



DACHENG  
LAW  
OFFICES

大成律师事务所

总第三十期

# 海商海事法规信息速递

2013 年第 5 期

大成律师事务所 海事海商部



---

## 目录

<b>新法速递 NEW LAWS AND REGULATIONS WATCH.....</b>	<b>2</b>
财政部 国家税务总局发布《关于成都双流等 3 个机场民航国际航班使用保税航空燃油有关税收政策的通知》 .....	2
国家外汇管理局印发《海关特殊监管区域外汇管理办法》 .....	3
国家外汇管理局印发《外债登记管理办法》和《外债登记管理操作指引》 .....	4
国家外汇管理局发布《关于加强外汇资金流入管理有关问题的通知》 .....	5
交通运输部公布《关于修改〈快递业务经营许可管理办法〉的决定》 .....	6
国家税务总局发布《关于中澳税收协定适用于澳大利亚新增税种的公告》 .....	8
国务院办公厅印发《国家铁路局主要职责内设机构和人员编制规定》 .....	9
商务部发布《执行世界贸易组织贸易救济争端裁决暂行规则（征求意见稿）》 .....	10
<b>实时资讯 REAL-TIME INFORMATION .....</b>	<b>11</b>
国家外汇管理局发布《国家外汇管理局关于推广资本项目信息系统的通知》 .....	11
国家外汇管理局发布《关于改进海关特殊监管区域经常项目外汇管理有关问题的通知》 .....	11
海关总署发布《关于公布香港、澳门享受零关税货物原产地标准表等的公告》 .....	13
财政部和国家税务总局联合印发《关于在全国开展交通运输业和部分现代服务业营业税改征增值税试点税收政策的通知》 .....	14
<b>案例分析 CASE STUDY .....</b>	<b>16</b>
非提单列明托运人的索赔权 .....	16
<b>资讯选编 INFORMATION SELECTION .....</b>	<b>27</b>
Hurricane Sandy in the US- was this "force majeure"? .....	27

## 新法速递 NEW LAWS AND REGULATIONS WATCH

财政部 国家税务总局发布《关于成都双流等 3 个机场民航国际航班使用保税航空燃油有关税收政策的通知》

MOF and SAT Issue Circular on Relevant Tax Policies for Bonded Jet Fuel Used by Civil Aviation International Flights of Three Airports including Chengdu Shuangliu

2013 年 4 月 2 日，财政部、国家税务总局发布《关于成都双流等 3 个机场民航国际航班使用保税航空燃油有关税收政策的通知》（《通知》）。

《通知》规定，从 2013 年 2 月 1 日起，中国航空油料有限责任公司在成都双流、厦门高崎和郑州新郑机场设立的航空油料保税仓库，在海关批准的保税仓库有效期内，应以不含增值税的价格向民航国际航班销售进口保税的航空燃油。

对中国航空油料有限责任公司所属的上述保税仓库，按照上述规定向民航国际航班销售进口保税的航空燃油取得的收入，免征增值税。

On April 2, 2013, the Ministry of Finance (MOF) and the State Administration of Taxation (SAT) issued the Circular on Relevant Tax Policies for Bonded Jet Fuel Used by Civil Aviation International Flights of Three Airports including Chengdu Shuangliu (the "Circular").

The Circular specifies that, from February 1, 2013, bonded warehouses of aviation fuel set up by China Aviation Oil Co., LTD at the airports of Chengdu Shuangliu, Xiamen Gaoqi and Zhengzhou Xinzheng shall, during the customs approved validity period of the bonded warehouses, sell imported bonded

aviation fuel to civil aviation international flights at the prices without value-added tax (VAT).

Aviation fuel bonded warehouses affiliated to China Aviation Oil Co., LTD shall be exempt from VAT on incomes from the sale of imported bonded aviation fuel to civil aviation international flights in accordance with the rules prescribed above.

(Source: [www.mof.gov.cn](http://www.mof.gov.cn))

### 国家外汇管理局印发《海关特殊监管区域外汇管理办法》

### SAFE Prints and Distributes Measures for Foreign Exchange Control in Areas under Special Customs Supervision

为完善海关特殊监管区域外汇管理，国家外汇管理局对《保税监管区域外汇管理办法》进行全面修订，形成并发布了《海关特殊监管区域外汇管理办法》《办法》，自 2013 年 6 月 1 日起施行。

《办法》规定，区内与境内区外之间货物贸易项下交易，可以以人民币或外币计价结算；服务贸易项下交易应当以人民币计价结算。区内机构之间的交易，可以以人民币或外币计价结算；区内行政管理机构的各项规费应当以人民币计价结算。

In order to improve foreign exchange control in areas under special customs supervision, the State Administration of Foreign Exchange (SAFE) conducted a comprehensive overhaul of the Measures for Foreign Exchange Control in Bonded Supervision Areas, thereby forming the Measures for Foreign

Exchange Control in Areas under Special Customs Supervision (the "Measures"), effective as of June 1, 2013.

According to the Measures, transactions made under trades of goods between regions in and outside the said areas within the territory of China may be settled in CNY or a foreign currency; and transactions made under trades of services shall be settled in CNY. Transactions between organizations in the said areas may be settled in CNY or a foreign currency; and all fees charged by administrative departments in the said area shall be in CNY.

