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新法速递 NEW LAWS AND REGULATIONS WATCH

外贸综合服务企业出口货物退(免)税有关问题明确

2月27日,国税总局发布《关于外贸综合服务企业出口货物退(免) 税有关问题的公告》,自2014年4月1日起施行。

《公告》明确,外贸综合服务企业申报退(免)税应同时满足以下条件:出口货物为生产企业自产货物;生产企业已将出口货物销售给外贸综合服务企业;生产企业与境外单位或个人已经签订出口合同,并约定货物由外贸综合服务企业出口至境外单位或个人,货款由境外单位或个人支付给外贸综合服务企业;外贸综合服务企业以自营方式出口。

SAT Clarifies Tax Rebate (Exemption) on Exported Goods of Integrated Foreign Trade Service Enterprises

On February 27, the State Administration of Taxation ("SAT") released the Announcement on Issues concerning Tax Rebates (Exemptions) on Exported Goods of Integrated Foreign Trade Service Enterprises (the "Announcement"), with effect as of April 1, 2014.

According to the Announcement, when declaring tax

rebates (exemptions), an integrated foreign trade service

enterprise shall meet the following conditions: (1) the

exported goods must be produced by the production

enterprise itself; (2) the production enterprise must have

sold the exported goods to an integrated foreign trade

service enterprise; (3) the production enterprise must have

signed an export contract with the overseas organization or

individual, agreeing that the goods will be exported by the

integrated foreign trade service enterprise to the overseas

organization or individual and the money will be paid by the

overseas organization or individual to the integrated foreign

trade service enterprise; and (4) the integrated foreign

trade service enterprise must have exported the goods as a

self-run business.

(Source: www.gdltax.gov.cn)

三部委联合印发《道路运输车辆动态监督管理办法》

近日,交通运输部、公安部、国家安全生产监督管理总局联合印发了《道路运输车辆动态监督管理办法》(以下简称《办法》),《办法》自2014年7月1日起施行。

《办法》共6章,计42条。《办法》规定,道路运输车辆安装、使用具有行驶记录功能的卫星定位装置以及相关安全监督管理活动,适用本办法。根据《办法》,道路运输管理机构、公安机关交通管理部门、安全监管部门依据法定职责,对道路运输车辆动态监控工作实施联合监督管理。

Three Authorities Issue Measures for Dynamic Supervision of Road Transport Vehicles

Recently, the Ministry of Transport, the Ministry of Public Security and the State Administration of Work Safety jointly issued the Administrative Measures for the Dynamic Supervision of Road Transport Vehicles (the "Measures"), with effect as of July 1, 2014.

The Measures, consisting of 42 articles in six chapters, are applicable to the situation where satellite positioning

devices with the function of travel recording are installed

and used in road transport vehicles and relevant safety

supervision and management activities. According to the

Measures, the road transport authorities, the traffic

administrative departments under the public security

authorities and the safety supervision authorities shall be

jointly in charge of the dynamic supervision of road

transport vehicles.

(Source: www.moc.gov.cn)

《海关政府信息公开办法》 4月1日起施行

2月26日,海关总署发布《中华人民共和国海关政府信息公开办法》,自2014年4月1日起施行。

《办法》明确了公开的范围、公开的方式和程序、监督和保障等问题。

《办法》规定:公民、法人或者其他组织认为海关不依法履行海关政府信息公开义务的,可以向海关监察部门、海关政府信息公开工作主管部门或者上一级海关举报。收到举报的海关或者部门应当予以调查处理。

Measures for Openness of Customs Information Released

The General Administration of Customs on February 26 released the Measures for the Openness of Government Information by Customs of the People's Republic of China (the "Measures") which shall be effective as of April 1, 2014.

The Measures clarify issues concerning the scope, methods, procedures, supervision and guarantee of the openness of customs information.

The Measures provide that any citizen, legal person or other organization that finds any Customs has failed to perform the obligation of opening the customs information may lodge a complaint to the customs supervision authorities, the authorities in charge of the openness of customs information or the Customs of the next higher level. The Customs or authorities receiving the complaint shall

conduct an investigation.

