事管理机构限定的期限内打捞清除。碍航物的所有人放弃所有权的，不免除其打捞清除义务。

不能确定碍航物的所有人、经营人或者管理人的，海事管理机构应当组织设置标志、打捞或者采取相应措施，发生的费用纳入部门预算。

第五十二条　有下列情形之一，对海上交通安全有较大影响的，海事管理机构应当根据具体情况采取停航、限速或者划定交通管制区等相应交通管制措施并向社会公告：

（一）天气、海况恶劣；

（二）发生影响航行的海上险情或者海上交通事故；

（三）进行军事训练、演习或者其他相关活动；

（四）开展大型水上水下活动；

（五）特定海域通航密度接近饱和；

（六）其他对海上交通安全有较大影响的情形。

第五十三条　国务院交通运输主管部门为维护海上交通安全、保护海洋环境，可以会同有关主管部门采取必要措施，防止和制止外国籍船舶在领海的非无害通过。

第五十四条　下列外国籍船舶进出中华人民共和国领海，应当向海事管理机构报告：

（一）潜水器；

（二）核动力船舶；

（三）载运放射性物质或者其他有毒有害物质的船舶；

（四）法律、行政法规或者国务院规定的可能危及中华人民共和国海上交通安全的其他船舶。

前款规定的船舶通过中华人民共和国领海，应当持有有关证书，采取符合中华人民共和国法律、行政法规和规章规定的特别预防措施，并接受海事管理机构的指令和监督。

第五十五条　除依照本法规定获得进入口岸许可外，外国籍船舶不得进入中华人民共和国内水；但是，因人员病急、机件故障、遇难、避风等紧急情况未及获得许可的可以进入。

外国籍船舶因前款规定的紧急情况进入中华人民共和国内水的，应当在进入的同时向海事管理机构紧急报告，接受海事管理机构的指令和监督。海事管理机构应当及时通报管辖海域的海警机构、就近的出入境边防检查机关和当地公安机关、海关等其他主管部门。

第五十六条　中华人民共和国军用船舶执行军事任务、公务船舶执行公务，遇有紧急情况，在保证海上交通安全的前提下，可以不受航行、停泊、作业有关规则的限制。

第五章　海上客货运输安全

第五十七条　除进行抢险或者生命救助外，客船应当按照船舶检验证书核定的载客定额载运乘客，货船载运货物应当符合船舶检验证书核定的载重线和载货种类，不得载运乘客。

第五十八条　客船载运乘客不得同时载运危险货物。

乘客不得随身携带或者在行李中夹带法律、行政法规或者国务院交通运输主管部门规定的危险物品。

第五十九条　客船应当在显著位置向乘客明示安全须知，设置安全标志和警示，并向乘客介绍救生用具的使用方法以及在紧急情况下应当采取的应急措施。乘客应当遵守安全乘船要求。

第六十条　海上渡口所在地的县级以上地方人民政府应当建立健全渡口安全管理责任制，制定海上渡口的安全管理办法，监督、指导海上渡口经营者落实安全主体责任，维护渡运秩序，保障渡运安全。

海上渡口的渡运线路由渡口所在地的县级以上地方人民政府交通运输主管部门会同海事管理机构划定。渡船应当按照划定的线路安全渡运。

遇有恶劣天气、海况，县级以上地方人民政府或者其指定的部门应当发布停止渡运的公告。

第六十一条　船舶载运货物，应当按照有关法律、行政法规、规章以及强制性标准和技术规范的要求安全装卸、积载、隔离、系固和管理。

第六十二条　船舶载运危险货物，应当持有有效的危险货物适装证书，并根据危险货物的特性和应急措施的要求，编制危险货物应急处置预案，配备相应的消防、应急设备和器材。

第六十三条　托运人托运危险货物，应当将其正式名称、危险性质以及应当采取的防护措施通知承运人，并按照有关法律、行政法规、规章以及强制性标准和技术规范的要求妥善包装，设置明显的危险品标志和标签。

托运人不得在托运的普通货物中夹带危险货物或者将危险货物谎报为普通货物托运。

托运人托运的货物为国际海上危险货物运输规则和国家危险货物品名表上未列明但具有危险特性的货物的，托运人还应当提交有关专业机构出具的表明该货物危险特性以及应当采取的防护措施等情况的文件。

货物危险特性的判断标准由国家海事管理机构制定并公布。

第六十四条　船舶载运危险货物进出港口，应当符合下列条件，经海事管理机构许可，并向海事管理机构报告进出港口和停留的时间等事项：

（一）所载运的危险货物符合海上安全运输要求；

（二）船舶的装载符合所持有的证书、文书的要求；

（三）拟靠泊或者进行危险货物装卸作业的港口、码头、泊位具备有关法律、行政法规规定的危险货物作业经营资质。

海事管理机构应当自收到申请之时起二十四小时内作出许可或者不予许可的决定。

定船舶、定航线并且定货种的船舶可以申请办理一定期限内多次进出港口许可，期限不超过三十日。海事管理机构应当自收到申请之日起五个工作日内作出许可或者不予许可的决定。

海事管理机构予以许可的，应当通报港口行政管理部门。

第六十五条　船舶、海上设施从事危险货物运输或者装卸、过驳作业，应当编制作业方案，遵守有关强制性标准和安全作业操作规程，采取必要的预防措施，防止发生安全事故。

在港口水域外从事散装液体危险货物过驳作业的，还应当符合下列条件，经海事管理机构许可并核定安全作业区：

（一）拟进行过驳作业的船舶或者海上设施符合海上交通安全与防治船舶污染海洋环境的要求；

（二）拟过驳的货物符合安全过驳要求；

（三）参加过驳作业的人员具备法律、行政法规规定的过驳作业能力；

（四）拟作业水域及其底质、周边环境适宜开展过驳作业；

（五）过驳作业对海洋资源以及附近的军事目标、重要民用目标不构成威胁；

（六）有符合安全要求的过驳作业方案、安全保障措施和应急预案。

对单航次作业的船舶，海事管理机构应当自收到申请之时起二十四小时内作出许可或者不予许可的决定；对在特定水域多航次作业的船舶，海事管理机构应当自收到申请之日起五个工作日内作出许可或者不予许可的决定。

第六章　海上搜寻救助

第六十六条　海上遇险人员依法享有获得生命救助的权利。生命救助优先于环境和财产救助。

第六十七条　海上搜救工作应当坚持政府领导、统一指挥、属地为主、专群结合、就近快速的原则。

第六十八条　国家建立海上搜救协调机制，统筹全国海上搜救应急反应工作，研究解决海上搜救工作中的重大问题，组织协调重大海上搜救应急行动。协调机制由国务院有关部门、单位和有关军事机关组成。

中国海上搜救中心和有关地方人民政府设立的海上搜救中心或者指定的机构（以下统称海上搜救中心）负责海上搜救的组织、协调、指挥工作。

第六十九条　沿海县级以上地方人民政府应当安排必要的海上搜救资金，保障搜救工作的正常开展。

第七十条　海上搜救中心各成员单位应当在海上搜救中心统一组织、协调、指挥下，根据各自职责，承担海上搜救应急、抢险救灾、支持保障、善后处理等工作。

第七十一条　国家设立专业海上搜救队伍，加强海上搜救力量建设。专业海上搜救队伍应当配备专业搜救装备，建立定期演练和日常培训制度，提升搜救水平。

国家鼓励社会力量建立海上搜救队伍，参与海上搜救行动。

第七十二条　船舶、海上设施、航空器及人员在海上遇险的，应当立即报告海上搜救中心，不得瞒报、谎报海上险情。

船舶、海上设施、航空器及人员误发遇险报警信号的，除立即向海上搜救中心报告外，还应当采取必要措施消除影响。

其他任何单位、个人发现或者获悉海上险情的，应当立即报告海上搜救中心。

第七十三条　发生碰撞事故的船舶、海上设施，应当互通名称、国籍和登记港，在不严重危及自身安全的情况下尽力救助对方人员，不得擅自离开事故现场水域或者逃逸。

第七十四条　遇险的船舶、海上设施及其所有人、经营人或者管理人应当采取有效措施防止、减少生命财产损失和海洋环境污染。

船舶遇险时，乘客应当服从船长指挥，配合采取相关应急措施。乘客有权获知必要的险情信息。

船长决定弃船时，应当组织乘客、船员依次离船，并尽力抢救法定航行资料。船长应当最后离船。

第七十五条　船舶、海上设施、航空器收到求救信号或者发现有人遭遇生命危险的，在不严重危及自身安全的情况下，应当尽力救助遇险人员。

第七十六条　海上搜救中心接到险情报告后，应当立即进行核实，及时组织、协调、指挥政府有关部门、专业搜救队伍、社会有关单位等各方力量参加搜救，并指定现场指挥。参加搜救的船舶、海上设施、航空器及人员应当服从现场指挥，及时报告搜救动态和搜救结果。

搜救行动的中止、恢复、终止决定由海上搜救中心作出。未经海上搜救中心同意，参加搜救的船舶、海上设施、航空器及人员不得擅自退出搜救行动。

军队参加海上搜救，依照有关法律、行政法规的规定执行。

第七十七条　遇险船舶、海上设施、航空器或者遇险人员应当服从海上搜救中心和现场指挥的指令，及时接受救助。

遇险船舶、海上设施、航空器不配合救助的，现场指挥根据险情危急情况，可以采取相应救助措施。

第七十八条　海上事故或者险情发生后，有关地方人民政府应当及时组织医疗机构为遇险人员提供紧急医疗救助，为获救人员提供必要的生活保障，并组织有关方面采取善后措施。

第七十九条　在中华人民共和国缔结或者参加的国际条约规定由我国承担搜救义务的海域内开展搜救，依照本章规定执行。

中国籍船舶在中华人民共和国管辖海域以及海上搜救责任区域以外的其他海域发生险情的，中国海上搜救中心接到信息后，应当依据中华人民共和国缔结或者参加的国际条约的规定开展国际协作。

第七章　海上交通事故调查处理

第八十条　船舶、海上设施发生海上交通事故，应当及时向海事管理机构报告，并接受调查。

第八十一条　海上交通事故根据造成的损害后果分为特别重大事故、重大事故、较大事故和一般事故。事故等级划分的人身伤亡标准依照有关安全生产的法律、行政法规的规定确定；事故等级划分的直接经济损失标准，由国务院交通运输主管部门会同国务院有关部门根据海上交通事故中的特殊情况确定，报国务院批准后公布施行。

第八十二条　特别重大海上交通事故由国务院或者国务院授权的部门组织事故调查组进行调查，海事管理机构应当参与或者配合开展调查工作。

其他海上交通事故由海事管理机构组织事故调查组进行调查，有关部门予以配合。国务院认为有必要的，可以直接组织或者授权有关部门组织事故调查组进行调查。

海事管理机构进行事故调查，事故涉及执行军事运输任务的，应当会同有关军事机关进行调查；涉及渔业船舶的，渔业渔政主管部门、海警机构应当参与调查。

第八十三条　调查海上交通事故，应当全面、客观、公正、及时，依法查明事故事实和原因，认定事故责任。

第八十四条　海事管理机构可以根据事故调查处理需要拆封、拆解当事船舶的航行数据记录装置或者读取其记录的信息，要求船舶驶向指定地点或者禁止其离港，扣留船舶或者海上设施的证书、文书、物品、资料等并妥善保管。有关人员应当配合事故调查。

第八十五条　海上交通事故调查组应当自事故发生之日起九十日内提交海上交通事故调查报告；特殊情况下，经负责组织事故调查组的部门负责人批准，提交事故调查报告的期限可以适当延长，但延长期限最长不得超过九十日。事故技术鉴定所需时间不计入事故调查期限。