(Source: [www.safe.gov.cn](http://www.safe.gov.cn))

国家外汇管理局印发《外债登记管理办法》和《外债登记管理操作指引》

SAFE Prints and Distributes Administrative Measures for Registration of Foreign Debts and Guidelines on the Administration of Registration of Foreign Debts

2013 年 4 月 28 日，国家外汇管理局印发了《国家外汇管理局关于发布〈外债登记管理办法〉的通知》（《通知》），自 2013 年 5 月 13 日起实施。

在积极防范外债风险的基础上，《通知》对现行外债登记管理流程进行优化，简化了外债登记管理环节，取消了部分外债管理审批事项，除外债签约登记外，外债账户开立、资金结汇和还本付息等均由外汇指定银行直接审核办理。同时，《通知》进一步完善了外债的登记和统计监测。

On April 28, 2013, the State Administration of Foreign Exchange (SAFE) printed and distributed the Circular of the State Administration of Foreign

Exchange on Distributing the Administrative Measures for Registration of Foreign Debts (the "Circular"), effective as of May 13, 2013.

On the basis of active prevention of risks in foreign debts, the Circular optimizes the administration process for the registration of foreign debts, simplifies the administration stage for the registration of foreign debts, and cancels several examination and approval items for foreign debts. Except for registration of foreign debts, the opening of a foreign debt account, foreign exchange settlement of funds, repayment of capital and interests, etc., shall be directly examined and verified by a designated foreign exchange bank. Moreover, the Circular further improves the registration and statistical monitoring of foreign debts.

(Source: [www.safe.gov.cn](http://www.safe.gov.cn))

### 国家外汇管理局发布《关于加强外汇资金流入管理有关问题的通知》

### SAFE Releases Circular on Issues Concerning Intensification of the Administration of Inflow of Foreign Exchange Funds

2013 年 5 月 5 日，国家外汇管理局发布《国家外汇管理局关于加强外汇资金流入管理有关问题的通知》（《通知》）。

《通知》规定，除政策性银行外，银行结售汇综合头寸限额计算公式为：“各银行当月结售汇综合头寸下限=（上月末境内外汇贷款余额-上月末外汇存款余额×参考贷存比）×国际收支调节系数”。其中：中资银行的参考贷存比为 75%，外资银行的参考贷存比为 100%，国际收支调节系数为 0.25；境内外汇贷款余额、外汇存款余额根据中国人民银行《金融机构外汇信贷收支月报》中的数据计算，

境内外汇贷款不含境外筹资转贷款。

On May 5, 2013, the State Administration of Foreign Exchange (SAFE) released the Circular of the State Administration of Foreign Exchange on Issues Concerning Intensification of the Administration of Inflow of Foreign Exchange Funds (the "Circular").

According to the Circular, except for policy banks, the formula of computation for the limit for synthetic positions of the banks in the settlements and sales of foreign exchange is: "the lower limit for synthetic positions of all banks in the settlements and sales of foreign exchange=(the balance of domestic foreign exchange loans at the end of last month - the balance of foreign exchange deposits at the end of last month $\times$ reference loan-to-deposit ratio) $\times$ the adjustment factor to balance of payments". In which, the reference loan-to-deposit ratio of Chinese-funded banks is 75%, the reference loan-to-deposit ratio of foreign-funded banks is 100%, and the adjustment factor to balance of payments is 0.25; the balance of domestic foreign exchange loans or the balance of foreign exchange deposits is to be calculated based on the data of the Monthly Report on Credit Receipts and Payments of Financial Institutions issued by the People's Bank of China, and domestic foreign exchange loans do not include on-lending of overseas financing.

(Source: [www.safe.gov.cn](http://www.safe.gov.cn))

交通运输部公布《关于修改〈快递业务经营许可管理办法〉的决定》

MOT Promulgates Decision on Revising the Administrative Measures for Business Licenses for Courier Services

交通运输部公布《关于修改〈快递业务经营许可管理办法〉的决定》(《决定》), 自公布之日施行。

《决定》明确, 国务院邮政管理部门和省、自治区、直辖市邮政管理机构以及按照国务院规定设立的省级以下邮政管理机构负责快递业务经营许可的管理工作。

取得快递业务经营许可的企业设立分公司、营业部等非法人分支机构, 凭企业法人快递业务经营许可证(副本)及所附分支机构名录, 到分支机构所在地工商行政管理部门办理注册登记。

The Ministry of Transport (MOT) promulgated the Decision on Revising the Administrative Measures for Business Licenses for Courier Services (the "Decision"), effective as of the date of promulgation.

The Decision specifies that the postal administration department under the State Council, the postal administration agencies of all provinces, autonomous regions and municipalities directly under the Central Government, and the postal administration agencies below the provincial level established in accordance with the regulations of the State Council are to be responsible for the administration of business licenses for courier services.

If an enterprise that has obtained a business license for courier services intends to establish a branch company, business department or any other non-legal-person branch, the enterprise shall, by presenting the enterprise legal person business license for courier services (duplicate) and the list of its affiliated branches, complete the registration formalities at the industrial and commercial administrative department at the place where the branch is located



(Source: [www.moc.gov.cn](http://www.moc.gov.cn))

## 国家税务总局发布《关于中澳税收协定适用于澳大利亚新增税种的公告》

### SAT Issues Announcement on the Application of the Sino-Australia Tax Agreement to Australia's New Taxes

国家税务总局发布《国家税务总局关于中澳税收协定适用于澳大利亚新增税种的公告》(《公告》), 自 2013 年 6 月 1 日起施行。

根据《公告》, 中澳双方税务主管当局代表经过协商, 同意将中澳税收协定适用于澳大利亚新增加的矿产资源租赁税 (Mineral Resource Rent Tax)。该税种是澳大利亚根据其国内相关法案设立, 以铁矿石项目和煤矿项目取得的利润为征税对象, 与中澳税收协定税种范围条款澳方所列的石油资源租赁税实质相同。

The State Administration of Taxation (SAT) issued the Announcement of the State Administration of Taxation on the Application of the Sino-Australia Tax Agreement to Australia's New Taxes (the "Announcement"), effective as of June 1, 2013.