(Source: www.customs.gov.cn)

交通运输部关于取消和下放一批行政审批项目的公告 中华人民共和国交通运输部公告 2014年第8号 2014年3月11号

根据《国务院关于取消和下放一批行政审批项目的决定》(国发 [2014]5号),取消和下放了涉及我部的5项行政审批项目,现公告如下:

取消的行政审批项目(共2项):

- 1. 雇用外国籍船员在中国籍船舶上任职审批;
- 2. 有关作业单位防治船舶及其有关作业活动污染海洋环境应急预案审批。

下放的行政审批项目(共3项):

- 1. 省际普通货物水路运输许可(下放至省级人民政府交通运输 主管部门);
- 2. 水运工程监理乙级企业资质认定(下放至省级人民政府交通运输主管部门);
- 3. 水运机电工程专项监理企业资质认定(下放至省级人民政府 交通运输主管部门);

Announcement of the Ministry of Transport to Cancel and Delegate to Lower Level a Group of Administrative Examination and Approval Items

Document Number: NO.8 (2014) OF THE MOT

Issued on 11th March, 2014

According to decision of the State Council on Matters concerning a Group of Administrative Approval Items to Be Cancelled and Delegated to Lower Levels (No. 5 [2014] of the State Council), 5 items of administrative approvals be referred to MOT.

To be cancelled (2 items approval):

- 1. To employ foreigners to serve on ships of Chinese nationality;
- 2. Emergency plan of prevention and cure of marine environment pollution related to some operators and activities.

To delegate to the competent authorities of transport under provincial government (3 items):

Approval of inter-province common goods carriage by water;

2. Verification of B class supervisor's qualification certification on water transport engineering;

 Verification of special supervisor's qualification certification on water transport mechanical & electrical engineering.

(Source: www.moc.gov.cn)

实时资讯 REAL-TIME INFORMATION

交通运输部就《关于推进港口转型升级的指导意见(征求意见稿)》公开征求意见

3月6日,交通运输部公布《关于推进港口转型升级的指导意见(征求意见稿)》,并向社会公开征求意见。意见反馈截止日期为3月17日。

在征求意见稿中,交通运输部明确了推进港口转型升级的主要任务:一要拓展港口服务功能,加快建设现代港口;二要完善港口运输系统,强化港口枢纽作用;三要节约资源保护环境,推动港口绿色发展;四要加强港口安全管理,深化港口平安建设;五要大力推进港口信息化,促进港口高效便捷。

MOT Promotes Transformation and Upgrading of Ports

The Ministry of Transport ("MOT") on March 6 released the draft Guiding Opinions on Promoting the Transformation and Upgrading of Ports (the "Opinions") for public comment until March 17.

The draft Opinions clarify the major tasks in promoting

the transformation and upgrading of ports, including

expanding the service function of ports by speeding up the

pace of the building of modern ports, improving port

transportation systems to enhance the role of ports as hubs,

promoting the development of green ports for resources

conservation and environmental protection, deepening the

construction of safe ports to tighten the administration of

port safety, and vigorously boosting port informatization to

promote the efficient and convenient operation of ports.

(Source: www.moc.gov.cn)

李克强: 支持提升香港国际金融贸易航运中心地位

发布时间: 2014-3-14

国务院总理李克强在京举行记者会,指出世界经济跌宕起伏,在 这种严峻复杂的环境下,香港能够站住脚跟,保持繁荣,本身就表明 香港经济有竞争力。他说,香港在祖国内地改革开放和现代化建设中, 作出了重要贡献,内地现在全面深化改革,促进经济升级,也给香港 发展带来更大的空间。

他指出,中央对港澳的政策是一贯的、明确的,中央政府也会继续支持香港,保持并且提升国际金融贸易航运中心的地位。他说,内地在进一步扩大开放服务业,香港在这方面是有专业优势的,近水楼台先得月。他相信香港同胞历来是有着敢拼能赢的精神,会在未来全球竞争中保持竞争优势,保持繁荣。

Li Keqiang: Support Ascension Hong Kong International Financial Trade and Shipping Center 2014-3-14

Premier of state council Li Keqiang held press conference in Beijing, pointed out that world economic went

up and down, in such severe complex circumstance, Hong

Kong can hold its feet to keep prosperity, which showed

Hong Kong's competitive economics. He said, Hong Kong

made important contributions in country's inland reform &

open and modern constructions, and also, deep reform and

promotions in economic ascent in inland bring more room

for Hong Kong's development.