海事管理机构应当自收到海上交通事故调查报告之日起十五个工作日内作出事故责任认定书，作为处理海上交通事故的证据。

事故损失较小、事实清楚、责任明确的，可以依照国务院交通运输主管部门的规定适用简易调查程序。

海上交通事故调查报告、事故责任认定书应当依照有关法律、行政法规的规定向社会公开。

第八十六条　中国籍船舶在中华人民共和国管辖海域外发生海上交通事故的，应当及时向海事管理机构报告事故情况并接受调查。

外国籍船舶在中华人民共和国管辖海域外发生事故，造成中国公民重伤或者死亡的，海事管理机构根据中华人民共和国缔结或者参加的国际条约的规定参与调查。

第八十七条　船舶、海上设施在海上遭遇恶劣天气、海况以及意外事故，造成或者可能造成损害，需要说明并记录时间、海域以及所采取的应对措施等具体情况的，可以向海事管理机构申请办理海事声明签注。海事管理机构应当依照规定提供签注服务。

第八章　监督管理

第八十八条　海事管理机构对在中华人民共和国管辖海域内从事航行、停泊、作业以及其他与海上交通安全相关的活动，依法实施监督检查。

海事管理机构依照中华人民共和国法律、行政法规以及中华人民共和国缔结或者参加的国际条约对外国籍船舶实施港口国、沿岸国监督检查。

海事管理机构工作人员执行公务时，应当按照规定着装，佩戴职衔标志，出示执法证件，并自觉接受监督。

海事管理机构依法履行监督检查职责，有关单位、个人应当予以配合，不得拒绝、阻碍依法实施的监督检查。

第八十九条　海事管理机构实施监督检查可以采取登船检查、查验证书、现场检查、询问有关人员、电子监控等方式。

载运危险货物的船舶涉嫌存在瞒报、谎报危险货物等情况的，海事管理机构可以采取开箱查验等方式进行检查。海事管理机构应当将开箱查验情况通报有关部门。港口经营人和有关单位、个人应当予以协助。

第九十条　海事管理机构对船舶、海上设施实施监督检查时，应当避免、减少对其正常作业的影响。

除法律、行政法规另有规定或者不立即实施监督检查可能造成严重后果外，不得拦截正在航行中的船舶进行检查。

第九十一条　船舶、海上设施对港口安全具有威胁的，海事管理机构应当责令立即或者限期改正、限制操作，责令驶往指定地点、禁止进港或者将其驱逐出港。

船舶、海上设施处于不适航或者不适拖状态，船员、海上设施上的相关人员未持有有效的法定证书、文书，或者存在其他严重危害海上交通安全、污染海洋环境的隐患的，海事管理机构应当根据情况禁止有关船舶、海上设施进出港，暂扣有关证书、文书或者责令其停航、改航、驶往指定地点或者停止作业。船舶超载的，海事管理机构可以依法对船舶进行强制减载。因强制减载发生的费用由违法船舶所有人、经营人或者管理人承担。

船舶、海上设施发生海上交通事故、污染事故，未结清国家规定的税费、滞纳金且未提供担保或者未履行其他法定义务的，海事管理机构应当责令改正，并可以禁止其离港。

第九十二条　外国籍船舶可能威胁中华人民共和国内水、领海安全的，海事管理机构有权责令其离开。

外国籍船舶违反中华人民共和国海上交通安全或者防治船舶污染的法律、行政法规的，海事管理机构可以依法行使紧追权。

第九十三条　任何单位、个人有权向海事管理机构举报妨碍海上交通安全的行为。海事管理机构接到举报后，应当及时进行核实、处理。

第九十四条　海事管理机构在监督检查中，发现船舶、海上设施有违反其他法律、行政法规行为的，应当依法及时通报或者移送有关主管部门处理。

第九章　法律责任

第九十五条　船舶、海上设施未持有有效的证书、文书的，由海事管理机构责令改正，对违法船舶或者海上设施的所有人、经营人或者管理人处三万元以上三十万元以下的罚款，对船长和有关责任人员处三千元以上三万元以下的罚款；情节严重的，暂扣船长、责任船员的船员适任证书十八个月至三十个月，直至吊销船员适任证书；对船舶持有的伪造、变造证书、文书，予以没收；对存在严重安全隐患的船舶，可以依法予以没收。

第九十六条　船舶或者海上设施有下列情形之一的，由海事管理机构责令改正，对违法船舶或者海上设施的所有人、经营人或者管理人处二万元以上二十万元以下的罚款，对船长和有关责任人员处二千元以上二万元以下的罚款；情节严重的，吊销违法船舶所有人、经营人或者管理人的有关证书、文书，暂扣船长、责任船员的船员适任证书十二个月至二十四个月，直至吊销船员适任证书：

（一）船舶、海上设施的实际状况与持有的证书、文书不符；

（二）船舶未依法悬挂国旗，或者违法悬挂其他国家、地区或者组织的旗帜；

（三）船舶未按规定标明船名、船舶识别号、船籍港、载重线标志；

（四）船舶、海上设施的配员不符合最低安全配员要求。

第九十七条　在船舶上工作未持有船员适任证书、船员健康证明或者所持船员适任证书、健康证明不符合要求的，由海事管理机构对船舶的所有人、经营人或者管理人处一万元以上十万元以下的罚款，对责任船员处三千元以上三万元以下的罚款；情节严重的，对船舶的所有人、经营人或者管理人处三万元以上三十万元以下的罚款，暂扣责任船员的船员适任证书六个月至十二个月，直至吊销船员适任证书。

第九十八条　以欺骗、贿赂等不正当手段为中国籍船舶取得相关证书、文书的，由海事管理机构撤销有关许可，没收相关证书、文书，对船舶所有人、经营人或者管理人处四万元以上四十万元以下的罚款。

以欺骗、贿赂等不正当手段取得船员适任证书的，由海事管理机构撤销有关许可，没收船员适任证书，对责任人员处五千元以上五万元以下的罚款。

第九十九条　船员未保持安全值班，违反规定摄入可能影响安全值班的食品、药品或者其他物品，或者有其他违反海上船员值班规则的行为的，由海事管理机构对船长、责任船员处一千元以上一万元以下的罚款，或者暂扣船员适任证书三个月至十二个月；情节严重的，吊销船长、责任船员的船员适任证书。

第一百条　有下列情形之一的，由海事管理机构责令改正；情节严重的，处三万元以上十万元以下的罚款：

（一）建设海洋工程、海岸工程未按规定配备相应的防止船舶碰撞的设施、设备并设置专用航标；

（二）损坏海上交通支持服务系统或者妨碍其工作效能；

（三）未经海事管理机构同意设置、撤除专用航标，移动专用航标位置或者改变航标灯光、功率等其他状况，或者设置临时航标不符合海事管理机构确定的航标设置点；

（四）在安全作业区、港外锚地范围内从事养殖、种植、捕捞以及其他影响海上交通安全的作业或者活动。

第一百零一条　有下列情形之一的，由海事管理机构责令改正，对有关责任人员处三万元以下的罚款；情节严重的，处三万元以上十万元以下的罚款，并暂扣责任船员的船员适任证书一个月至三个月：

（一）承担无线电通信任务的船员和岸基无线电台（站）的工作人员未保持海上交通安全通信频道的值守和畅通，或者使用海上交通安全通信频率交流与海上交通安全无关的内容；

（二）违反国家有关规定使用无线电台识别码，影响海上搜救的身份识别；

（三）其他违反海上无线电通信规则的行为。

第一百零二条　船舶未依照本法规定申请引航的，由海事管理机构对违法船舶的所有人、经营人或者管理人处五万元以上五十万元以下的罚款，对船长处一千元以上一万元以下的罚款；情节严重的，暂扣有关船舶证书三个月至十二个月，暂扣船长的船员适任证书一个月至三个月。

引航机构派遣引航员存在过失，造成船舶损失的，由海事管理机构对引航机构处三万元以上三十万元以下的罚款。

未经引航机构指派擅自提供引航服务的，由海事管理机构对引领船舶的人员处三千元以上三万元以下的罚款。

第一百零三条　船舶在海上航行、停泊、作业，有下列情形之一的，由海事管理机构责令改正，对违法船舶的所有人、经营人或者管理人处二万元以上二十万元以下的罚款，对船长、责任船员处二千元以上二万元以下的罚款，暂扣船员适任证书三个月至十二个月；情节严重的，吊销船长、责任船员的船员适任证书：

（一）船舶进出港口、锚地或者通过桥区水域、海峡、狭水道、重要渔业水域、通航船舶密集的区域、船舶定线区、交通管制区时，未加强瞭望、保持安全航速并遵守前述区域的特殊航行规则；

（二）未按照有关规定显示信号、悬挂标志或者保持足够的富余水深；

（三）不符合安全开航条件冒险开航，违章冒险操作、作业，或者未按照船舶检验证书载明的航区航行、停泊、作业；

（四）未按照有关规定开启船舶的自动识别、航行数据记录、远程识别和跟踪、通信等与航行安全、保安、防治污染相关的装置，并持续进行显示和记录；

（五）擅自拆封、拆解、初始化、再设置航行数据记录装置或者读取其记录的信息；

（六）船舶穿越航道妨碍航道内船舶的正常航行，抢越他船船艏或者超过桥梁通航尺度进入桥区水域；

（七）船舶违反规定进入或者穿越禁航区；

（八）船舶载运或者拖带超长、超高、超宽、半潜的船舶、海上设施或者其他物体航行，未采取特殊的安全保障措施，未在开航前向海事管理机构报告航行计划，未按规定显示信号、悬挂标志，或者拖带移动式平台、浮船坞等大型海上设施未依法交验船舶检验机构出具的拖航检验证书；

（九）船舶在不符合安全条件的码头、泊位、装卸站、锚地、安全作业区停泊，或者停泊危及其他船舶、海上设施的安全；

（十）船舶违反规定超过检验证书核定的载客定额、载重线、载货种类载运乘客、货物，或者客船载运乘客同时载运危险货物；

（十一）客船未向乘客明示安全须知、设置安全标志和警示；

（十二）未按照有关法律、行政法规、规章以及强制性标准和技术规范的要求安全装卸、积载、隔离、系固和管理货物；

（十三）其他违反海上航行、停泊、作业规则的行为。

第一百零四条　国际航行船舶未经许可进出口岸的，由海事管理机构对违法船舶的所有人、经营人或者管理人处三千元以上三万元以下的罚款，对船长、责任船员或者其他责任人员，处二千元以上二万元以下的罚款；情节严重的，吊销船长、责任船员的船员适任证书。

国内航行船舶进出港口、港外装卸站未依法向海事管理机构报告的，由海事管理机构对违法船舶的所有人、经营人或者管理人处三千元以上三万元以下的罚款，对船长、责任船员或者其他责任人员处五百元以上五千元以下的罚款。

第一百零五条　船舶、海上设施未经许可从事海上施工作业，或者未按照许可要求、超出核定的安全作业区进行作业的，由海事管理机构责令改正，对违法船舶、海上设施的所有人、经营人或者管理人处三万元以上三十万元以下的罚款，对船长、责任船员处三千元以上三万元以下的罚款，或者暂扣船员适任证书六个月至十二个月；情节严重的，吊销船长、责任船员的船员适任证书。

从事可能影响海上交通安全的水上水下活动，未按规定提前报告海事管理机构的，由海事管理机构对违法船舶、海上设施的所有人、经营人或者管理人处一万元以上三万元以下的罚款，对船长、责任船员处二千元以上二万元以下的罚款。

第一百零六条　碍航物的所有人、经营人或者管理人有下列情形之一的，由海事管理机构责令改正，处二万元以上二十万元以下的罚款；逾期未改正的，海事管理机构有权依法实施代履行，代履行的费用由碍航物的所有人、经营人或者管理人承担：

（一）未按照有关强制性标准和技术规范的要求及时设置警示标志；

（二）未向海事管理机构报告碍航物的名称、形状、尺寸、位置和深度；

（三）未在海事管理机构限定的期限内打捞清除碍航物。

第一百零七条　外国籍船舶进出中华人民共和国内水、领海违反本法规定的，由海事管理机构对违法船舶的所有人、经营人或者管理人处五万元以上五十万元以下的罚款，对船长处一万元以上三万元以下的罚款。

