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目录

新法速递 NEW LAWS AND REGULATIONS WATCH

海关总署发布《中华人民共和国海关对横琴新区监管办法（试行）》

General Administration of Customs Promulgates the Measures for the Supervision and Administration of the Customs of the People's Republic of China for Hengqin New Area (Tentative)

2013 年 6 月 27 日，海关总署发布《中华人民共和国海关对横琴新区监管办法（试行）》（《办法》），自 2013 年 8 月 1 日起施行。

《办法》规定，横琴与澳门之间的口岸设定为“一线”管理；横琴与中华人民共和国关境内的其他地区之间的通道设定为“二线”管理。海关按照“一线放宽、二线管住、人货分离、分类管理”的原则实行分线管理。在横琴内从事进出口业务，享受保税、减免税、入区退税政策以及与之相关的仓储物流和从事报关业务的企业和单位，应当向海关办理注册登记手续。

On June 27, 2013, the General Administration of Customs Promulgated the Measures of the Customs of the People's Republic of China on the Supervision and Administration of Hengqin New Area (for Trial Implementation) ("Measures"), which will be effective as of August 1, 2013.

It is provided in the Measures that the port between Hengqin and Macao will be subject to "first line" administration; the passage between Hengqin and other areas within Customs border of the People's Republic of China will be subject to "second line" administration. The Customs will implement differentiate administration on the principle of "relax restrictions on first line, strictly control the second line, separate passenger and cargo, classified administration". The enterprises and units engaged in importation and exportation business in Hengqin New Area and entitled to the policy of bond, tax reduction or exemption, tax reimbursement for cargo entering the zone and engaged in relevant warehousing, logistics and Customs declaration business shall complete registration formality with the Customs.

(Source: www.customs.gov.cn)

海关总署发布《关于修改〈中华人民共和国海关最不发达国家特别优惠关税待遇进口货物原产地管理办法〉的决定》

GAC Promulgates the Decision to Amend Measures of the Customs of the People's Republic of China for the Administration of the Origin of Imported Goods under the Special Preferential Tariff Treatment to the

Least Developed Countries

《海关总署关于修改〈中华人民共和国海关最不发达国家特别优惠关税待遇进口货物原产地管理办法〉的决定》(《决定》)已于 2013 年 7 月 1 日经海关总署署务会议审议通过，自 2013 年 7 月 1 日起施行。《中华人民共和国海关最不发达国家特别优惠关税待遇进口货物原产地管理办法》(《办法》)根据《决定》作相应修改，重新公布。

《决定》增加“货物适用从价百分比标准的，在计算货物的增值百分比时，与货物一起申报进口并在《协调制度》中与该货物一并归类的包装、包装材料和容器，以及正常配备的附件、备件、工具及介绍说明性材料的价格应当予以计算。”的规定，作为《办法》第十一条第二款。

The Decision of the General Administration of Customs to Amend Measures of the Customs of the People's Republic of China for the Administration of the Origin of Imported Goods under the Special Preferential Tariff Treatment to the Least Developed Countries ("Decision") was approved on July 1, 2013 after review on administrative meeting of the General Administration of Customs and will be effective as of July 1, 2013. Measures of the Customs of the People's Republic of China for the Administration of the Origin of Imported Goods under the Special Preferential Tariff Treatment to the Least Developed Countries

("Measures") will be amended according to the Decision and promulgated again.

The Decision has supplemented as Article 1.2 in the Measure the provision of "In case where the ad valorem percentage criterion is applied, when calculating the value-added percentage of the commodity, the price of packing, packing materials and containers declared along with the commodity and classified with such commodity in HS system and the price of accessory, parts, tools and introduction materials normally affiliated to the commodity shall be calculated."