He pointed that the central government's policy for

Hong Kong and Macao is successive and clear, central

government will continuously support Hong Kong, keep and

promote its position of international financial trade and

shipping center. He also said, Hong Kong has professional

advantages in present inland deep open in services. He

believed that Hong Kong compatriot always have the spirits

of dare wins, will keep superiority in the future global

competition, and keep prosperity.

(Source: www.aastocks.com)

中海码头首次登陆欧洲港口

2014-3-14

日前,中海码头下属的中海码头发展(香港)有限公司顺利完成

了对 APMT 泽布吕赫码头股权收购并转入营运。这是中海码头在欧洲

投资参股的首个码头,也是中海集团加强航运与陆岸产业协同发展的

新成果。

CST Firstly Invested in European Ports

2014-3-14

Days ago, China Shipping Line subsidiary company,

China Shipping Terminal Development (H.K) Co., Ltd

successfully finished the shareholdings purchase

APMT's share on Zeebrugge port and started to operate,

this is the first terminal with China Shipping Terminal's

investment and joint - stock in Europe, it's also the new

outcome of China Shipping Group strengthening

collaboratively developments between shipping and

offshore industries.

(Source: www.ccmt.org.cn)

商船三井起诉三菱重工

来源: Baird maritime

翻译: 国际海事信息文献网 张丽娟 曾艳 汪涛

据报道,继去年8110-TEU集装箱船"MOL Comfort"号沉没后, 日本商船三井公司(MOL)已在东京地方法院对三菱重工 (MHI) 提 出索赔。

据悉,此次索赔包括损害赔偿和补偿,同时囊括加强六艘姊妹船所需的费用。

"MOL Comfort"号船的船体和机械投保额为 6,600 万美元,而索赔中数家保险公司将会为此次沉船赔付约 3—4 亿美元。

该艘超巴拿马型集装箱船由三菱重工长崎造船厂于 2008 年出产,悬挂巴哈马旗。2013 年 6 月 17 日,在印度洋上航行在新加坡至沙特吉达之间时,恶劣天气造成船舶从中部断裂。

船体一分为二后,船尾十日后沉没,而船首部分仍然在海上漂浮, 直到被火烧毁,最终于7月11日沉没。

据 MOL 媒体消息称,事故的原因仍未确定。然而,会暂时撤消 对其姊妹船的使用,以使船体升级,并引入操作变更,以减少结构性 压力。

MHI sued by MOL

From: Baird maritime

Translated by: Zhang Lijuan, Zeng Yan, Wang Tao

Japanese carrier Mitsui OSK Lines (MOL) has reportedly filed a claim in the Tokyo District Court against Mitsubishi Heavy Industries (MHI) following last year's sinking of the 8110-TEU 'MOL Comfort'.

It is understood the claim encompasses damages and compensation as well as covering the costs of strengthening six sister ships.

The hull and machinery of the 'MOL Comfort' were insured for US\$66 million, while the sinking is being estimated to cost insurers between US\$300-400 million in claims.

Launched from MHI's Nagasaki yard in 2008, the Bahamian-flagged and post-Panamax containership suffered a crack amidships in rough weather while steaming between Singapore and Jeddah in the Indian Ocean on June 17.

Having split in two, the aft section sank ten days later,

while the bow section remained afloat until being ravished

by fire and ultimately sinking on July 11.

According to MOL media information, the cause of the

incident remains undetermined. However, it temporarily

withdrew its sister ships from service to enable their hulls to

be upgraded and introduced operational changes to reduce

structural stresses.