According to the Announcement, the representatives of the competent tax authorities of China and Australia have agreed, after consultation, to apply the Sino-Australia tax agreement to Australia's newly added Mineral Resource Rent Tax. The new tax was created by Australia according to its relevant domestic legislations and is in respect of profits obtained from iron ore projects and coal mine projects. It is the same in nature as the petroleum resource rent tax listed by Australia under the article of the Sino-Australia Tax Agreement on

scope of taxes.

(Source: [www.sat.gov.cn](http://www.sat.gov.cn))

### 国务院办公厅印发《国家铁路局主要职责内设机构和人员编制规定》

### General Office of the State Council Prints and Distributes Provisions on the Main Responsibilities, Internal Organization and Staffing of the State Railway Administration

国务院办公厅发布《国务院办公厅关于印发国家铁路局主要职责内设机构和人员编制规定的通知》(《规定》)。

《规定》要求设立国家铁路局(副部级),为交通运输部管理的国家局。加强铁路运输安全、工程质量和设备质量的监督管理,完善监督管理制度和技术标准体系,监督铁路企业落实安全生产主体责任、承担国家规定的公益性运输任务情况。

The General Office of the State Council released the Circular of the General Office of the State Council on Printing and Distributing the Provisions on the Main Responsibilities, Internal Organization and Staffing of the State Railway Administration (the "Provisions").

According to the Provisions, the State Railway Administration (deputy ministry level) is to be established as a State administration under the Ministry of Transport. It will strengthen the supervision and administration of railway transportation safety, construction quality and safety, and equipment quality and safety, improve the supervision and administration system and the

technological standard system, and supervise railway enterprises to ensure they observe their responsibilities for work safety and undertake tasks required by the State in relation to the provision of charitable transport services.

(Source: [www.gov.cn](http://www.gov.cn))

### 商务部发布《执行世界贸易组织贸易救济争端裁决暂行规则（征求意见稿）》

### MOFCOM Releases Interim Rules for the Implementation of Trade Remedy Dispute Adjudications of the World Trade Organization (Draft for Comments)

为规范世界贸易组织贸易救济争端裁决的执行工作，商务部起草了《执行世界贸易组织贸易救济争端裁决暂行规则（征求意见稿）》，现向社会公开征求意见。

意见反馈截止日期为 2013 年 6 月 12 日。

In order to regulate the implementation of trade remedy dispute adjudications of the World Trade Organization, the Ministry of Commerce (MOFCOM) drew up the Interim Rules for the Implementation of Trade Remedy Dispute Adjudications of the World Trade Organization (Draft for Comments).

The MOFCOM is seeking opinions thereon from the public until June 12, 2013.

(Source: [www.chinalaw.gov.cn](http://www.chinalaw.gov.cn))

## 实时资讯 REAL-TIME INFORMATION

国家外汇管理局发布《国家外汇管理局关于推广资本项目信息系统的通知》

### SAFE Releases Circular on Popularization of the Capital Account Information System

2013 年 4 月 25 日，国家外汇管理局发布《国家外汇管理局关于推广资本项目信息系统的通知》(《通知》)，决定自 2013 年 5 月 13 日起，国家外汇管理局及其分支局和境内银行应通过资本项目信息系统为境内主体办理各类资本项目业务。

On April 25, 2013, the State Administration of Foreign Exchange (SAFE) released the Circular of the State Administration of Foreign Exchange on Popularization of the Capital Account Information System (the "Circular"), deciding that SAFE and its sub-administrations and branches as well as domestic banks shall handle all types of capital account operations for domestic entities via the capital account information system from May 13, 2013.

(Source: [www.safe.gov.cn](http://www.safe.gov.cn))

国家外汇管理局发布《关于改进海关特殊监管区域经常项目外汇管理有关问题的通知》

### SAFE Releases Circular on Issues Concerning Improvement on Foreign Exchange Control over Current Accounts in Areas under Special Customs Supervision

《海关特殊监管区域外汇管理办法》(汇发[2013]15号), 国家外汇管理局决定自 2013 年 6 月 1 日起, 进一步改进海关特殊监管区域经常项目外汇管理。2013 年 5 月 22 日, 国家外汇管理局发布《国家外汇管理局关于改进海关特殊监管区域经常项目外汇管理有关问题的通知》(《通知》)。

根据《通知》, 海关特殊监管区域机构无须办理《保税监管区域外汇登记证》及进行《登记证》年检。已核发的《登记证》不再使用。

新设区内机构办理货物贸易外汇收支、购结汇前, 应按照《货物贸易外汇管理指引》及其实施细则, 到所在地国家外汇管理局分支局(以下简称外汇局)办理“贸易外汇收支企业名录”登记手续。

According to the Measures for Foreign Exchange Control in Areas under Special Customs Supervision (Hui Fa [2013] No. 15), the State Administration of Foreign Exchange (SAFE) decided to further improve the foreign exchange control over current accounts in areas under special customs supervision from June 1, 2013. The SAFE released the Circular on Issues Concerning Improvement on Foreign Exchange Control over Current Accounts in Areas under Special Customs Supervision (the "Circular") on May 22, 2013.

According to the Circular, institutions in areas under special customs supervision are not required to possess the Foreign Exchange Registration Certificate of Bonded Supervision Areas (the "Registration Certificate") or to be subject to the annual inspection of the Registration Certificates. The Registration Certificates issued are no longer be used.

Before going through the foreign exchange receipts and payments, or the purchase or settlement of foreign exchange, under trades of goods, the newly established institutions within such areas shall, in accordance with the

Guidelines for Foreign Exchange Control under Trades of Goods and the implementing rules thereof, complete the registration formalities for the Directory of Trade Foreign Exchange Receipts and Payments Enterprises with the SAFE sub-branches at the place where they are located.