第一百零八条　载运危险货物的船舶有下列情形之一的，海事管理机构应当责令改正，对违法船舶的所有人、经营人或者管理人处五万元以上五十万元以下的罚款，对船长、责任船员或者其他责任人员，处五千元以上五万元以下的罚款；情节严重的，责令停止作业或者航行，暂扣船长、责任船员的船员适任证书六个月至十二个月，直至吊销船员适任证书：

（一）未经许可进出港口或者从事散装液体危险货物过驳作业；

（二）未按规定编制相应的应急处置预案，配备相应的消防、应急设备和器材；

（三）违反有关强制性标准和安全作业操作规程的要求从事危险货物装卸、过驳作业。

第一百零九条　托运人托运危险货物，有下列情形之一的，由海事管理机构责令改正，处五万元以上三十万元以下的罚款：

（一）未将托运的危险货物的正式名称、危险性质以及应当采取的防护措施通知承运人；

（二）未按照有关法律、行政法规、规章以及强制性标准和技术规范的要求对危险货物妥善包装，设置明显的危险品标志和标签；

（三）在托运的普通货物中夹带危险货物或者将危险货物谎报为普通货物托运；

（四）未依法提交有关专业机构出具的表明该货物危险特性以及应当采取的防护措施等情况的文件。

第一百一十条　船舶、海上设施遇险或者发生海上交通事故后未履行报告义务，或者存在瞒报、谎报情形的，由海事管理机构对违法船舶、海上设施的所有人、经营人或者管理人处三千元以上三万元以下的罚款，对船长、责任船员处二千元以上二万元以下的罚款，暂扣船员适任证书六个月至二十四个月；情节严重的，对违法船舶、海上设施的所有人、经营人或者管理人处一万元以上十万元以下的罚款，吊销船长、责任船员的船员适任证书。

第一百一十一条　船舶发生海上交通事故后逃逸的，由海事管理机构对违法船舶的所有人、经营人或者管理人处十万元以上五十万元以下的罚款，对船长、责任船员处五千元以上五万元以下的罚款并吊销船员适任证书，受处罚者终身不得重新申请。

第一百一十二条　船舶、海上设施不依法履行海上救助义务，不服从海上搜救中心指挥的，由海事管理机构对船舶、海上设施的所有人、经营人或者管理人处三万元以上三十万元以下的罚款，暂扣船长、责任船员的船员适任证书六个月至十二个月，直至吊销船员适任证书。

第一百一十三条　有关单位、个人拒绝、阻碍海事管理机构监督检查，或者在接受监督检查时弄虚作假的，由海事管理机构处二千元以上二万元以下的罚款，暂扣船长、责任船员的船员适任证书六个月至二十四个月，直至吊销船员适任证书。

第一百一十四条　交通运输主管部门、海事管理机构及其他有关部门的工作人员违反本法规定，滥用职权、玩忽职守、徇私舞弊的，依法给予处分。

第一百一十五条　因海上交通事故引发民事纠纷的，当事人可以依法申请仲裁或者向人民法院提起诉讼。

第一百一十六条　违反本法规定，构成违反治安管理行为的，依法给予治安管理处罚；造成人身、财产损害的，依法承担民事责任；构成犯罪的，依法追究刑事责任。

第十章　附　　则

第一百一十七条　本法下列用语的含义是：

船舶，是指各类排水或者非排水的船、艇、筏、水上飞行器、潜水器、移动式平台以及其他移动式装置。

海上设施，是指水上水下各种固定或者浮动建筑、装置和固定平台，但是不包括码头、防波堤等港口设施。

内水，是指中华人民共和国领海基线向陆地一侧至海岸线的海域。

施工作业，是指勘探、采掘、爆破，构筑、维修、拆除水上水下构筑物或者设施，航道建设、疏浚（航道养护疏浚除外）作业，打捞沉船沉物。

海上交通事故，是指船舶、海上设施在航行、停泊、作业过程中发生的，由于碰撞、搁浅、触礁、触碰、火灾、风灾、浪损、沉没等原因造成人员伤亡或者财产损失的事故。

海上险情，是指对海上生命安全、水域环境构成威胁，需立即采取措施规避、控制、减轻和消除的各种情形。

危险货物，是指国际海上危险货物运输规则和国家危险货物品名表上列明的，易燃、易爆、有毒、有腐蚀性、有放射性、有污染危害性等，在船舶载运过程中可能造成人身伤害、财产损失或者环境污染而需要采取特别防护措施的货物。

海上渡口，是指海上岛屿之间、海上岛屿与大陆之间，以及隔海相望的大陆与大陆之间，专用于渡船渡运人员、行李、车辆的交通基础设施。

第一百一十八条　公务船舶检验、船员配备的具体办法由国务院交通运输主管部门会同有关主管部门另行制定。

体育运动船舶的登记、检验办法由国务院体育主管部门另行制定。训练、比赛期间的体育运动船舶的海上交通安全监督管理由体育主管部门负责。

渔业船员、渔业无线电、渔业航标的监督管理，渔业船舶的登记管理，渔港水域内的海上交通安全管理，渔业船舶（含外国籍渔业船舶）之间交通事故的调查处理，由县级以上人民政府渔业渔政主管部门负责。法律、行政法规或者国务院对渔业船舶之间交通事故的调查处理另有规定的，从其规定。

除前款规定外，渔业船舶的海上交通安全管理由海事管理机构负责。渔业船舶的检验及其监督管理，由海事管理机构依照有关法律、行政法规的规定执行。

浮式储油装置等海上石油、天然气生产设施的检验适用有关法律、行政法规的规定。

第一百一十九条　海上军事管辖区和军用船舶、海上设施的内部海上交通安全管理，军用航标的设立和管理，以及为军事目的进行作业或者水上水下活动的管理，由中央军事委员会另行制定管理办法。

划定、调整海上交通功能区或者领海内特定水域，划定海上渡口的渡运线路，许可海上施工作业，可能对军用船舶的战备、训练、执勤等行动造成影响的，海事管理机构应当事先征求有关军事机关的意见。

执行军事运输任务有特殊需要的，有关军事机关应当及时向海事管理机构通报相关信息。海事管理机构应当给予必要的便利。

海上交通安全管理涉及国防交通、军事设施保护的，依照有关法律的规定执行。

第一百二十条　外国籍公务船舶在中华人民共和国领海航行、停泊、作业，违反中华人民共和国法律、行政法规的，依照有关法律、行政法规的规定处理。

在中华人民共和国管辖海域内的外国籍军用船舶的管理，适用有关法律的规定。

第一百二十一条　中华人民共和国缔结或者参加的国际条约同本法有不同规定的，适用国际条约的规定，但中华人民共和国声明保留的条款除外。

第一百二十二条　本法自 2021 年 9 月 1 日起施行。

《中华人民共和国海关办理行政处罚案件程序规定》

中华人民共和国海关总署令

（第 250 号）

《中华人民共和国海关办理行政处罚案件程序规定》已于 2021 年 6 月 11 日经海关总署署务会议审议通过，现予公布，自 2021 年 7 月 15 日起实施。2006 年 1 月 26 日海关总署令第 145 号公布、根据 2014 年 3 月 13 日海关总署令第 218 号修改的《中华人民共和国海关行政处罚听证办法》，2007 年 3 月 2 日海关总署令第 159 号公布、根据 2014 年 3 月 13 日海关总署令第 218 号修改的《中华人民共和国海关办理行政处罚案件程序规定》，2010 年 3 月 1 日海关总署令第 188 号公布的《中华人民共和国海关办理行政处罚简单案件程序规定》同时废止。

署长　倪岳峰

2021 年 6 月 15 日

中华人民共和国海关办理行政处罚案件程序规定

目　录

第一章 总 则

第一条 为了规范海关办理行政处罚案件程序，保障和监督海关有效实施行政管理，保护公民、法人或者其他组织的合法权益，根据《中华人民共和国行政处罚法》《中华人民共和国行政强制法》《中华人民共和国海关法》《中华人民共和国海关行政处罚实施条例》（以下简称《海关行政处罚实施条例》）及有关法律、行政法规的规定，制定本规定。

第二条 海关办理行政处罚案件的程序适用本规定。

第三条 海关办理行政处罚案件应当遵循公正、公开的原则，坚持处罚与教育相结合。

第四条 海关办理行政处罚案件，在少数民族聚居或者多民族共同居住的地区，应当使用当地通用的语言进行查问和询问。

对不通晓当地通用语言文字的当事人及有关人员，应当为其提供翻译人员。

第五条 海关及其工作人员对实施行政处罚过程中知悉的国家秘密、商业秘密、海关工作秘密或者个人隐私，应当依法予以保密。

第二章 一般规定

第六条 海关行政处罚的立案依据、实施程序和救济渠道等信息应当公示。

第七条 海关应当依法以文字、音像等形式，对行政处罚的启动、调查取证、审核、决定、送达、执行等进行全过程记录，归档保存。

第八条 海关行政处罚应当由具有行政执法资格的海关执法人员（以下简称执法人员）实施。执法人员不得少于两人，法律另有规定的除外。

执法人员应当文明执法，尊重和保护当事人合法权益。

第九条 在案件办理过程中，当事人委托代理人的，应当提交授权委托书，载明委托人及其代理人的基本信息、委托事项及代理权限、代理权的起止日期、委托日期和委托人签名或者盖章。

委托人变更委托内容或者提前解除委托的，应当书面告知海关。

第十条 海关行政处罚由发现违法行为的海关管辖，也可以由违法行为发生地海关管辖。

两个以上海关都有管辖权的案件，由最先立案的海关管辖。

对管辖发生争议的，应当协商解决，协商不成的，报请共同的上一级海关指定管辖；也可以直接由共同的上一级海关指定管辖。

重大、复杂的案件，可以由海关总署指定管辖。

第十一条 海关发现的依法应当由其他行政机关或者司法机关处理的违法行为，应当制作案件移送函，及时将案件移送有关行政机关或者司法机关处理。

第十二条 执法人员有下列情形之一的，应当自行回避，当事人及其代理人有权申请其回避：

（一）是案件的当事人或者当事人的近亲属；

（二）本人或者其近亲属与案件有直接利害关系；

（三）与案件有其他关系，可能影响案件公正处理的。

第十三条　执法人员自行回避的，应当提出书面申请，并且说明理由，由海关负责人决定。

第十四条　当事人及其代理人要求执法人员回避的，应当提出申请，并且说明理由。当事人口头提出申请的，海关应当记录在案。

海关应当依法审查当事人的回避申请，并在三个工作日内由海关负责人作出决定，并且书面通知申请人。

海关驳回回避申请的，当事人及其代理人可以在收到书面通知后的三个工作日内向作出决定的海关申请复核一次；作出决定的海关应当在三个工作日内作出复核决定并且书面通知申请人。

第十五条　执法人员具有应当回避的情形，其本人没有申请回避，当事人及其代理人也没有申请其回避的，有权决定其回避的海关负责人可以指令其回避。

第十六条　在海关作出回避决定前，执法人员不停止办理行政处罚案件。在回避决定作出前，执法人员进行的与案件有关的活动是否有效，由作出回避决定的海关根据案件情况决定。

第十七条　听证主持人、记录员、检测、检验、检疫、技术鉴定人和翻译人员的回避，适用本规定第十二条至第十六条的规定。

第十八条　海关办理行政处罚案件的证据种类主要有：

（一）书证；

（二）物证；

（三）视听资料；

（四）电子数据；

（五）证人证言；

（六）当事人的陈述；

（七）鉴定意见；

（八）勘验笔录、现场笔录。

证据必须经查证属实，方可作为认定案件事实的根据。

以暴力、威胁、引诱、欺骗以及其他非法手段取得的证据，不得作为认定案件事实的根据。

第十九条　海关收集的物证、书证应当是原物、原件。收集原物、原件确有困难的，可以拍摄、复制足以反映原物、原件内容或者外形的照片、录像、复制件，并且可以指定或者委托有关单位或者个人对原物、原件予以妥善保管。