(Source: www.customs.gov.cn)

两部门联合发布《关于调整海域使用金免缴审批权限的通知》

Two Departments Jointly Promulgate the Circular on Adjusting the Authority of Approving the Exemption of Fees for the Use of Sea Areas

财政部 、国家海洋局联合发布《关于调整海域使用金免缴审批权限的通知》(《通知》)，自 2013 年 7 月 1 日起执行。

《通知》规定，将用海单位和个人申请免缴国务院批准项目用海的海域使用金，按中央和地方分成，分别报财政部、国家海洋局和省、

自治区、直辖市、计划单列市财政部门、海洋行政主管部门审查批准，调整为报财政部、国家海洋局审查批准。

根据《通知》，财综〔2006〕24 号文件、财综〔2008〕71 号文件有关规定与《通知》不一致的，一律以《通知》规定为准。

The Ministry of Finance (MOF) and the State Oceanic Administration (SOA) jointly promulgate the Circular on Adjusting the Authority to Approve the Exemption of Fees for the Use of Sea Areas ("Circular"), effective as of July 1, 2013.

It is provided in the Circular that application for exemption of fees for the use of sea areas from units and individuals using sea for projects approved by the State Council shall be submitted to the MOF and the SOA for examination and approval, instead of submission to MOF, SOA in case of central projects and financial departments and oceanic administrative authorities under the governments of each province, autonomous region, municipality directly under the central government and city specially designated in the State plan in case of local projects.

According to the Circular, in case of discrepancy between relevant provisions in Cai Zong [2006] No.24 Document, Cai Zong [2008] No.71 Document and the Circular, the Circular shall prevail.

(Source: Ministry of Finance)

交通运输部就《港口危险货物集装箱开箱查验管理办法(征求意见稿)》和《港口生产安全事故应急预案管理办法（征求意见稿)》公开征求意见

MOT Publicly Solicits Opinions on Administrative Measures on Opening and Inspection of Port Hazardous Cargo Containers (Draft for Comments) and Administrative Measures on Contingency Plan for Port Production Safety Accident (Draft for Comments)

2013 年 7 月 1 日，交通运输部水运局组织公布了《港口危险货物集装箱开箱查验管理办法》（征求意见稿)、《港口生产安全事故应急预案管理办法》（征求意见稿)， 现公开征求意见。

《港口危险货物集装箱开箱查验管理办法》（征求意见稿）适用于港口行政管理部门对涉嫌在普通货物集装箱中夹带危险货物，或者将危险货物集装箱匿报、谎报为普通货物集装箱等的开箱查验活动。《港口生产安全事故应急预案管理办法》（征求意见稿）适用于港口生产安全事故应急预案的编制、发布、备案、演练等工作。

On July 1, 2013, the Department of Water Transportation under the Ministry of Transport (MOT) organized to promulgate the Administrative

Measures on Opening and Inspection of Port Hazardous Cargo Containers (Draft for Comments) and the Administrative Measures on Contingency Plan for Port Production Safety Accident (Draft for Comments) and is presently soliciting for opinions publicly.

The Administrative Measures on Opening and Inspection of Port Hazardous Cargo Containers (Draft for Comments) applies to the opening and inspection of containers by port administrative authorities in case of suspicion of carrying hazardous commodity in general cargo containers or concealing or giving false information of hazardous cargo container as general cargo container. The Administrative Measures on Contingency Plan for Port Production Safety Accident (Draft for Comments) applies to the preparation, release, filing, drill of contingency for port production safety accidents.

(Source: www.moc.gov.cn)

海关总署发布《海关特殊监管区域和保税监管场所内销货物适用协定税率或者特惠税率的有关事宜》

General Administration of Customs Promulgates Issues Concerning Application of Conventional Tariff or Preferential Tariff on Goods for

Home Use in Areas under Special Customs Supervision and Customs Bonded and Supervisory Premises

2013 年 7 月 8 日，海关总署发布《海关特殊监管区域和保税监管场所内销货物适用协定税率或者特惠税率的有关事宜》(《事宜》)，自发布之日起施行。

《事宜》规定，货物出区(场所)内销时，如进口人仍无法补充提交符合要求的原产地证书或者正在开展原产地对外核查的，进口人应向所在地海关提出凭保放行的申请，所在地海关应进口人的申请可以按照有关规定收取相当于应缴税款的等值保证金后办理货物放行手续。

On July 8, 2013, the General Administration of Customs promulgated Issues Concerning Application of Conventional Tariff or Preferential Tariff on Goods for Home Use in Areas under Special Customs Supervision and Customs Bonded and Supervisory Premises (the "Issues"), effective as of the date of promulgation.