(Source: [www.safe.gov.cn](http://www.safe.gov.cn))

海关总署发布《关于公布香港、澳门享受零关税货物原产地标准表等的公告》

GAC Issues Announcement on the Promulgation of the Schedules on Standards of the Place of Origin of Newly-Added Goods Entitled to Zero Tariff Preference in Hong Kong and Macao, etc.

根据《内地与香港关于建立更紧密经贸关系的安排》和《内地与澳门关于建立更紧密经贸关系的安排》(CEPA) 及其相关补充协议, 2013 年 5 月 28 日, 海关总署制订了《2013 年 7 月 1 日起新增香港享受零关税货物原产地标准表》和《2013 年 7 月 1 日起新增澳门享受零关税货物原产地标准表》, 并修改了部分享受货物贸易优惠措施香港货物的原产地标准。

According to the Closer Economic Partnership Arrangement between Mainland and Hong Kong and the Closer Economic Partnership Arrangement between Mainland and Macao (CEPA) and the relevant supplementary agreements, on May 28, 2013, the General Administration of Customs (GAC) formulated the Schedule on Standards of the Place of Origin of Newly-Added Goods Entitled to Zero Tariff Preference in Hong Kong from July 1, 2013 and the Schedule on Standards of the Place of Origin of Newly-Added Goods Entitled to Zero Tariff Preference in Macao from July 1, 2013, and revised the standards of the place of origin of certain goods entitled to preferential trade

measures in Hong Kong.

(Source: [www.customs.gov.cn](http://www.customs.gov.cn))

财政部和国家税务总局联合印发《关于在全国开展交通运输业和部分现代服务业营业税改征增值税试点税收政策的通知》

MOF and SAT Jointly Print and Distribute Circular on Tax Policies in the Nationwide Pilot Collection of Value Added Tax in Lieu of Business Tax in the Transportation Industry and Certain Modern Services Industries

2013 年 5 月 28 日，财政部和国家税务总局联合印发《关于在全国开展交通运输业和部分现代服务业营业税改征增值税试点税收政策的通知》（《通知》）。

《通知》对前期试点的税收政策进行了整合，并根据前期试点中反映的情况，对部分政策进行了调整和完善。《通知》还明确，前期试点的相关税收政策规定自 2013 年 8 月 1 日起废止。

On May 28, 2013, the Ministry of Finance (MOF) and the State Administration of Taxation (SAT) jointly printed and distributed the Circular on Tax Policies in the Nationwide Pilot Collection of Value Added Tax in Lieu of Business Tax in the Transportation Industry and Certain Modern Services Industries (the "Circular").

The Circular integrates the tax policies for the early pilot projects, and adjust and improve certain policies based on the circumstances reported during the implementation of the early pilot projects. The Circular also specifies that the relevant tax policies for the early pilot projects will be repealed on August 1,

2013.

(Source: [www.mof.gov.cn](http://www.mof.gov.cn))



## 案例分析 CASE STUDY

### 非提单列明托运人的索赔权

#### The right to claim of a non-listed carrier on B/L

——深圳市璟翰实业有限公司诉利通物流有限公司、A-SONIC MARINE (H.K.) LIMITED 海上货物运输合同纠纷案

#### 【要点提示】 Points to Note

国际贸易中，卖方为了组织货源与供货方协商，由供货方将所需货物安排运输并交付承运人，承运人向供货方签发了提单。后因承运人无单放货，供货方本身并未因此遭受货款损失，但如果卖方可确定为提单持有人并因此遭受了损失，仍有权向承运人请求赔偿。

In the international business, for managing sources of goods the vendor requests suppliers to arrange shipping goods and the carrier signed B/L to suppliers. Suppliers will not suffer loss from payment for goods if the carrier delivery of goods without B/L. In the case, the vendor could claim loss to the carrier if he is the holder of the B/L and suffered loss.

#### 【案例索引】

一审：大连海事法院（2006）大海商初字第 385 号民事判决（2009 年 12 月 22 日）

#### 【案情】

原告：深圳市璟翰实业有限公司

被告：利通物流有限公司（原利通国际货运有限公司）

被告：A-SONIC MARINE (H.K.) LIMITED（原威瑞海陆运输有限公司）

大连海事法院经审理查明：2005 年 11 月至 2006 年 3 月期间，原告深圳市璵翰实业有限公司（以下简称原告）与美国买方 PRIMARK 公司共订立 21 份买卖合同，约定由原告向买方供应铁制花园用品、木质装饰品等货物，付款方式为 T/T 30 天。为此，原告又分别与供货方常州市庭园装饰用品有限公司（4 份合同）、江西省靖安县华利实业有限公司（2 份合同），新世纪控股集团有限公司（3 份合同），深圳市松艺进出口贸易有限公司（1 份合同）和浙江惠灵对外贸易有限责任公司（4 份合同）等五家公司（以下简称供货方）订立购销合同，约定付款方式均为 T/T，并约定由供货方负责办理货物的出运和报关手续。

威瑞海陆运输有限公司（以下简称威瑞公司）是取得中华人民共和国交通部许可的无船承运人。2004 年 8 月 17 日起，威瑞公司与利通货运订立代理合同，授权利通货运在中国大陆以其代理人的身份签发该公司的提单。为涉案货物，利通货运在 2005 年 12 月至 2006 年 4 月期间，接受本案供货方和原告的委托，并作为威瑞公司的授权签单人，在提单“代表承运人签章”栏内签发了威瑞公司的 14 份记名提单，提单中记名收货人和通知方均为 PRIMARK 公司。涉案货物分别由供货方和原告实际交付给威瑞公司，供货方和原告分别为其所托运的货物向海关办理报关手续。提单签发日期、托运人及报关金额、发票金额如下：