海关收集物证、书证的原物、原件的，应当开列清单，注明收集的日期，由有关单位或者个人确认后盖章或者签字。

海关收集由有关单位或者个人保管书证原件的复制件、影印件或者抄录件的，应当注明出处和收集时间，经提供单位或者个人核对无异后盖章或者签字。

海关收集由有关单位或者个人保管物证原物的照片、录像的，应当附有关制作过程及原物存放处的文字说明，并且由提供单位或者个人在文字说明上盖章或者签字。

提供单位或者个人拒绝盖章或者签字的，执法人员应当注明。

第二十条　海关收集电子数据或者录音、录像等视听资料，应当收集原始载体。

收集原始载体确有困难的，可以采取打印、拍照或者录像等方式固定相关证据，并附有关过程等情况的文字说明，由执法人员、电子数据持有人签名，持有人无法或者拒绝签名的，应当在文字说明中予以注明；也可以收集复制件，注明制作方法、制作时间、制作人、证明对象以及原始载体持有人或者存放处等，并且由有关单位或者个人确认后盖章或者签字。

海关对收集的电子数据或者录音、录像等视听资料的复制件可以进行证据转换，电子数据能转换为纸质资料的应当及时打印，录音资料应当附有声音内容的文字记录，并且由有关单位或者个人确认后盖章或者签字。

第二十一条　刑事案件转为行政处罚案件办理的，刑事案件办理过程中收集的证据材料，经依法收集、审查后，可以作为行政处罚案件定案的根据。

第二十二条　期间以时、日、月、年计算。期间开始的时和日，不计算在期间内。期间届满的最后一日是节假日的，以其后的第一个工作日为期间届满日期。

期间不包括在途时间，法定期满前交付邮寄的，不视为逾期。

第二十三条　当事人因不可抗拒的事由或者其他正当理由耽误期限的，在障碍消除后的十日内可以向海关申请顺延期限，是否准许，由海关决定。

第二十四条　海关法律文书的送达程序，《中华人民共和国行政处罚法》《中华人民共和国行政强制法》和本规定均未明确的，适用《中华人民共和国民事诉讼法》的相关规定。

第二十五条　经当事人或者其代理人书面同意，海关可以采用传真、电子邮件、移动通信、互联网通讯工具等方式送达行政处罚决定书等法律文书。

采取前款方式送达的，以传真、电子邮件、移动通信、互联网通讯工具等到达受送达人特定系统的日期为送达日期。

第二十六条　海关可以要求当事人或者其代理人书面确认法律文书送达地址。

当事人及其代理人提供的送达地址，应当包括邮政编码、详细地址以及受送达人的联系电话或者其确认的电子送达地址等。

海关应当书面告知送达地址确认书的填写要求和注意事项以及提供虚假地址或者提供地址不准确的法律后果，并且由当事人或者其代理人确认。

当事人变更送达地址，应当以书面方式告知海关。当事人未书面变更的，以其确认的地址为送达地址。

因当事人提供的送达地址不准确、送达地址变更未书面告知海关，导致法律文书未能被受送达人实际接收的，直接送达的，法律文书留在该地址之日为送达之日；邮寄送达的，法律文书被退回之日为送达之日。

第二十七条　海关邮寄送达法律文书的，应当附送达回证并且以送达回证上注明的收件日期为送达日期；送达回证没有寄回的，以挂号信回执、查询复单或者邮寄流程记录上注明的收件日期为送达日期。

第二十八条　海关依法公告送达法律文书的，应当将法律文书的正本张贴在海关公告栏内。行政处罚决定书公告送达的，还应当在报纸或者海关门户网站上刊登公告。

第三章　案件调查

第二十九条　除依法可以当场作出的行政处罚外，海关发现公民、法人或者其他组织有依法应当由海关给予行政处罚的行为的，必须全面、客观、公正地调查，收集有关证据；必要时，依照法律、行政法规的规定，可以进行检查。符合立案标准的，海关应当及时立案。

第三十条　执法人员在调查或者进行检查时，应当主动向当事人或者有关人员出示执法证件。

当事人或者有关人员有权要求执法人员出示执法证件。执法人员不出示执法证件的，当事人或者有关人员有权拒绝接受调查或者检查。

当事人或者有关人员对海关调查或者检查应当予以协助和配合，不得拒绝或者阻挠。

第三十一条　执法人员查问违法嫌疑人、询问证人应当个别进行，并且告知其依法享有的权利和作伪证应当承担的法律责任。

违法嫌疑人、证人应当如实陈述、提供证据。

第三十二条　执法人员查问违法嫌疑人，可以到其所在单位或者住所进行，也可以要求其到海关或者指定地点进行。

执法人员询问证人，可以到其所在单位、住所或者其提出的地点进行。必要时，也可以通知证人到海关或者指定地点进行。

第三十三条　查问、询问应当制作查问、询问笔录。

查问、询问笔录上所列项目，应当按照规定填写齐全，并且注明查问、询问开始和结束的时间；执法人员应当在查问、询问笔录上签字。

查问、询问笔录应当当场交给被查问人、被询问人核对或者向其宣读。被查问人、被询问人核对无误后，应当在查问、询问笔录上逐页签字或者捺指印，拒绝签字或者捺指印的，执法人员应当在查问、询问笔录上注明。如记录有误或者遗漏，应当允许被查问人、被询问人更正或者补充，并且在更正或者补充处签字或者捺指印。

第三十四条　查问、询问聋、哑人时，应当有通晓聋、哑手语的人作为翻译人员参加，并且在笔录上注明被查问人、被询问人的聋、哑情况。

查问、询问不通晓中国语言文字的外国人、无国籍人，应当为其提供翻译人员；被查问人、被询问人通晓中国语言文字不需要提供翻译人员的，应当出具书面声明，执法人员应当在查问、询问笔录中注明。

翻译人员的姓名、工作单位和职业应当在查问、询问笔录中注明。翻译人员应当在查问、询问笔录上签字。

第三十五条　海关首次查问违法嫌疑人、询问证人时，应当问明违法嫌疑人、证人的姓名、出生日期、户籍所在地、现住址、身份证件种类及号码、工作单位、文化程度，是否曾受过刑事处罚或者被行政机关给予行政处罚等情况；必要时，还应当问明家庭主要成员等情况。

违法嫌疑人或者证人不满十八周岁的，查问、询问时应当依法通知其法定代理人或者其成年家属、所在学校的代表等合适成年人到场，并且采取适当方式，在适当场所进行，保障未成年人的名誉权、隐私权和其他合法权益。

第三十六条　被查问人、被询问人要求自行提供书面陈述材料的，应当准许；必要时，执法人员也可以要求被查问人、被询问人自行书写陈述。

被查问人、被询问人自行提供书面陈述材料的，应当在陈述材料上签字并且注明书写陈述的时间、地点和陈述人等。执法人员收到书面陈述后，应当注明收到时间并且签字确认。

第三十七条　执法人员对违法嫌疑人、证人的陈述必须充分听取，并且如实记录。

第三十八条　执法人员依法检查运输工具和场所，查验货物、物品，应当制作检查、查验记录。

检查、查验记录应当由执法人员、当事人或者其代理人签字或者盖章；当事人或者其代理人不在场或者拒绝签字或者盖章的，执法人员应当在检查、查验记录上注明，并且由见证人签字或者盖章。

第三十九条　执法人员依法检查走私嫌疑人的身体，应当在隐蔽的场所或者非检查人员视线之外，由两名以上与被检查人同性别的执法人员执行，并且制作人身检查记录。

检查走私嫌疑人身体可以由医生协助进行，必要时可以前往医疗机构检查。

人身检查记录应当由执法人员、被检查人签字或者盖章；被检查人拒绝签字或者盖章的，执法人员应当在人身检查记录上注明。

第四十条　为查清事实或者固定证据，海关或者海关依法委托的机构可以提取样品。

提取样品时，当事人或者其代理人应当到场；当事人或者其代理人未到场的，海关应当邀请见证人到场。海关认为必要时，可以径行提取货样。

提取的样品应当予以加封确认，并且填制提取样品记录，由执法人员或者海关依法委托的机构人员、当事人或者其代理人、见证人签字或者盖章。

第四十一条　海关或者海关依法委托的机构提取的样品应当一式两份以上；样品份数及每份样品数量以能够满足案件办理需要为限。

第四十二条　为查清事实，需要对案件中专门事项进行检测、检验、检疫、技术鉴定的，应当由海关或者海关依法委托的机构实施。

第四十三条　检测、检验、检疫、技术鉴定结果应当载明委托人和委托事项、依据和结论，并且应当有检测、检验、检疫、技术鉴定人的签字和海关或者海关依法委托的机构的盖章。

检测、检验、检疫、技术鉴定的费用由海关承担。

第四十四条　检测、检验、检疫、技术鉴定结果应当告知当事人。

第四十五条　在调查走私案件时，执法人员查询案件涉嫌单位和涉嫌人员在金融机构、邮政企业的存款、汇款，应当经直属海关关长或者其授权的隶属海关关长批准。

执法人员查询时，应当主动向当事人或者有关人员出示执法证件和海关协助查询通知书。

第四十六条　海关实施扣留应当遵守下列规定：

（一）实施前须向海关负责人报告并经批准，但是根据《中华人民共和国海关法》第六条第四项实施的扣留，应当经直属海关关长或者其授权的隶属海关关长批准；

（二）由两名以上执法人员实施；

（三）出示执法证件；

（四）通知当事人到场；

（五）当场告知当事人采取扣留的理由、依据以及当事人依法享有的权利、救济途径；

（六）听取当事人的陈述和申辩；

（七）制作现场笔录；

（八）现场笔录由当事人和执法人员签名或者盖章，当事人拒绝的，在笔录中予以注明；

（九）当事人不到场的，邀请见证人到场，由见证人和执法人员在现场笔录上签名或者盖章；

（十）法律、行政法规规定的其他程序。

海关依法扣留货物、物品、运输工具、其他财产及账册、单据等资料，可以加施海关封志。

第四十七条　海关依法扣留的货物、物品、运输工具，在人民法院判决或者海关行政处罚决定作出之前，不得处理。但是，危险品或者鲜活、易腐、易烂、易失效、易变质等不宜长期保存的货物、物品以及所有人申请先行变卖的货物、物品、运输工具，经直属海关关长或者其授权的隶属海关关长批准，可以先行依法变卖，变卖所得价款由海关保存；依照法律、行政法规的规定，应当采取退运、销毁、无害化处理等措施的货物、物品，可以依法先行处置。

海关在变卖前，应当通知先行变卖的货物、物品、运输工具的所有人。变卖前无法及时通知的，海关应当在货物、物品、运输工具变卖后，通知其所有人。

第四十八条　海关依法解除对货物、物品、运输工具、其他财产及有关账册、单据等资料的扣留，应当制发解除扣留通知书送达当事人。解除扣留通知书由执法人员、当事人或者其代理人签字或者盖章；当事人或者其代理人不在场，或者当事人、代理人拒绝签字或者盖章的，执法人员应当在解除扣留通知书上注明，并且由见证人签字或者盖章。

第四十九条　有违法嫌疑的货物、物品、运输工具应当或者已经被海关依法扣留的，当事人可以向海关提供担保，申请免予或者解除扣留。

有违法嫌疑的货物、物品、运输工具无法或者不便扣留的，当事人或者运输工具负责人应当向海关提供等值的担保。

第五十条　当事人或者运输工具负责人向海关提供担保时，执法人员应当制作收取担保凭单并送达当事人或者运输工具负责人，执法人员、当事人、运输工具负责人或者其代理人应当在收取担保凭单上签字或者盖章。