(Source: www.simic.net.cn)

案例分析 CASE STUDY

上海衍六国际货物运输代理有限公司诉安丘临福食品有限公司等海上货物运输合同案

-----FOB 贸易方式下两种托运人的身份识别及责任承担

【基本案情】

2010年1月18日,安丘临福公司与美国公司POLO公司签订一份买卖合同,约定安丘临福公司向POLO公司出售新鲜生姜,成交方式为FOB青岛。包装方式中要求每个集装箱中有24个托盘,安丘临福公司确认在涉案集装箱中使用了含有木质成分的复合托盘,未经熏蒸。

2010 年 9 月,辽宁港捷国际物流有限公司济南分公司接受境外 买方 POLO 公司的委托向上海衍六国际货物运输代理有限公司发出订 舱委托,并要求出具正本提单。安丘临福公司向上海衍六公司交付货 物后,后者向其出具了该票货物的全套正本提单,安丘临福公司确认 已收到并将其按照 POLO 公司的要求寄给上海衍六公司的美国代理 WTO 公司。该提单载明托运人为安丘临福公司,收货人为 POLO 公司, 出运日期为 2010 年 9 月 10 日,承运人为上海衍六公司。上海衍六公 司再以托运人的名义向实际承运人阳明海运股份有限公司租船订舱, WTO 公司作为收货人。

2010年9月15日,港捷济南分公司向上海衍六公司支付了出运

的海运费及杂费,并确认所有出运费用系收取 POLO 公司的境外汇款 代为支付的。

2010年10月6日,涉案货物到达美国纽约港,POLO公司进行了进口申报。2010年10月19日,美国农业部动物和植物健康检验部门对该票货物进行了检验,其出具《紧急通知》中载明,该票货物因未对木质包装材料中的有害生物、有害种子和物品采取措施,因此抵运的木质包装材料(WPM)不符合要求,必须在24小时之内退运。

2010年10月28日,WTO公司作为托运人向阳明海运租船订舱,办理该票货物的退运事宜并支付了海运费、滞箱费、仓储费等共计11858美元,上海衍六公司已向WTO公司支付上述费用。

2010年11月9日,阳明海运将该票货物从美国纽约港运出,目的港为中国青岛港,提单载明托运人是WTO公司,收货人是原告,回运提单号为YMLUE144237951,提单正面还载明该票货物因违反美国法律强制性规定而退运。同日,WTO公司签发了POLO公司为托运人,被告安丘临福公司为收货人的无船承运人提单,提单号为10NYCQDO633。

2010年12月5日,上海衍六公司向安丘临福公司发出律师函,告知涉案货物因违反美国法律被要求退运一事,并要求其付清有关费用提取涉案货物。安丘临福公司确认收到,自此时起知道货物被退运回青岛一事,但认为该票货物的风险已经转移给国外的收货人,货物与其没有关系,因此没有必要提取货物。

2010年12月12日,该票货物抵达青岛港。因长期无人提取货

物,该票货物于 2011 年 6 月 10 日被阳明公司代理处理掉,产生码头费用、拖车费、润海场地费等合计人民币 53850 元。上海衍六公司于 2011 年 6 月 15 日支付了上述费用。

原告上海衍六公司诉称,其接受港捷济南分公司的委托,安排安 丘临福公司的货物由青岛港出口至美国纽约港,并出具了无船承运人 提单。涉案货物到纽约港后,由于安丘临福公司未对货物包装的木质 部分进行熏蒸处理,被美国海关责令退运,给其造成了巨大损失。特 诉至本院,请求判令在美国纽约港产生的滞箱费、回运费、仓库到码 头的回运费、快递费、代理费等 11858 美元、在青岛产生的无公害处 理费人民币 53850 元; 2、被告港捷济南分公司、辽宁港捷公司对上 述费用承担连带责任。

被告安丘临福公司辩称, 1、安丘临福公司作为 FOB 价格下的发货人,并非与上海衍六公司订立运输合同的一方当事人,也非海运费的付款人,不是运输合同项下义务的相对人。2、在退运的过程中,上海衍六公司没有及时的通知安丘临福公司,也没有与其协商,上海衍六公司对损失存有过错,所以请求驳回原告的诉讼请求。

被告港捷济南分公司、辽宁港捷公司共同辩称, 1、其系接受买方 POLO 公司的委托进行租船订舱, 货物已经安全运至目的港, 上海衍六公司要求两被告承担连带责任没有法律依据。2、上海衍六公司主张的费用是因其没有及时通知安丘临福公司造成的损失, 与两被告无关。3、上海衍六公司退货时没有通知两被告和 POLO 公司, 剥夺了两被告对于退货确认的权利。请求驳回原告对该两被告的诉讼请求