利通货运在中国大陆以其代理人的身份签发该公司的提单。为涉案货物，利通货运在 2005 年 12 月至 2006 年 4 月期间，接受本案供货方和原告的委托，并作为威瑞公司的授权签单人，在提单“代表承运人签章”栏内签发了威瑞公司的 14 份记名提单，提单中记名收货人和通知方均为 PRIMARK 公司。涉案货物分别由

利通货运在中国大陆以其代理人的身份签发该公司的提单。为涉案货物，利通货运在 2005 年 12 月至 2006 年 4 月期间，接受本案供货方和原告的委托，并作为威瑞公司的授权签单人，在提单“代表承运人签章”栏内签发了威瑞公司的 14 份记名提单，提单中记名收货人和通知方均为 PRIMARK 公司。涉案货物分别由供货方和原告实际交付给威瑞公司，供货方和原告分别为其所托运的货物向海关办理报关手续。提单签发日期、托运人及报关金额、发票金额如下：

1、SHA08790D 号提单于 2005 年 12 月 22 日、SHA09460D 号提单于 2006 年 3 月 4 日、SHA10107C 号提单于 2006 年 4 月 10 日签发。提单托运人均为常州市庭园装饰用品有限公司，报关总金额为 16 987.56 美元，发票金额为 19 548 美元。

2、SHA09738 号提单于 2006 年 3 月 21 日、SHA09197B 号提单于 2006 年 1 月 31 日签发。提单托运人均为新世纪控股集团有限公司，报关金额为 5 910 美元，发票金额为 6 784 美元。

3、SHA09363 号提单于 2006 年 3 月 4 日、SHA09736 号提单于 2006 年 3 月 21 日签发。提单托运人均为江西省靖安县华利实业有限公司，报关金额为 9 430 美元，发票金额为 10 660 美元。

4、SHA09794 号提单于 2006 年 3 月 21 日、SHA10107A 号提单于 2006 年 4 月 16 日、XSE05141B 号提单于 2006 年 4 月 10 日签发。提单托运人均为原告，报关金额为 4 045 美元，发票金额为 11 191.97 美元。

5、SHA09197D 号提单于 2006 年 1 月 31 日签发，提单托运人是深圳市松艺进出口贸易有限公司，报关金额是 1 001.52 美元，发票金额为 1 278 美元。

6、SHA09460A 号提单于 2006 年 3 月 4 日、SHA09740 号提单于 2006 年 3 月 21 日、SHA10107B 号提单于 2006 年 4 月 16 日签发、提单托运人均为浙江惠灵对

外贸易有限责任公司, 报关金额是 6 727.8 美元, 发票金额为 12 952.8 美元。

14 份提单的起运港分别为上海和厦门, 目的港分别为美国长滩、洛山矶。货物到港后, 被告在未收回正本提单的情况下将货物交付。根据原告与供货方的约定, 原告将货款支付后, 取得供货方持有的正本提单。根据原告与美国买方 PRIMARK 公司的约定, 原告向美国买方提供提单复印件或传真件后, 由美国买方付款, 原告将正本提单寄送给买方。原告现仍持有本案 14 份全套正本提单, 美国买方 PRIMARK 公司未向原告支付货款。

2006 年 7 月 3 日, 常州市庭园装饰用品有限公司出具债权转让证明称, 其三份提单项下的货款已由原告支付; 现将其拥有的提单项下的债权 (包括但不限于收取货款的权利及诉讼权利等) 转让给原告。2006 年 7 月 20 日, 江西省靖安县华利实业有限公司出具证明称, 其两份提单项下的货款原告已付清; 提单项下的货款由原告代为追偿。2006 年 7 月 28 日新世纪控股集团有限公司出具债权转让证明称, 其两份提单项下的货款已由原告支付; 现将其拥有的提单项下的债权 (包括但不限于收取货款的权利及诉讼权利等) 转让给原告。2006 年 7 月 24 日, 深圳市松艺进出口贸易有限公司出具债权转让证明称, 其提单项下的货款已由原告支付; 现将其拥有的提单项下债权 (包括但不限于收取货款的权利及诉讼权利等) 转让给原告。2006 年 7 月 21 日, 浙江惠灵对外贸易有限责任公司出具债权转让证明称, 其三份提单项下的货款已由原告支付; 现将其拥有的提单项下的债权 (包括但不限于收取货款的权利及诉讼权利等) 转让给原告。

原告于 2006 年 10 月 23 日在本院起诉被告利通国际货运有限公司。2006 年 12 月 27, 原告向本院申请追加威瑞公司为共同被告。

2007 年 6 月 5 日, 被告利通国际货运有限公司申请变更登记, 经工商核准企

业名称变更为利通物流有限公司（以下简称利通物流）。2008 年 2 月 12 日，被告威瑞公司更名为本案被告 A—SONIC MARINE (H.K.) LIMITED（以下简称 A 公司）。

原告诉称：根据《中华人民共和国海商法》第七十一条的规定，无论何种提单，承运人都必须凭正本提单放货。被告利通物流和 A 公司是涉案货物的承运人，其无单放货的行为给原告造成了严重损失，应承担相应的赔偿责任。现原告已将相关货款支付给了供货方，并受让了供货方提单项下的债权，请求法院判令两被告连带赔偿原告货款损失 57 122.77 美元，以及该款项自 2006 年 5 月 16 日起至实际给付之日止的利息，由两被告承担本案的诉讼费用。