收取担保后，可以对涉案货物、物品、运输工具进行拍照或者录像存档。

第五十一条　海关依法解除担保的，应当制发解除担保通知书送达当事人或者运输工具负责人。解除担保通知书由执法人员及当事人、运输工具负责人或者其代理人签字或者盖章；当事人、运输工具负责人或者其代理人不在场或者拒绝签字或者盖章的，执法人员应当在解除担保通知书上注明。

第五十二条　海关依法对走私犯罪嫌疑人实施人身扣留，依照《中华人民共和国海关实施人身扣留规定》规定的程序办理。

第五十三条　经调查，行政处罚案件有下列情形之一的，海关可以终结调查并提出处理意见：

（一）违法事实清楚、法律手续完备、据以定性处罚的证据充分的；

（二）违法事实不能成立的；

（三）作为当事人的自然人死亡的；

（四）作为当事人的法人或者其他组织终止，无法人或者其他组织承受其权利义务，又无其他关系人可以追查的；

（五）案件已经移送其他行政机关或者司法机关的；

（六）其他依法应当终结调查的情形。

第四章　行政处理决定

第一节　行政处罚的适用

第五十四条　不满十四周岁的未成年人有违法行为的，不予行政处罚，但是应当责令其监护人加以管教；已满十四周岁不满十八周岁的未成年人有违法行为的，应当从轻或者减轻行政处罚。

第五十五条　精神病人、智力残疾人在不能辨认或者不能控制自己行为时有违法行为的，不予行政处罚，但是应当责令其监护人严加看管和治疗。间歇性精神病人在精神正常时有违法行为的，应当给予行政处罚。尚未完全丧失辨认或者控制自己行为能力的精神病人、智力残疾人有违法行为的，可以从轻或者减轻行政处罚。

第五十六条　违法行为轻微并及时改正，没有造成危害后果的，不予行政处罚。初次违法且危害后果轻微并及时改正的，可以不予行政处罚。

对当事人的违法行为依法不予行政处罚的，海关应当对当事人进行教育。

第五十七条　当事人有证据足以证明没有主观过错的，不予行政处罚。法律、行政法规另有规定的，从其规定。

第五十八条　当事人有下列情形之一，应当从轻或者减轻行政处罚：

（一）主动消除或者减轻违法行为危害后果的；

（二）受他人胁迫或者诱骗实施违法行为的；

（三）主动供述海关尚未掌握的违法行为的；

（四）配合海关查处违法行为有立功表现的；

（五）法律、行政法规、海关规章规定其他应当从轻或者减轻行政处罚的。

当事人积极配合海关调查且认错认罚的或者违法行为危害后果较轻的，可以从轻或者减轻处罚。

第五十九条　发生重大传染病疫情等突发事件，为了控制、减轻和消除突发事件引起的社会危害，海关对违反突发事件应对措施的行为，依法快速、从重处罚。

第六十条　违法行为在二年内未被发现的，不再给予行政处罚；涉及公民生命健康安全、金融安全且有危害后果的，上述期限延长至五年。法律另有规定的除外。

前款规定的期限，从违法行为发生之日起计算；违法行为有连续或者继续状态的，从行为终了之日起计算。

第六十一条　实施行政处罚，适用违法行为发生时的法律、行政法规、海关规章的规定。但是，作出行政处罚决定时，法律、行政法规、海关规章已被修改或者废止，且新的规定处罚较轻或者不认为是违法的，适用新的规定。

第六十二条　海关可以依法制定行政处罚裁量基准，规范行使行政处罚裁量权。行政处罚裁量基准应当向社会公布。

第二节　法制审核

第六十三条　海关对已经调查终结的行政处罚普通程序案件，应当由从事行政处罚决定法制审核的人员进行法制审核；未经法制审核或者审核未通过的，不得作出处理决定。但是依照本规定第六章第二节快速办理的案件除外。

海关初次从事行政处罚决定法制审核的人员，应当通过国家统一法律职业资格考试取得法律职业资格。

第六十四条　海关对行政处罚案件进行法制审核时，应当重点审核以下内容，并提出审核意见：

（一）执法主体是否合法；

（二）执法人员是否具备执法资格；

（三）执法程序是否合法；

（四）案件事实是否清楚，证据是否合法充分；

（五）适用法律、行政法规、海关规章等依据是否准确；

（六）自由裁量权行使是否适当；

（七）是否超越法定权限；

（八）法律文书是否完备、规范；

（九）违法行为是否依法应当移送其他行政机关或者司法机关处理。

第六十五条　经审核存在问题的，法制审核人员应当提出处理意见并退回调查部门。

仅存在本规定第六十四条第五项、第六项规定问题的，法制审核人员也可以直接提出处理意见，依照本章第三节、第四节规定作出处理决定。

第三节　告知、复核和听证

第六十六条　海关在作出行政处罚决定或者不予行政处罚决定前，应当告知当事人拟作出的行政处罚或者不予行政处罚内容及事实、理由、依据，并且告知当事人依法享有的陈述、申辩、要求听证等权利。

海关未依照前款规定履行告知义务，或者拒绝听取当事人的陈述、申辩，不得作出行政处罚决定或者不予行政处罚决定。

在履行告知义务时，海关应当制发行政处罚告知单或者不予行政处罚告知单，送达当事人。

第六十七条　当事人有权进行陈述和申辩。

除因不可抗力或者海关认可的其他正当理由外，当事人应当在收到行政处罚或者不予行政处罚告知单之日起五个工作日内提出书面陈述、申辩和要求听证。逾期视为放弃陈述、申辩和要求听证的权利。

当事人当场口头提出陈述、申辩或者要求听证的，海关应当制作书面记录，并且由当事人签字或者盖章确认。

当事人明确放弃陈述、申辩和听证权利的，海关可以直接作出行政处罚或者不予行政处罚决定。当事人放弃陈述、申辩和听证权利应当有书面记载，并且由当事人或者其代理人签字或者盖章确认。

第六十八条　海关必须充分听取当事人的陈述、申辩和听证意见，对当事人提出的事实、理由和证据，应当进行复核；当事人提出的事实、理由、证据或者意见成立的，海关应当采纳。

第六十九条　海关不得因当事人陈述、申辩、要求听证而给予更重的处罚，但是海关发现新的违法事实的除外。

第七十条　经复核后，变更原告知的行政处罚或者不予行政处罚内容及事实、理由、依据的，应当重新制发海关行政处罚告知单或者不予行政处罚告知单，并且依照本规定第六十六条至第六十九条的规定办理。

经复核后，维持原告知的行政处罚或者不予行政处罚内容及事实、理由、依据的，依照本章第四节的规定作出处理决定。

第四节　处理决定

第七十一条　海关负责人应当对行政处罚案件进行审查，根据不同情况，分别作出以下决定：

（一）确有应受行政处罚的违法行为的，根据情节轻重及具体情况，作出行政处罚决定；

（二）符合本规定第五十四条至第五十六条规定的不予行政处罚情形之一的，作出不予行政处罚决定；

（三）符合本规定第五十三条第二项规定的情形的，不予行政处罚，撤销案件；

（四）符合本规定第五十三条第三项、第四项规定的情形之一的，撤销案件；

（五）符合法定收缴条件的，予以收缴；

（六）应当由其他行政机关或者司法机关处理的，移送有关行政机关或者司法机关依法办理。

海关作出行政处罚决定，应当做到认定违法事实清楚，定案证据确凿充分，违法行为定性准确，适用法律正确，办案程序合法，处罚合理适当。

违法事实不清、证据不足的，不得给予行政处罚。

第七十二条　对情节复杂或者重大违法行为给予行政处罚，应当由海关负责人集体讨论决定。

第七十三条　海关依法作出行政处罚决定或者不予行政处罚决定的，应当制发行政处罚决定书或者不予行政处罚决定书。

第七十四条　行政处罚决定书应当载明以下内容：

（一）当事人的基本情况，包括当事人姓名或者名称、地址等；

（二）违反法律、行政法规、海关规章的事实和证据；

（三）行政处罚的种类和依据；

（四）行政处罚的履行方式和期限；

（五）申请行政复议或者提起行政诉讼的途径和期限；

（六）作出行政处罚决定的海关名称和作出决定的日期，并且加盖作出行政处罚决定海关的印章。

第七十五条　不予行政处罚决定书应当载明以下内容：

（一）当事人的基本情况，包括当事人姓名或者名称、地址等；

（二）违反法律、行政法规、海关规章的事实和证据；

（三）不予行政处罚的依据；

（四）申请行政复议或者提起行政诉讼的途径和期限；

（五）作出不予行政处罚决定的海关名称和作出决定的日期，并且加盖作出不予行政处罚决定海关的印章。

第七十六条　海关应当自行政处罚案件立案之日起六个月内作出行政处罚决定；确有必要的，经海关负责人批准可以延长期限，延长期限不得超过六个月。案情特别复杂或者有其他特殊情况，经延长期限仍不能作出处理决定的，应当由直属海关负责人集体讨论决定是否继续延长期限，决定继续延长期限的，应当同时确定延长的合理期限。

上述期间不包括公告、检测、检验、检疫、技术鉴定、复议、诉讼的期间。

在案件办理期间，发现当事人另有违法行为的，自发现之日起重新计算办案期限。

第七十七条　行政处罚决定书应当在宣告后当场交付当事人；当事人不在场的，海关应当在七个工作日内将行政处罚决定书送达当事人。

第七十八条　具有一定社会影响的行政处罚决定，海关应当依法公开。

公开的行政处罚决定被依法变更、撤销、确认违法或者确认无效的，海关应当在三个工作日内撤回行政处罚决定信息并公开说明理由。

第七十九条　海关依法收缴有关货物、物品、违法所得、运输工具、特制设备的，应当制作收缴清单并送达被收缴人。

走私违法事实基本清楚，但是当事人无法查清的案件，海关在制发收缴清单之前，应当制发收缴公告，公告期限为三个月，并且限令有关当事人在公告期限内到指定海关办理相关海关手续。公告期满后仍然没有当事人到海关办理相关海关手续的，海关可以依法予以收缴。

第八十条　收缴清单应当载明予以收缴的货物、物品、违法所得、运输工具、特制设备的名称、规格、数量或者重量等。有关货物、物品、运输工具、特制设备有重要、明显特征或者瑕疵的，执法人员应当在收缴清单中予以注明。

第八十一条　收缴清单由执法人员、被收缴人或者其代理人签字或者盖章。

被收缴人或者其代理人拒绝签字或者盖章，或者被收缴人无法查清但是有见证人在场的，应当由见证人签字或者盖章。

没有被收缴人签字或者盖章的，执法人员应当在收缴清单上注明原因。

海关对走私违法事实基本清楚，但是当事人无法查清的案件制发的收缴清单应当公告送达。

第五章　听证程序

第一节　一般规定

第八十二条　海关拟作出下列行政处罚决定，应当告知当事人有要求听证的权利，当事人要求听证的，海关应当组织听证：

（一）对公民处一万元以上罚款、对法人或者其他组织处十万元以上罚款；

（二）对公民处没收一万元以上违法所得、对法人或者其他组织处没收十万元以上违法所得；

（三）没收有关货物、物品、走私运输工具；

（四）降低资质等级、吊销许可证件；

（五）责令停产停业、责令关闭、限制从业；

（六）其他较重的行政处罚；

（七）法律、行政法规、海关规章规定的其他情形。

当事人不承担组织听证的费用。

第八十三条　听证由海关负责行政处罚案件法制审核的部门组织。

第八十四条　听证应当由海关指定的非本案调查人员主持。听证主持人履行下列职权：

（一）决定延期、中止听证；

（二）就案件的事实、拟作出行政处罚的依据与理由进行提问；

（三）要求听证参加人提供或者补充证据；

（四）主持听证程序并维持听证秩序，对违反听证纪律的行为予以制止；

（五）决定有关证人、检测、检验、检疫、技术鉴定人是否参加听证。

第八十五条　听证参加人包括当事人及其代理人、第三人及其代理人、案件调查人员；其他人员包括证人、翻译人员、检测、检验、检疫、技术鉴定人。

第八十六条　与案件处理结果有直接利害关系的公民、法人或者其他组织要求参加听证的，可以作为第三人参加听证；为查明案情，必要时，听证主持人也可以通知其参加听证。

第八十七条　当事人、第三人可以委托一至二名代理人参加听证。

第八十八条　案件调查人员是指海关负责行政处罚案件调查取证并参加听证的执法人员。

在听证过程中，案件调查人员陈述当事人违法的事实、证据、拟作出的行政处罚决定及其法律依据，并同当事人进行质证、辩论。

第八十九条　经听证主持人同意，当事人及其代理人、第三人及其代理人、案件调查人员可以要求证人、检测、检验、检疫、技术鉴定人参加听证，并在举行听证的一个工作日前提供相关人员的基本情况。