或者由安丘临福公司承担责任。

【法院裁判要旨】

青岛海事法院经审理认为,安丘临福公司虽然并未与上海衍六公司订立涉案海上货物运输合同,但以自己的名义将货物交予承运人自青岛港运至美国纽约港,接受了载明安丘临福公司为托运人的正本提单并转寄给国外,因此被告安丘临福公司是我国海商法规定的交货托运人,安丘临福公司与上海衍六公司之间存在海上货物运输的提单法律关系。港捷济南分公司是以自己的名义向上海衍六公司租船订舱,委托其运输涉案货物,明显符合我国海商法中第一种托运人的定义,港捷济南分公司是与上海衍六公司订立海上货物运输合同的契约托运人。

安丘临福公司作为提单法律关系下的交货托运人,应当妥善包装 其交付运输的货物,负有保证其交付给承运人的货物包装是符合进口 国要求的法定义务,而安丘临福公司违反该法定义务,未熏蒸处理货 物包装的木质部分导致美国农业部动物和植物健康检验部门强令退 运该票货物,安丘临福公司对该过错行为负有责任,应当向承运人承 担相应的赔偿责任。上海衍六公司要求港捷济南分公司承担连带赔偿 责任。但不能提供法律依据,且该损失是因交货托运人的过错造成的, 由契约托运人承担连带责任没有法律依据。

上海衍六公司已经实际支付了涉案货物从美国纽约港退运回青岛港产生的费用 11858 美元以及货物被强令退运回青岛港后因长期 无人提取产生费用人民币 53850 元,这些费用均属于安丘临福公司未 履行法定义务给上海衍六公司造成的损失,安丘临福公司应当对该费用承担赔偿责任。

青岛海事法院依照《中华人民共和国海商法》第四十二条、第六十六条、第七十一条、第二百六十九条、《中华人民共和国涉外民事关系法律适用法》第三条之规定,判决:一、被告安丘临福公司应赔偿原告上海衍六公司海运费、仓储费、滞箱费、文件费、快递费、代理费等各项费用共计美元 11858 元;二、被告安丘临福公司应赔偿原告上海衍六公司码头费用、拖车费、润海场地费、熏蒸费、人工搬运垃圾费、垃圾处理等各项费用共计人民币 53850 元;三、驳回原告上海衍六公司对被告港捷济南分公司的诉讼请求;四、驳回原告上海衍六公司对被告港捷济南分公司的诉讼请求;四、驳回原告上海衍六公司对被告辽宁港捷国际物流有限公司的诉讼请求。

被告安丘临福公司持原审起诉意见提起上诉。山东省高级人民法院另查明上海衍六公司未将退运提单交付给安丘临福公司,其他事实与一审法院认定的事实基本一致。山东省高级人民法院经审理认为,原审判决关于安丘临福公司是交货托运人,应当承担赔偿责任,港捷济南分公司是契约托运人,承担连带赔偿责任没有法律依据的认定,均事实清楚,适用法律正确。

但关于损失中退运回青岛港后因长期无人提取产生的费用认为,货物退运后,2010年12月5日,上海衍六公司向安丘临福公司发出律师函,告知退运一事,但安丘临福公司认为货物风险已转移给国外买方,没有必要提货,上海衍六公司也没有将退运提单交付安丘临福公司,因此上海衍六公司为实际承运人提单的收货人,在货物退运回

青岛港后明知安丘临福公司拒绝提取货物时,应及时处理货物,其未及时处理货物,导致货物在青岛港存放半年之久,上海衍六公司应自行承担在青岛港码头产生的码头费用 30650 元。无论上海衍六公司是否及时处理退运货物,在青岛港产生的拖车费、场地费、熏蒸费、人工搬运垃圾费、垃圾处理费都是不可避免的,均是由于货物包装不良退运所导致承运人的损失,该部分费用仍应由安丘临福公司负担。