两被告辩称：1、本案共有 14 份提单，应分别形成 14 个诉讼，本案实际上是诉的合并，原告只是其中 3 份提单的托运人，其对另外 11 份提单没有权利提出主张；2、涉案提单均为记名提单，根据《中华人民共和国海商法》第 79 条的规定，记名提单不得转让，因此原告以提单债权受让人的身份提起诉讼没有法律依据，应予驳回；3、对于原告不是托运人的 11 份提单，原告主张按照债权转让的方式行使受让人的权利，但根据《合同法》的规定，债权转让未经通知债务人的，对债务人不发生效力，本案在原告起诉或追加被告前均未履行通知义务；4、江西省靖安县华利实业有限责任公司的债权转让证明仅是表达了“货款”由原告代为追偿，不能得出把向承运人的索赔权转给原告的结论；5、根据《海商法》的规定，提单作为物权凭证所表征的是物权而非债权，债权转让证明转让的是收取货款的权利，而支付货款并非承运人的义务，故原告仅有权向货物买方主张债权，原告起诉两被告没有事实和法律依据；6、原告没有提供证明被告有无单放货事实的证据，应承担举证不能的后果；7、原告没有提供全部的报关单原件，

其货物价值应以报关单确定；8、根据我国外汇管理制度，每票出口货物收回货款后应办理收汇核销，如果已经办理了收汇核销，则证明相关货款已收回，除非有相反证据应推定没有发生货款损失；9、利通货运是威瑞公司在装货港的签单代理人，威瑞公司是涉案货物运输的无船承运人，现两公司的名称已变更；10、原告最早只起诉了利通货运，后原告追加威瑞公司为被告已超过了《海商法》规定的 1 年诉讼时效期间，其增加的利息请求也超过了诉讼时效期间，依法不应予以支持。

### 【审判】

大连海事法院经审理认为：原、被告均同意选择适用中华人民共和国法律，根据《中华人民共和国海商法》（以下简称《海商法》）第二百六十九条的规定，本案适用中华人民共和国法律。

根据涉案 14 份记名提单、利通货运与威瑞公司之间的代理关系，可以证明涉案提单的托运人（即五家供货方与原告）分别与威瑞公司建立了海上货物运输合同关系，提单本身即为海上货物运输合同，该合同合法有效，受法律保护。原告关于利通货运是承运人的主张没有事实和法律依据，不予支持。本案在审理过程中，两被告的企业名称均发生了变更，依照《中华人民共和国民法通则》第四十四条的规定，企业名称变更后，原企业的权利、义务由变更后法人享有和承担，本案两被告主体适格。

根据原告及两被告的诉辩理由，本案的争议焦点有：1、是否有无单放货的事实；2、被告 A 公司的赔偿责任；3、本案货款损失金额的确定；4、本案的诉讼时效。

#### 1、关于无单放货的事实

被告认为，应由原告举证证明被告 A 公司有无单放货的行为，但原告没有举证证明，故对原告主张的无单放货事实不应予以认定。

大连海事法院认为：依据《最高人民法院关于民事诉讼证据的若干规定》（下称《证据规则》）第二条“当事人对其诉讼所依据的事实或者反驳对方诉讼请求所依据的事实有责任提供证据加以证明”的规定，原、被告均有义务对各自的主张提供证据。原告现持有全套正本提单，被告虽主张没有无单放货的事实，但没有证据证明货物仍处于承运人掌管期间。依据《证据规则》第七十五条的规定，本院对原告主张的被告 A 公司无单放货的事实予以确认。

## 2、关于 A 公司的赔偿责任

原告认为，根据供货方出具的债权转让证明和本正提单，已履行了债权转让的通知义务，故 A 公司应向原告承担赔偿责任。

被告认为，原告对托运人为供货方的 11 份提单没有索赔权。因为，根据《海商法》的规定，记名提单不得转让；即使原告有债权转让证明，但债权转让没有通知被告，不发生法律效力；江西省靖安县华利实业有限责任公司出具的不是债权转让，仅是代为追偿，不能得出有债权转让的结论；根据《海商法》的规定，提单作为物权凭证，其所表征的应是物权而非债权，但债权转让证明均采用“收取货款的权利”这一相同的措辞，既然是收取货款则不是承运人的义务而是买方的债务，不能向承运人主张。

大连海事法院认为：根据《海商法》第七十一条，以及《最高人民法院关于审理无正本提单交付货物案件适用法律若干问题的解释》第二条“承运人违反法律规定，无正本提单交付货物，损害正本提单持有人提单权利的，正本提单持有人可以要求承运人承担由此造成损失的民事责任”的规定，承运人应当向正本提

单持有人承担无单放货造成损失的民事责任。本案共涉 14 份记名提单，从提单形式上看，原告是其中 3 份提单的列明托运人，也是正本提单持有人，原告有权向承运人就该 3 份提单项下因无单放货造成的货款损失提出索赔，被告 A 公司应承担相应的赔偿责任。对于另外 11 份记名提单项下货款损失的索赔权，应确定原告在涉案运输合同关系中的法律地位，即原告是正本提单合法持有人还是行使正本提单持有人权利的人，据此确定被告 A 公司是否应向原告承担赔偿责任。

本案提单所证明的海上货物运输合同即为提单本身，兼具债权凭证和提货凭证的功能。依据《中华人民共和国合同法》第七十九条的规定，供货方作为提单列明的托运人有权将提单所代表的运输合同项下的债权进行转让。两被告关于本案记名提单属物权凭证，不代表债权不得转让的主张本院不予支持。但根据查明的事实，供货方收取货款的权利并不受提单关系项下提单所表征的权利义务的影响，而只受内贸合同的约束，说明供货方收取货款与否与被告 A 公司是否凭单放货没有因果关系。本案，供货方已通过与原告的内贸合同收回了货款，其所称提单项下货物的货款损失未发生，其债权转让和委托追偿的实体权利已经受偿，与海上货物运输合同无关。对原告以受让提单债权为由要求被告承担无单放货责任的主张不予支持。