第二节　听证的申请与决定

第九十条　当事人要求听证的，应当在海关告知其听证权利之日起五个工作日内向海关提出。

第九十一条　海关决定组织听证的，应当自收到听证申请之日起二十个工作日以内举行听证，并在举行听证的七个工作日前将举行听证的时间、地点通知听证参加人和其他人员。

第九十二条　有下列情形之一的，海关应当作出不予听证的决定：

（一）申请人不是本案当事人或者其代理人；

（二）未在收到行政处罚告知单之日起五个工作日内要求听证的；

（三）不属于本规定第八十二条规定范围的。

决定不予听证的，海关应当在收到听证申请之日起三个工作日以内制作海关行政处罚不予听证通知书，并及时送达申请人。

第三节　听证的举行

第九十三条　听证参加人及其他人员应当遵守以下听证纪律：

（一）听证参加人及其他人员应当遵守听证秩序，经听证主持人同意后，才能进行陈述和辩论；

（二）旁听人员不得影响听证的正常进行；

（三）准备进行录音、录像、摄影和采访的，应当事先报经听证主持人批准。

第九十四条　听证应当按照下列程序进行：

（一）听证主持人核对当事人及其代理人、第三人及其代理人、案件调查人员的身份；

（二）听证主持人宣布听证参加人、翻译人员、检测、检验、检疫、技术鉴定人名单，询问当事人及其代理人、第三人及其代理人、案件调查人员是否申请回避；

（三）宣布听证纪律；

（四）听证主持人宣布听证开始并介绍案由；

（五）案件调查人员陈述当事人违法事实，出示相关证据，提出拟作出的行政处罚决定和依据；

（六）当事人及其代理人陈述、申辩，提出意见和主张；

（七）第三人及其代理人陈述，提出意见和主张；

（八）听证主持人就案件事实、证据、处罚依据进行提问；

（九）当事人及其代理人、第三人及其代理人、案件调查人员相互质证、辩论；

（十）当事人及其代理人、第三人及其代理人、案件调查人员作最后陈述；

（十一）宣布听证结束。

第九十五条　有下列情形之一的，应当延期举行听证：

（一）当事人或者其代理人因不可抗力或者有其他正当理由无法到场的；

（二）临时决定听证主持人、听证员或者记录员回避，不能当场确定更换人选的；

（三）作为当事人的法人或者其他组织有合并、分立或者其他资产重组情形，需要等待权利义务承受人的；

（四）其他依法应当延期举行听证的情形。

延期听证的原因消除后，由听证主持人重新确定举行听证的时间，并在举行听证的三个工作日前书面告知听证参加人及其他人员。

第九十六条　有下列情形之一的，应当中止举行听证：

（一）需要通知新的证人到场或者需要重新检测、检验、检疫、技术鉴定、补充证据的；

（二）当事人因不可抗力或者有其他正当理由暂时无法继续参加听证的；

（三）听证参加人及其他人员不遵守听证纪律，造成会场秩序混乱的；

（四）其他依法应当中止举行听证的情形。

中止听证的原因消除后，由听证主持人确定恢复举行听证的时间，并在举行听证的三个工作日前书面告知听证参加人及其他人员。

第九十七条　有下列情形之一的，应当终止举行听证：

（一）当事人及其代理人撤回听证申请的；

（二）当事人及其代理人无正当理由拒不出席听证的；

（三）当事人及其代理人未经许可中途退出听证的；

（四）当事人死亡或者作为当事人的法人、其他组织终止，没有权利义务承受人的；

（五）其他依法应当终止听证的情形。

第九十八条　听证应当制作笔录，听证笔录应当载明下列事项：

（一）案由；

（二）听证参加人及其他人员的姓名或者名称；

（三）听证主持人、听证员、记录员的姓名；

（四）举行听证的时间、地点和方式；

（五）案件调查人员提出的本案的事实、证据和拟作出的行政处罚决定及其依据；

（六）陈述、申辩和质证的内容；

（七）证人证言；

（八）按规定应当载明的其他事项。

第九十九条　听证笔录应当由听证参加人及其他人员确认无误后逐页进行签字或者盖章。对记录内容有异议的可以当场更正后签字或者盖章确认。

听证参加人及其他人员拒绝签字或者盖章的，由听证主持人在听证笔录上注明。

第一百条　听证结束后，海关应当根据听证笔录，依照本规定第六十八条至第七十二条的规定进行复核及作出决定。

第六章　简易程序和快速办理

第一节　简易程序

第一百零一条　违法事实确凿并有法定依据，对公民处以二百元以下、对法人或者其他组织处以三千元以下罚款或者警告的行政处罚的，海关可以适用简易程序当场作出行政处罚决定。

第一百零二条　执法人员当场作出行政处罚决定的，应当向当事人出示执法证件，填写预定格式、编有号码的行政处罚决定书，并当场交付当事人。当事人拒绝签收的，应当在行政处罚决定书上注明。

前款规定的行政处罚决定书应当载明当事人的违法行为，行政处罚的种类和依据、罚款数额、时间、地点，申请行政复议、提起行政诉讼的途径和期限以及海关名称，并由执法人员签名或者盖章。

执法人员当场作出的行政处罚决定，应当报所属海关备案。

第二节　快速办理

第一百零三条　对不适用简易程序，但是事实清楚，当事人书面申请、自愿认错认罚且有其他证据佐证的行政处罚案件，符合以下情形之一的，海关可以通过简化取证、审核、审批等环节，快速办理案件：

（一）适用《海关行政处罚实施条例》第十五条第一项、第二项规定进行处理的；

（二）报关企业、报关人员对委托人所提供情况的真实性未进行合理审查，或者因为工作疏忽致使发生《海关行政处罚实施条例》第十五条第一项、第二项规定情形的；

（三）适用《海关行政处罚实施条例》第二十条至第二十三条规定进行处理的；

（四）违反海关监管规定携带货币进出境的；

（五）旅检渠道查获走私货物、物品价值在五万元以下的；

（六）其他违反海关监管规定案件货物价值在五十万元以下或者物品价值在十万元以下，但是影响国家出口退税管理案件货物申报价格在五十万元以上的除外；

（七）法律、行政法规、海关规章规定处警告、最高罚款三万元以下的；

（八）海关总署规定的其他情形。

第一百零四条　快速办理行政处罚案件，当事人在自行书写材料或者查问笔录中承认违法事实、认错认罚，并有查验、检查记录、鉴定意见等关键证据能够相互印证的，海关可以不再开展其他调查取证工作。

使用执法记录仪等设备对当事人陈述或者海关查问过程进行录音录像的，录音录像可以替代当事人自行书写材料或者查问笔录。必要时，海关可以对录音录像的关键内容及其对应的时间段作文字说明。

第一百零五条　海关快速办理行政处罚案件的，应当在立案之日起七个工作日内制发行政处罚决定书或者不予行政处罚决定书。

第一百零六条　快速办理的行政处罚案件有下列情形之一的，海关应当依照本规定第三章至第五章的规定办理，并告知当事人：

（一）海关对当事人提出的陈述、申辩意见无法当场进行复核的；

（二）海关当场复核后，当事人对海关的复核意见仍然不服的；

（三）当事人要求听证的；

（四）海关认为违法事实需要进一步调查取证的；

（五）其他不宜适用快速办理的情形。

快速办理阶段依法收集的证据，可以作为定案的根据。

第七章　处理决定的执行

第一百零七条　海关作出行政处罚决定后，当事人应当在行政处罚决定书载明的期限内，予以履行。

海关作出罚款决定的，当事人应当自收到行政处罚决定书之日起十五日内，到指定的银行或者通过电子支付系统缴纳罚款。

第一百零八条　当事人确有经济困难向海关提出延期或者分期缴纳罚款的，应当以书面方式提出申请。

海关收到当事人延期、分期缴纳罚款的申请后，应当在十个工作日内作出是否准予延期、分期缴纳罚款的决定，并且制发通知书送达申请人。

第一百零九条　当事人逾期不履行行政处罚决定的，海关可以采取下列措施：

（一）到期不缴纳罚款的，每日按照罚款数额的百分之三加处罚款，加处罚款的数额不得超出罚款的数额；

（二）当事人逾期不履行海关的处罚决定又不申请复议或者向人民法院提起诉讼的，海关可以将其保证金抵缴或者将其被扣留的货物、物品、运输工具依法变价抵缴，也可以申请人民法院强制执行；

（三）根据法律规定，采取其他行政强制执行方式。

第一百一十条　受海关处罚的当事人或者其法定代表人、主要负责人在出境前未缴清罚款、违法所得和依法追缴的货物、物品、走私运输工具等值价款的，也未向海关提供相当于上述款项担保的，海关可以依法制作阻止出境协助函，通知出境管理机关阻止其出境。

阻止出境协助函应当随附行政处罚决定书等相关法律文书，并且载明被阻止出境人员的姓名、性别、出生日期、出入境证件种类和号码。被阻止出境人员是外国人、无国籍人员的，应当注明其英文姓名。

第一百一十一条　当事人或者其法定代表人、主要负责人缴清罚款、违法所得和依法追缴的货物、物品、走私运输工具等值价款的，或者向海关提供相当于上述款项担保的，海关应当及时制作解除阻止出境协助函通知出境管理机关。

第一百一十二条　将当事人的保证金抵缴或者将当事人被扣留的货物、物品、运输工具依法变价抵缴罚款之后仍然有剩余的，应当及时发还或者解除扣留、解除担保。

第一百一十三条　自海关送达解除扣留通知书之日起三个月内，当事人无正当理由未到海关办理有关货物、物品、运输工具或者其他财产的退还手续的，海关应当发布公告。

自公告发布之日起三十日内，当事人仍未办理退还手续的，海关可以依法将有关货物、物品、运输工具或者其他财产提取变卖，并且保留变卖价款。

变卖价款在扣除自海关送达解除扣留通知书之日起算的仓储等相关费用后，尚有余款的，自海关公告发布之日起一年内，当事人仍未办理退还手续的，海关应当将余款上缴国库。

未予变卖的货物、物品、运输工具或者其他财产，自海关公告发布之日起一年内，当事人仍未办理退还手续的，由海关依法处置。

第一百一十四条　自海关送达解除担保通知书之日起三个月内，当事人无正当理由未办理财产、权利退还手续的，海关应当发布公告。

自海关公告发布之日起一年内，当事人仍未办理退还手续的，海关应当将担保财产、权利依法变卖或者兑付后，上缴国库。

第一百一十五条　当事人实施违法行为后，发生企业分立、合并或者其他资产重组等情形，对当事人处以罚款、没收违法所得或者依法追缴货物、物品、走私运输工具等值价款的，应当以承受其权利义务的法人、组织作为被执行人。