- 二审法院根据《中华人民共和国民事诉讼法》第一百五十三条第 一款第(三)项之规定,判决如下:
- 一、维持(2011)青海法海商初字第 32 号民事判决第一、三、 四项;
- 二、变更(2011)青海法海商初字第 32 号民事判决第二项为安 丘临福食品有限公司应赔偿上海衍六国际货物运输代理有限公司拖 车费、润海场地费、熏蒸费、人工搬运垃圾费、垃圾处理费等各项费 用共计 23200 元。

【法官后语】

本案主要涉及 FOB 下两种托运人的身份识别及责任承担问题。

FOB 贸易术语下,安丘临福公司按照买卖合同的要求将货物交付给承运人,境外买方 POLO 公司按照买卖合同委托港捷济南分公司办理租船订舱事宜,那么谁是涉案货物的托运人?这时涉及到契约托运人与交货托运人两种身份的问题。我国《海商法》第四十二条规定的"托运人"是指: 1、本人或者委托他人以本人名义或者委托他人为本

人与承运人订立海上货物运输合同的人; 2、本人或者委托他人以本人名义或者委托他人为本人将货物交给与海上货物运输合同有关的承运人的人。

对于安丘临福公司而言,其并非与上海衍六公司订立运输合同的一方当事人,也非海运费的付款人,显然并非与承运人订立运输合同的契约托运人。但其以自己的名义将货物交予承运人运输,接受了载明自己为托运人的正本提单并背书流转,符合第二种托运人即交货托运人的身份。交货托运人是法定的,它是依据行为的实际交付货物的事实而依法确立其托运人身份的。根据我国《海商法》第七十一条的规定,提单是指用以证明海上货物运输合同和货物已经由承运人接受或者装船,以及承运人保证据以交付货物的单证。提单作为海上货物运输合同关系的证明,提单上记载的托运人可以首先推定为契约托运人,但提单并非海上货物运输合同本身,安丘临福公司显然并非与承运人订立运输合同的契约托运人,其因为接受了承运人签发的正本提单并参与了提单的流转,而与上海衍六公司之间存在海上货物运输的提单法律关系,安丘临福公司是交货托运人。

对于港捷济南分公司而言,其接受境外买方 POLO 公司的委托向上海衍六公司进行租船订舱,并向其支付海运费,港捷济南分公司或 POLO 公司应当被认定为我国海商法规定的第一种托运人即契约托运人。认定谁为契约托运人的关键是港捷济南分公司订舱时的身份识别。港捷济南分公司并不能证明在订舱过程中曾向上海衍六公司披露过自己是 POLO 公司的委托进行订舱,上海衍六公司并不知晓 POLO

公司是订舱的实际委托方,而且对于港捷济南分公司支付海运费的来源,上海衍六公司没有义务查明,这属于港捷济南分公司与其委托人之间的权利义务关系,不能以此证明涉案运输合同的订舱委托人是POLO公司。因此,法院认为港捷济南分公司是以自己的名义向上海衍六公司租船订舱,委托其运输涉案货物,港捷济南分公司是与上海衍六公司订立海上货物运输合同的契约托运人。

关于托运人的责任,按照《海商法》第六十六条的规定,托运人 托运货物,应当妥善包装,并向承运人保证,货物装船时所提供的货 物的品名、标志、重量或者体积的正确性;由于包装不良或者上述资 料不正确,对承运人造成损失的,托运人应当负赔偿责任。该托运人 并未明确是交货托运人还是契约托运人,对于本案而言,安丘临福公 司作为向美国出口货物的出口商,应当了解美国关于货物包装的法律 规定,并且安丘临福公司提供的有关货物的木质包装材料的检验检疫 标准 ISPM15 包装标准也证明其知晓美国对于木质包装材料有着严格 的要求,其未对涉案货物的木质包装采取熏蒸的处理措施,导致货物 被美国强令退运,在实际承运人阳明海运股份公司的退运提单上也明 确载明这点,证明该退运并非上海衍六公司的擅自作为而影响了安丘 临福公司的处分权。安丘临福公司对该过错行为负有责任,给作为承 运人的上海衍六公司造成了损失,应当承担相应的法律后果。