事实上，该 11 份提单项下的货款损失完全是因 A 公司未凭单交付货物导致原告自身的损失。本案中原告是外贸合同的卖方，其负有将约定的货物交付给承运人的义务。原告是通过与供货方的约定，委托供货方安排货物出运并将货物交付给承运人；而且，供货方办理货物出运等事宜也是代原告履行了出运货物的义务。依照《海商法》第四十二条第（三）项的规定，原告虽未以列明托运人的身份体现在该 11 份提单当中，但依据其与供货方的委托关系，原告属于与 A 公司



订立海上货物运输合同的托运人，原告与 A 公司之间成立海上货物运输合同关系。原告通过向供货方付款取得该 11 份正本提单的行为符合内贸合同的约定，不违反记名提单禁止背书转让的法律规定。原告取得该 11 份正本提单的行为亦可以证明是原告介入海上货物运输合同的行为，原告应是该 11 份正本提单的合法持有人之一。被告 A 公司在目的港未凭正本提单交付货物，其行为违反了凭单交付的义务，A 公司应对由此给原告造成的货款损失承担赔偿责任。

### 3、货款损失金额的认定

根据《海商法》第六十六条、第六十七条的规定，托运人应当履行向海关等主管机关如实申报办理货物运输所需要的各项手续，并向承运人保证其托运货物在品名、标志、件数、重量或体积的正确性。本案应以报关单申报的货物价款确定货款损失的数额，涉案 14 份提单报关金额共计 44 101.88 美元。

### 4、关于诉讼时效

根据《海商法》第二百五十七条第一款的规定，就海上货物运输向承运人要求赔偿的请求权时效期间为一年，自承运人交付或应当交付货物之日起计算。涉案货物于 2005 年 12 月至 2006 年 4 月期间启运，以合理到达目的港并应当交付货物的期限为 20 天开始起算诉讼时效，原告于 2006 年 10 月 23 日向利通物流提起诉讼，后于 2006 年 12 月 27 日提出追加威瑞公司为共同被告的申请，均在一年诉讼时效期间内。

综上，依据原告与被告 A 公司之间的海上货物运输合同，被告 A 公司应当承担因其无单放货而给原告造成的货款损失及利息。对原告要求被告利通物流承担赔偿责任的诉讼请求，不予支持。依照《中华人民共和国民事诉讼法》第四十四条第二款，《中华人民共和国海商法》第四十二条第（三）项、第七十一条、第

二百五十七条第一款的规定，判决：

一、被告 A—SONIC MARINE (H.K.) LIMITED 于本判决生效之日起七日内赔偿原告深圳市璟翰实业有限公司货款损失 44 101.88 美元，以及该款项自 2006 年 5 月 17 日起至实际给付之日止按中国人民银行同期贷款利率计算的利息。

二、驳回原告深圳市璟翰实业有限公司对被告利通物流有限公司的诉讼请求。

### 【评析】

#### 一、无单放货行为与提单持有人损失之间的因果关系

在审判实践中有一种观点认为，只要承运人实施了无单放货行为，承运人对提单持有人提出的损失就应承担赔偿责任。但根据我国《合同法》、《海商法》及最高人民法院关于《无单放货解释》的相关规定，均要求应就违约行为造成的损失承担责任。本案原告主张受让了提单列明托运人（供货方）货款损失的债权，但从案件事实来看，供货方并没有因承运人无单放货行为遭受货款损失，也没有因此丧失对货物的控制。因为供货方仅需履行安排货物出运和交付承运人的义务就可依约向内贸合同的买方（原告）索要货款，并将提单流转向原告手中。此时供货方货款已收回，货物控制权人是原告，供货方已不再也无需控制货物。因此，虽然有名义上的债权转让和委托追偿，但供货方因无单放货并没有产生对承运人的债权，原告以受让债权为由要求承运人承担责任也就缺乏相应的事实基础，影响其请求权的实现；原告的请求权不是源于债权转让或委托追偿，而应根据案件的具体情况确定原告在涉案法律关系中的法律地位，并审查其损失是否由无单放货行为造成来确定本案的赔偿责任。

#### 二、原告作为非提单列明的托运人的索赔权

1、我国《海商法》第四十二条第（三）项就海上货物运输合同中托运人的含义作了明确的规定，包括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运合同，或将货物交给与海运合同有关的承运人的人。根据该条的规定，海上货物运输合同的托运人不仅包括提单列明的托运人，还包括列明托运人的委托方。本案原告依据其与供货方订购合同的约定，实际委托供货方安排出口货物运输并向承运人交付货物，属于《海商法》规定的托运人。

## 2、非提单列明托运人行使索赔权的条件

根据承运人应对其无单放货行为给正本提单持有人造成损失承担责任的法律规定，对于本案所涉的这种情况，权利人应当证明其系海上货物运输合同的托运人，同时还应证明其已经合法持有全套正本提单取得对货物的控制权，并因承运人的行为造成了本人的经济损失。如果原告仅证明其系托运人，但却未合法取得正本提单，则不能保障其请求权的实现。因为，合法持有提单是一种对物的占有形态，对于海上货物运输合同而言，只有合法持有提单方可介入海上货物运输合同的履行，依据提单享有对承运人的权利。本案原告已经证明了其行使索赔权的三个基本条件，法院据此确定了被告的赔偿责任。

## 资讯选编 INFORMATION SELECTION

### Hurricane Sandy in the US- was this "force majeure"?

by Gill Nadel, Omer Wagner (Gill Nadel Law Offices)

The US, as we know, is one of the world's most important countries, located high up in the world's economic rating. The country is famous for its motor vehicle industry, clothing apparel, computers, electronics and more. The US is the world's largest importer of products and services, and the second largest exporter. Its primary partners in trade are Canada, Mexico, China, Japan and the European Union.

The US is also well-known for its natural disasters, particularly tropical storms, tornadoes and hurricanes.

As we know, Hurricane Sandy has recently hampered the lives of residents, and, it would be assumed, consequently caused many significant delays to the chain of supply of products around the world or in the US itself.