第一百一十六条　当事人对行政处罚决定不服，申请行政复议或者提起行政诉讼的，行政处罚不停止执行，法律另有规定的除外。

当事人申请行政复议或者提起行政诉讼的，加处罚款的数额在行政复议或者行政诉讼期间不予计算。

第一百一十七条　有下列情形之一的，中止执行：

（一）处罚决定可能存在违法或者不当情况的；

（二）申请人民法院强制执行，人民法院裁定中止执行的；

（三）行政复议机关、人民法院认为需要中止执行的；

（四）海关认为需要中止执行的其他情形。

根据前款第一项情形中止执行的，应当经海关负责人批准。

中止执行的情形消失后，海关应当恢复执行。对没有明显社会危害，当事人确无能力履行，中止执行满三年未恢复执行的，海关不再执行。

第一百一十八条　有下列情形之一的，终结执行：

（一）据以执行的法律文书被撤销的；

（二）作为当事人的自然人死亡，无遗产可供执行，又无义务承受人的；

（三）作为当事人的法人或者其他组织被依法终止，无财产可供执行，又无义务承受人的；

（四）海关行政处罚决定履行期限届满超过二年，海关依法采取各种执行措施后仍无法执行完毕的，但是申请人民法院强制执行的除外；

（五）申请人民法院强制执行的，人民法院裁定中止执行后超过二年仍无法执行完毕的；

（六）申请人民法院强制执行后，人民法院裁定终结本次执行程序或者终结执行的；

（七）海关认为需要终结执行的其他情形。

第一百一十九条　海关申请人民法院强制执行，应当自当事人的法定起诉期限届满之日起三个月内提出。

海关批准延期、分期缴纳罚款的，申请人民法院强制执行的期限，自暂缓或者分期缴纳罚款期限结束之日起计算。

第八章　附　则

第一百二十条　执法人员玩忽职守、徇私舞弊、滥用职权、索取或者收受他人财物的，依法给予处分；构成犯罪的，依法追究刑事责任。

第一百二十一条　海关规章对办理行政处罚案件的程序有特别规定的，从其规定。

第一百二十二条　海关侦查走私犯罪公安机构办理治安管理处罚案件的程序依照《中华人民共和国治安管理处罚法》《公安机关办理行政案件程序规定》执行。

第一百二十三条　海关对外国人、无国籍人、外国法人或者其他组织给予行政处罚的，适用本规定。

第一百二十四条　本规定由海关总署负责解释。

第一百二十五条　本规定自 2021 年 7 月 15 日起施行。2006 年 1 月 26 日海关总署令第 145 号公布、根据 2014 年 3 月 13 日海关总署令第 218 号修改的《中华人民共和国海关行政处罚听证办法》，2007 年 3 月 2 日海关总署令第 159 号公布、根据 2014 年 3 月 13 日海关总署令第 218 号修改的《中华人民共和国海关办理行政处罚案件程序规定》，2010 年 3 月 1 日海关总署令第 188 号公布的《中华人民共和国海关办理行政处罚简单案件程序规定》同时废止。

《海南自由贸易港国际船舶条例》

海南省人民代表大会常务委员会

公　告

第 82 号

《海南自由贸易港国际船舶条例》已由海南省第六届人民代表大会常务委员会第二十八次会议于 2021 年 6 月 1 日通过，现予公布，自 2021 年 9 月 1 日起施行。

海南省人民代表大会常务委员会

2021 年 6 月 1 日

海南自由贸易港国际船舶条例

(2021 年 6 月 1 日海南省第六届人民代表大会常务委员会第二十八次会议通过)

第一章 总　则

第一条 为提升海南自由贸易港国际船舶检验、登记、营运等活动的便利化和服务保障水平，促进海运业及相关产业发展，根据《中华人民共和国海上交通安全法》《中华人民共和国船舶登记条例》等有关法律、法规，结合海南自由贸易港实际，制定本条例。

第二条 本条例所称国际船舶，是指在海南自由贸易港登记的航行国际航线的船舶。

国际船舶的船籍港为中国洋浦港。

第三条 海南海事管理机构负责海南自由贸易港国际船舶检验、安全监督、污染防治和船员权益保障等服务管理工作。

与国际船舶登记相关具体工作由国家海事管理机构确定的国际船舶登记机构(以下简称国际船舶登记机构)负责。

省人民政府交通运输主管部门负责国际船舶的营运等服务管理工作，其他有关部门依据职责做好国际船舶的相关服务管理工作。

第四条 海南海事管理机构、国际船舶登记机构和省人民政府交通运输等主管部门应当通过全省统一的政务信息资源共享开放基础设施，实现互联互通和信息共享，加强执法协同。

第五条 海南海事管理机构、国际船舶登记机构和省人民政府交通运输等主管部门应当对国际船舶有关活动的组织和个人加强信用管理，依照有关规定予以联合激励和联合惩戒。

第二章 船　舶

第六条 经授权的船舶检验机构可以开展国际船舶法定检验及相应证书的签发工作。

外国船舶检验机构可以根据国际船舶业务发展需要，在海南自由贸易港依法设立企业法人、分支机构或者常驻代表机构等。

第七条 取得法定检验授权的船舶检验机构可以开展国际船舶入级检验。

外国船舶检验机构开展国际船舶入级检验的具体管理办法，由省人民政府制定，经国务院交通运输主管部门同意后实施。

第八条 在海南自由贸易港设立且从事国际船舶法定检验、入级检验的船舶检验机构或者分支机构及其船舶检验活动的监督管理由海南海事管理机构负责。

第九条 下列船舶可以办理国际船舶登记：

(一)在海南自由贸易港有住所的中国公民所有或者融资租赁、光船租赁的船舶；

(二)在海南自由贸易港依法成立的法人所有或者融资租赁、光船租赁的船舶；

(三)在海南自由贸易港依法成立的非法人组织所有或者融资租赁、光船租赁的船舶。

国际船舶登记主体外资股比不受限制。

第十条 申请办理国际船舶登记应当先行取得船舶识别号、中文名称和英文名称，英文名称可以使用英文单词。

第十一条 国际船舶登记种类包括：

(一)船舶所有权登记；

(二)船舶国籍登记；

(三)船舶抵押权登记；

(四)光船租赁登记；

(五)船舶变更登记；

(六)船舶注销登记；

(七)国家规定的其他种类。

第十二条 国际船舶登记申请材料应当使用格式文本。

申请人提交的国际船舶登记申请材料是外文的，应当同时提供中文译本，中文译本与外文不一致的，以中文为准。

通过国家或海南自由贸易港政务服务平台能够核验的证照类材料，免于提交原件。

第十三条 国际船舶登记机构应当审查国际船舶登记申请材料是否齐全，申请材料是否符合法定形式，申请书内容与所附材料是否一致，格式文本填写是否完整，并核实申请材料是否为原件或者与原件一致。

第十四条 经国际船舶登记机构审查，船舶登记申请符合规定要求的，予以登记，制作并发放相应船舶登记证书。

国际船舶登记机构应当建立国际船舶登记信息记录簿，记载国际船舶各项登记信息。

第十五条 有下列情形之一的，国际船舶登记机构不予登记并书面告知理由：

(一)申请人不能提供权利取得证明文件或者申请登记事项与权利取得证明文件不一致的；

(二)第三人主张存在尚未解决的权属争议且能提供证据的；

(三)申请登记事项与已签发的登记证书内容相冲突的；

(四)违反法律、行政法规规定的。

第十六条 船舶所有人申请办理船舶所有权登记时，应当提交以下申请材料：

(一)申请人合法身份的证明文件；

(二)船舶所有权取得的证明文件；

(三)经授权的船舶检验机构签发的船舶技术参数证明。

现有船舶申请前款登记时，还应当提交上一船籍港船舶登记机关出具的船舶抵押情况证明和船舶注销登记证明书。

国际船舶所有权取得的证明文件，对于新造船舶是指建造证明和船舶交接文件；对于购买取得的船舶是指买卖证明和船舶交接文件；对于仅改变船籍港、所有权不变的船舶是指上一船籍港船舶所有权登记证书。

第十七条 船舶所有人暂时无法提交船舶所有权取得的证明文件原件时,可以使用复印件或者扫描件申请办理临时船舶所有权登记。船舶所有人应当对复印件或者扫描件的真实性、合法性、有效性负责。

已办理临时船舶所有权登记的国际船舶，申请办理国际船舶抵押权登记的，抵押权人应当提交确认书，确认其持有尚未提交给船舶登记机关的船舶所有权证明文件原件。

第十八条 船舶所有人申请办理国际船舶国籍登记，暂时无法提交船舶注销登记证明书的，可以使用上一船籍港船舶登记机关出具的同意注销证明；或者原船舶所有人在临时船舶国籍登记有效期届满前，将上一船籍港船舶注销登记证明书交付给新船舶所有人的承诺文件，申请办理临时船舶国籍登记。

第十九条 符合办理船舶临时登记条件的，国际船舶登记机构审核后颁发临时证书。

临时船舶所有权登记证书、临时船舶国籍证书的有效期均为一个月。

船舶所有人可以在临时船舶所有权登记证书、临时船舶国籍证书有效期届满前向国际船舶登记机构申请延续，并提交相关证明材料。符合条件的，国际船舶登记机构应当作出准予延续的决定，延续时间最长不得超过一个月。

船舶所有人在临时船舶所有权登记证书、临时船舶国籍证书有效期内可以持国际船舶所有权取得证明材料原件和船舶注销登记证明书，申请办理国际船舶所有权登记和船舶国籍登记。完成国际船舶所有权登记和船舶国籍登记的同时，临时登记终止。

第二十条 国际船舶具有下列情形之一的，国际船舶登记机构应当注销其国际船舶国籍登记：

(一)申请人提交虚假国际船舶登记申请材料的；

(二)不再符合本条例规定的国际船舶登记资格要求的；

(三)船舶检验证书失效三个月以上的；

(四)临时船舶国籍登记有效期届满，未提交上一船籍港船舶登记机关出具的船舶注销登记证明书的；

(五)光船租赁合同期满或者光船租赁关系终止之日起十五日内未办理注销登记的；

(六)国际船舶质量评价连续三年达不到规定标准的；

(七)其他不再符合船舶登记要求的。

第二十一条 单位和个人可以按照有关规定查询、复制国际船舶登记信息记录簿中的船舶技术资料、船舶登记种类等基本信息。国际船舶登记机构应当根据单位和个人的需要，对查询、复制的信息资料予以盖章确认。

单位和个人不得非法使用国际船舶登记信息。

第二十二条 国际船舶登记机构和船舶检验机构可以按照有关规定核发国际船舶电子证书，电子证书与纸质证书具有同等法律效力。

第二十三条 超出国家规定的进口船舶船龄限制的国际船舶，经国务院交通运输主管部门同意，并经授权的船舶检验机构检验合格后，可以申请办理国际船舶登记。

第二十四条 国际船舶应当同时持有船舶检验证书和(临时)船舶国籍证书，方可航行、停泊和作业。

第二十五条 经国家授权的机构应当依照国际通行做法设置国际船舶质量、企业安全和防污染管理、船舶检验机构等评价指标，定期开展评价。

评价分值较低的，经国家授权的机构应当开展海事特别安全检查并提出整改意见。

第三章 船 员

第二十六条 持有工作证明材料并在国际船舶任职的境外船员及其家属，按照相关法律法规和工作要求入境海南。

第二十七条 与海南自由贸易港船员用人单位签订劳动合同的境外船员的社会保险，应当按照法律法规和海南自由贸易港有关规定办理，船员所在国(地区)与我国签订社会保险双边或者多边协议的除外。

第二十八条 境外企业和个人可以按照有关规定在海南自由贸易港开办或者合作开办船员培训机构，从事船员培训业务。开设国家规定的船员培训项目，应当经海南海事管理机构批准。