对于港捷济南分公司而言,上海衍六公司主张其承担连带责任, 连带责任属于债务人的"加重"责任,司法实践中对连带责任的适用有 严格的限制。根据我国《民法通则》第八十七条,连带责任的承担应 当依据法定或者约定。本案中的海上货物运输过程中并未对连带责任的承担有任何约定,因此上海衍六公司主张港捷济南分公司承担连带责任必须以法律明确规定为依据,而其不能提供法律依据。本案原告坚持主张港捷济南分公司承担连带责任,可视为交由法院根据案件事实权衡选择一方作为责任承担者。由于安丘临福公司是交货托运人,知晓美国对于货物包装的法律规定,对货物被退运具有过错,因此法院判令安丘临福公司作为责任承担主体更加符合实际。

本案一审合议庭组成人员: 王爱玲

刘晓娜

张 波

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资讯选编 INFORMATION SELECTION

No Resolution in DHL Demurrage Case

By Gavin Magrath (Magrath's Law Chambers)

Readers may recall a previous article on the decision of the Federal Court of Canada in DHL v CA-CGM, involving an underlying dispute over approximately \$680,000 in demurrage charges on a cargo shipped from Halifax to Ho Chi Minh City but ultimately abandoned by the consignee.

The carrier brought a suit in the Courts of Marseille pursuant to the bill of lading's jurisdiction clause against a number of parties, including the forwarder, on the basis that they were liable for those charges under the definition of "Merchant" in the carrier's bill of lading.

The forwarder brought an application before the Federal Court for an anti - suit injunction, essentially asking the Court to confirm that the forwarder was not a "Merchant"

and therefore subject neither to the jurisdiction clause nor to liability for demurrage charges. That application was rejected, and the forwarder appealed.

Since that update, the appeal has been dropped and the underlying demurrage claim apparently settled. While this is of course a good outcome for the parties, it leaves us with more questions than answers.

What is the true scope of the "Merchant" clause? Anecdotally, carriers appear to have become somewhat more aggressive in attempting to recover these charges from Canadian forwarders, possibly in reliance on the Federal Court's decision. In my opinion, however, that decision is very restricted:

It was a claim for an anti-suit injunction by the forwarder, not a claim for demurrage by the carrier. At all times not only was the burden on DHL to prove its case, but to the very high standard required to obtain a mandatory injunction. While DHL failed to meet that high burdens, that does not mean that the carrier would have succeeded in

proving the opposite case against the forwarder as plaintiff in Marseille.

On the particular facts, the Forwarder not only held the Bills of Lading, but exercised their legal rights as holders to stop the goods pending payment of freight. The claim in Marseille might have determined whether this actually caused the abandonment and damages, but in any event the Federal Court decision merely confirms that if you exercise your rights as the BL holder, you will be considered a BL holder. Had the stoppage and abandonment occurred without any intervention by DHL - if they had never exercised their rights under the BL - then the Court may not have considered them bound as a "Holder" under the Merchant clause.

In any event the Court only determined that DHL should have to make its defence to the claim as brought in Marseille, and nothing about its actual liability for these demurrage charges or for charges generally.

As both appeal and claim were settled on a confidential

basis, general concerns with demurrage claims were not tested. For example, plaintiffs have an obligation to mitigate damages, and therefore in the case of such substantial charges there may be evidence that the carrier could have and should have taken steps to dispose of or return the goods to mitigate those losses, limiting the liability of any Merchant. Similarly, demurrage charges are arbitrary and in the nature of a penalty for failure to return, rather than commercial costs borne by the carriers. Where these charges are excessive they represent a windfall to the carrier and principles of law or equity might limit those damages, for example to the replacement cost of the container.

Forwarders - and carriers - should view this decision as extremely limited in scope, and certainly not as a decision that establishes that forwarders acting in their capacity as agents only will be considered "Merchants" or that they will be liable for demurrage charges owed by their disclosed principals. Forwarders who have acted as agent only, and not contracted directly as NVOC, should continue to resist these commercial claims by directing the carrier to their

principal contracting parties, the shipper and consignee.

Of course, forwarders should seek the advice of a qualified lawyer in their jurisdiction before making any

decision about their response to possible claims, in addition

to notifying their insurers.

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(Source: www.forwarderlaw.com)

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