The question is, can Hurricane Sandy be considered a "force majeure" thereby exempting parties from upholding their contractual obligations?

#### **About "force majeure" clauses:**

The clauses delineating a force majeure in contracts can provide the party in breach with protection against claims for compensation (and more), in circumstances where the contract could not be upheld for reasons that are beyond the power of both parties. A force majeure can be broadly determined

in the contract (any event such as war, strike, weather conditions, and more) or narrowly, as the parties will decide;

It should be noted that there is no standard by which to precisely determine what is or is not considered a force majeure, and everything depends upon the circumstances of each case. Events such as a volcanic eruption, terrorist activities, biological warfare, fire or flood- may be considered a force majeure in one case, or not in another case.

If there is no specific clause referring to force majeure in a contract, clause 79 of the UN treaty for international sale of goods, covers a considerable portion of international trade, and was incorporated in Israel under the Trade Law (International Sale of Goods)- 1999 (which came into effect in the year 2000) which states that any party will be exempt from paying compensation to another party due to a breach of agreement if it is proven that this breach was caused by an obstacle that was beyond his control, and which it could not have been reasonably expected of him at the time of signing the contract to take this obstacle into consideration, or to prevent it, or to overcome it and its consequences.

### **Is a hurricane in the US an unforeseeable event?**

As to this matter, the question is whether in the US, a country where hurricanes are not rare, could an American supplier cancel his contractual obligation to export goods to Israel on time by claiming that the hurricane is considered a "force majeure" that was unforeseeable during the signing of the contract?

Naturally, what may be considered as rare in Israel may be considered routine in the US, and vice versa.

War and terrorist activities have, unfortunately, become a foreseeable event in Israel, while these may be considered less probable in the US. On the other hand, a hurricane in Israel is unlikely, while in the US it is more probable.

It is important to further note that after looking into this matter, we found that every state in the US interprets the "force majeure" clause differently and there is no uniform approach.

The answer to this question depends, among other things, upon the contract signed by the parties, and upon the manner in which force majeure clauses were determined in the contract. Likewise, the answer depends upon the question of which judicial system the parties will chose to conduct their proceedings in.

**In any case, the inability to overcome the obstacle must be proven:**

Despite everything mentioned above, even if we assume that Hurricane Sandy, especially due to its great intensity, may be considered a force majeure, in order to utilize the exemption afforded by the force majeure clause, the inability to overcome this obstacle must be proven.

As such, the claimant for exemption is required to prove that he had taken or attempted to take alternative steps towards minimizing the damage or overcoming the obstacle despite its unforeseeable nature.

For instance, if the Israeli importer ordered a shipment of car parts from the US, and the American exporter claims the delay in shipment was caused by force majeure, it may be claimed that the American exporter could have exported the car parts on time as agreed by making use of a subsidiary company or an affiliated company located in another state, or to have prepared in advance by

sending the shipment at an earlier date.

For example, in a verdict given in the Court of Appeals of Louisiana in 2009, it was ruled that the "Katrina" hurricane of 2005, was considered a force majeure, but due to the circumstances of the case, this did not have the power to prevent the parties from fulfilling their contractual obligations, and this was due to the fact that the party making the claim for force majeure failed in this point exactly- and was unable to prove that they could not overcome the obstacle.

In this case, the sales contract of an apartment was not signed during the appointed date and the buyer claimed that this was caused as a result of the hurricane which was a force majeure. The court ruled that while the hurricane was in fact a force majeure, it did not significantly damage the relevant residential area and so the storm did not have the power to exempt the parties from their contractual obligations.

[Melissa Baxter Ziegler V. Vicki Pansano et al. No. 2008 CA 1 495, Louisiana court of appeal, First Circuit, 6.30.2009]

### **And what about Israel?**

Courts in Israel and overseas have shown a tendency over the years to interpret clauses such as these very diminishingly, only allowing a party of a contract to evade their contractual obligations in exceptional cases. The courts repeat the principle that contracts must be fulfilled, and that almost every event is foreseeable.

For instance, in the ruling of Israel courts it was determined that the following circumstances do not justify an exemption from contractual obligations (that is, they are not considered "a force majeure"): heavy rain that caused damage to

cargo that was not properly protected; a crack that was discovered in an airplane which caused a delay in departure; problems that were discovered in the sewage and air conditioning systems on a ship during a pleasure cruise in the Mediterranean Sea; and even: a recession which led to a company's demise; in the remote past, it was even ruled that a war in Israel is a foreseeable factor that cannot be considered a force majeure;

On a different note, it was ruled that a tsunami is considered a force majeure, as opposed to other typical winter storms which can be foreseen. In this case, a construction contractor claimed that the delay in delivering the apartment to the buyer was caused due to a particularly rainy winter, but the court deferred the claimed and thoroughly differentiated between rainy weather, which is a foreseeable event, and a tsunami which is unforeseeable.

来源: [http://www.forwarderlaw.com/library/view.php?article\\_id=893](http://www.forwarderlaw.com/library/view.php?article_id=893)



---

## 联系我们

官方网站: [www.dachenglaw.com](http://www.dachenglaw.com)

北京总部: 北京市东直门南大街 3 号国华投资大厦 5、12、15 层

邮编: 100007

联系人: 王婷

电话: 86-10-58137232

传真: 86-10-58137788

邮箱: [ting.wang@dachenglaw.com](mailto:ting.wang@dachenglaw.com)

*Beijing Dacheng Law Offices, LLP*

[www.dachenglaw.com](http://www.dachenglaw.com)

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

District, Beijing China

Postcode: 100007

Contact: Ting Wang

Tel: 86-10-58137232

Fax: 86-10-58137788

E-mail: [ting.wang@dachenglaw.com](mailto:ting.wang@dachenglaw.com)