境外人员在海南自由贸易港参加国家规定的船员培训项目，经考试合格的，可以按照有关规定申请相应的船员适任证书和培训合格证书。

第四章 营 运

第二十九条 经营国际客船、国际散装液体危险品船运输业务，应当符合国家有关法律法规规定，并经省人民政府交通运输主管部门批准。

省人民政府应当制定具体管理办法，经国务院交通运输主管部门同意后实施。

第三十条 国内水路运输经营者使用国际船舶从事省内沿海水域水路运输业务，应当经省人民政府交通运输主管部门批准。

国际船舶经批准可以从事省内沿海水域水上施工作业。

第三十一条 达到国家强制报废船龄的国际船舶，经国务院交通运输主管部门同意，并经授权的船舶检验机构检验合格后，在证书有效期内可以继续从事水路运输。

第三十二条 国际船舶所有人或者经营人应当在海南自由贸易港设立联络机构，代表该企业与行政主管机关就有关管理及法律事务等进行联络。联络机构可以由国际船舶所有人或者经营人自行担任，也可以委托注册在海南自由贸易港的法人或者非法人组织担任。

联络机构应当向海南海事管理机构和省人民政府交通运输主管部门备案。

第五章 进出境

第三十三条 公安机关应当优化审批方式、简化审批流程，为需要办理《合资船船员登陆证》的船员提供网上办理等便利服务。

第三十四条 船舶检验、维修和物料供应的相关人员可以在国际船舶办理进口岸手续前上船开展服务，但应当提前取得相关口岸检查机关许可。

第三十五条 从境外购买或者通过其他合法途径取得且拟申请办理国际船舶登记的旧船舶，按照有关规定免于办理重点旧机电产品进口许可证。

第六章 税费和海运服务

第三十六条 对境外进口和境内建造的国际船舶，船用备件以及在船自用的燃料，按照有关规定免税或者退税。

第三十七条 对注册在海南自由贸易港并实质性运营的国际船舶及其辅助性业务经营者、船员服务机构和船舶检验机构，按照有关规定享受企业所得税优惠；其高级管理人员、船员等按照有关规定享受个人所得税优惠。

第三十八条 在海南自由贸易港内设立的企业因开展国际船舶融资借用外债涉及跨境担保的，可以自行办理担保合同签约，无需事前审批，合同签约后，按照有关规定办理登记。

符合条件的国际船舶融资，外债资金可以意愿结汇。

第三十九条 支持在海南自由贸易港注册的国际船舶企业通过保单融资、仓单质押贷款、应收账款质押贷款、知识产权质押贷款等方式开展融资业务。

第四十条 在海南自由贸易港内注册的企业申请银行提供境外船舶融资担保的，可以以购买保险的方式取代保证金。

第四十一条 在海南自由贸易港设立的融资租赁企业开展境内融资租赁业务，可以按照有关规定收取外币租金。

第四十二条 在海南自由贸易港内注册的国际海运及其辅助性企业向境外支付运费及相关费用，符合规定的免于办理税务备案。

第四十三条 支持境内外企业和机构在海南自由贸易港开展航运保险、船舶融资租赁、海损理算、船舶交易和航运仲裁等服务。

鼓励在海运业开展跨境人民币结算再保险业务。

第四十四条 鼓励在海南自由贸易港设立的海运企业依照有关规定成立相互保险组织和自保公司。

第四十五条 建立国际船舶商事纠纷化解机制，与境内外仲裁机构、调解机构等争议解决机构开展合作，提高化解商事纠纷服务水平。

第七章 法律责任

第四十六条 未按照本条例第二十五条规定对海事特别安全检查意见所列问题进行整改的，应当限期整改；经限期整改仍不符合要求，存在严重安全隐患的，可以按照以下规定处理：

(一)对国际船舶签发短期船舶安全管理证书或者取消船舶安全管理证书；

(二)对企业签发短期符合证明或者取消符合证明；

(三)对船舶检验机构取消部分或者全部授权。

第四十七条 国家机关工作人员违反本条例规定滥用职权、徇私舞弊、玩忽职守的，依法给予处分；构成犯罪的，依法追究刑事责任。

第四十八条 违反本条例规定，本条例未设定处罚而法律法规另有处罚规定的，从其规定。

第八章 附 则

第四十九条 在海南自由贸易港登记的航行港澳航线的船舶参照适用本条例。

第五十条 本条例自 2021 年 9 月 1 日起施行。

农业农村部关于实施 2021 年公海自主休渔措施的通知

有关省、自治区、直辖市农业农村、渔业厅（局、委），各计划单列市渔业主管局，中国农业发展集团有限公司，中国远洋渔业协会，上海海洋大学：

为践行“海洋命运共同体”理念，养护和可持续利用公海鱿鱼渔业资源，农业农村部于 2020 年在部分公海海域试行自主休渔，取得了积极成效，得到国内外广泛认可。为促进公海鱿鱼资源长期可持续利用，保障我国远洋渔业绿色高质量发展，农业农村部决定，从 2021 年起，在西南大西洋、东太平洋部分公海海域正式实施公海自主休渔措施。现将有关事项通知如下。

一、实施海域和时间

（一）32° S 一 44° S、48° W—60° W 之间，有关国家专属经济区外的西南大西洋公海海域，休渔时间为 7 月 1 日至 9 月 30 日。

（二）5° N—5° S、110° W 一 95° W 之间的东太平洋公海海域，休渔时间为 9 月 1 日至 11 月 30 日。

在上述海域（详见下图）作业的所有鱿鱼捕捞渔船统一实行自主休渔，实施休渔期间停止捕捞作业，以养护公海鱿鱼资源。

二、实施要求

实行公海自主休渔，是践行“海洋命运共同体”理念、积极履行国际勤勉义务、科学养护公海渔业资源的重要举措，彰显了我国推动实现全球海洋可持续发展目标的坚定决心，展现了我负责任渔业大国形象。各级渔业主管部门及有关单位要高度重视，组织实施好 2021 年公海自主休渔各项工作。

（一）加强组织领导和贯彻落实。各省（自治区、直辖市及计划单列市）渔业主管部门要加强领导和宣传发动，组织辖区内远洋渔业企业切实贯彻执行。休渔开始前，务必组织所有应休渔船及时撤出休渔区；休渔期间要强化渔船监控和管理，严防渔船违规作业；对因避风等确有必要穿行休渔区的，按程序报批。

（二）加强资源动态监测评估。中国远洋渔业协会、中国远洋渔业数据中心要组织有关企业、远洋渔船和科研单位，完善公海鱿鱼资源动态监测体系，切实加强生产信息及样本收集，深入开展资源动态监测与评估，及时对公海自主休渔实施情况与效果进行总结分析并提出建议。

（三）加强国际养护管理合作。加强多双边合作交流，积极推动与有关沿海国联合开展资源调查与监测。根据我国自主休渔实施情况，适时向有关区域渔业管理组织和沿海国通报，分享信息和科学数据，推动加强国际鱿鱼资源养护和管理，展现我负责任大国形象。

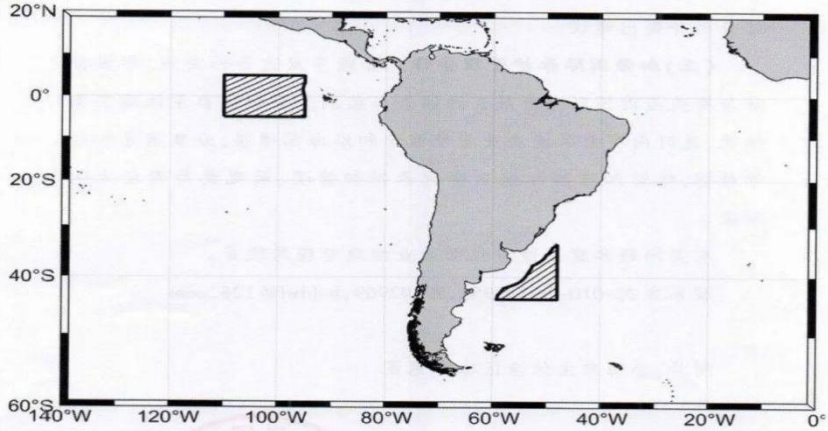
有关问题和建议请与农业农村部渔业渔政管理局联系。

联系方式：010 一 59192952，59192969，bofdwf@126.com

附图：公海自主休渔区域示意图

附件

公海自主休渔区域示意图



《海洋法律与政策》稿约

《海洋法律与政策》(Marine Law and Policy)，国际刊号：2709-3948, 电子刊号：2710-1738，是大 海法领域中英双语对照的优秀国际学术期刊。本刊秉承实事求是的精神，力求刊发海内外与海洋法律、海洋政策相关的一切优秀研究成果，热忱欢迎广大专家、学者不吝赐稿，兹立稿约如下:

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《海洋法律与政策》编辑

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〔1〕 季卫东：《法律程序的意义：对中国法制建设的另一种思考》，载《中国社会科学》 1993 年第 1 期。

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〔1〕 汪波：《哈尔滨市政法机关正对“ 宝马案” 认真调查复查》，载人民网 2004 年 1 月 10 日。http://www.people.com.cn/GB/shehui/1062/2289764.html。

〔2〕赵耀彤：《一名基层法官眼里好律师的样子》，载微信公众号“中国法律评论”，2018 年 12 月 1 日。

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（四） 引用学位论文的基本格式为：

〔1〕 李松锋:《游走在上帝与凯撒之间:美国宪法第一修正案中的政教关系研究》,中国政法大学 2015 年博士学位论文。

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〔1〕《民法总则》第 27 条第 2 款第 3 项

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〔1〕 包郑照诉苍南县人民政府强制拆除房屋案，浙江省高级人民法院（1988）浙法民上字 7 号民事判决书。

〔2〕 陆红霞诉南通市发改委政府信息公开案，《最高人民法院公报》2015 年第 11 期。

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对同一文献的引用应当适度；同一文献在文中多次出现的，为防止修改、编辑过程中发生错乱，作者投稿时不建议采用略写。

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（一）英文学术期刊

Charles A. Reich, The New Property, 73 Yale Law Journal 733, 737-738 (1964).

Stephen J. Choi & Adam C. Pritchard, Behavioral Economics and the SEC, Stanford Law Review, Vol.56:1, p.1-73 (2003).

（二）英文报纸文章

Andrew Rosenthal, White House Tutors Kremlin in How a Presidency Works, New York Times, June 15, 1990.

（三）英文书籍

William P. Alford, To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization, Stanford University Press, 1995, p.98.

页码为复数的，也写 p.，不写 pp.。

Jürgen Habermas, Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy, translated by William Rehg, MIT Press, 1996, p.330-336.

（四）英文网页

Stephen McDonell, When China Began Streaming Trials Online, BBC NEWS (Sept. 30, 2016), https://www.bbc.com/news/blogs-china-blog-37515399.

（五）其他

英文案例的引用方式， 因不同国家、不同法院、不同案例报告系统而有所区别。基本格式为

Natural Resources Defense Council v. Gorsuch, 685 F.2d 718 (D.C. Cir. 1982); Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

*详细可请参考中国法学会法学期刊研究会出版的《法学引注手册 2019》。

海洋法律与政策
Marine Law and Policy

（季刊）

2021 年 第 3 期　总 第 3 期

刊　　号：ISSN 2709-3948

ISSN 2710-1738（online）

出版时间：2021 年 10 月

出版单位：宏願（香港）顾问服务有限公司

创刊主编：傅崐成

共同主编：赖来焜　韩立新　翁文挺　戴锡崑　傅崐成

网　　址：https://marinelawandpolicy.com/

电　　话：+86-13950134985

电子信箱：marinelawpolicy@163.com

发行单位：《海洋法律与政策》编辑部

国内定价：人民币 50 元

国外定价：美元 40 元

Marine Law and Policy

(Quarterly)

Volume 2021 Number 3

ISSN : 2709-3948

ISSN : 2710-1738（online）

Publication: October 2021

Publisher: Great Hope (HK) Consultants Service Co. LTD.

Founding Editor-in-Chief: FU Kuen-chen

Address: https://marinelawandpolicy.com

Mobile: +86-13950134985

E-mail: marinelawpolicy@163.com

Distributor: Editorial Board of *Marine Law and Policy*

Price: (RMB) ¥50

(USD) $ 40