It is provided in the Issues that when goods exit the area (premise) for domestic sales, if the importers still fail to supplement qualified Certificate of Origin or the importers are under external investigation on origins of the goods, the importers shall submit to local customs the

application for releasing the goods with deposits and the local customs may complete formalities for releasing the goods as requested by the importers after collecting deposits equivalent with payable tax according to relevant regulations.

(Source: http://www.customs.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》

MOFCOM Issues Interim Rules for Implementation of WTO Trade Remedy Dispute Rulings

2013 年 7 月 29 日，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》（《规则》），自公布之日起施行。

根据《规则》，世界贸易组织争端解决机构作出裁决，要求我国反倾销、反补贴或者保障措施与世界贸易组织协定相一致的，商务部可以依法建议或者决定修改、取消反倾销、反补贴或保障措施，或者决定采取其他适当措施。

On July 29, 2013, the Ministry of Commerce (MOFCOM) issued the Interim Rules for Implementation of WTO Trade Remedy Dispute Rulings ("the Rules"), effective as of the date of promulgation.

According to the Rules, WTO Dispute Settlement Body ruled that it calls for China's action: if any anti-dumping, countervailing or safeguard measures of China are consistent with WTO agreements, the MOFCOM may, according to the law, suggest or decide to modify or cancel anti-dumping, countervailing or safeguard measures, or decide to take other appropriate measures.

(Source: tfs.mofcom.gov.cn)

实时资讯 REAL-TIME INFORMATION

海关总署发布《关于给予与我国建交的最不发达国家 95%税目产品零关税待遇的实施方案的公告》

GAC Promulgates Announcement Regarding Implementation Scheme for Granting Zero Tariff Treatment to 95% Taxable Items Originated from Least Developed Countries that have established Diplomatic Relations with China

2013 年 6 月 28 日，海关总署发布公告 2013 年第 34 号《关于给予与我国建交的最不发达国家 95%税目产品零关税待遇的实施方案的公告》（《公告》）。

《公告》规定，自 2013 年 7 月 1 日起，对进口原产于埃塞俄比亚联邦民主共和国等 29 个已经完成换文手续的最不发达国家的 7831 个税目产品实施本公告所列的特惠税率（95%税目产品零关税待遇的实施方案）；自 2013 年 7 月 1 日起至 2015 年 12 月 31 日止，对原产于瓦努阿图共和国（已经完成换文手续，2013 年 2 月从最不发达国家名单毕业）的 7831 个税目产品实施本公告所列的特惠税率。

On June 28, 2013, the General Administration of Customs promulgated

2013 No.34 Announcement Regarding Implementation Scheme for Granting Zero Tariff Treatment to 95% Taxable Items for Products Originated from Least Developed Countries that have established Diplomatic Relations with China ("Announcement").

It is provided in the Announcement that as of July 1, 2013, special preferential tariff listed in this Announcement (Implementation Scheme for Granting Zero Tariff Treatment to 95% Taxable Items) will be implemented on 7,831 taxable items originated from 29 least developed countries that have completed formality of exchange of notes including the Federal Democratic Republic of Ethiopia; from July 1, 2013 to December 31, 2015, special preferential tariff listed in this Announcement will be implemented on 7,831 taxable items originated from the Republic of Vanuatu that have completed formality of exchange of notes and graduated from the list of least developed countries in February, 2013.

(Source: www.customs.gov.cn)

交通运输部发布《国内水路运输辅助业管理规定（征求意见稿）》

Ministry of Transportation Promulgates the Administrative Provisions on

Supportive Industry for Domestic Waterway Transportation (Draft for Comments)

为加强并规范对国内水路运输辅助业的管理工作，2013 年 7 月 18 日，交通运输部发布《国内水路运输辅助业管理规定（征求意见稿）》（《规定》），公开征求意见。

根据《规定》，交通运输部对全国水路运输辅助业务实施行业管理。交通运输部派出机构受部委托从事相关管理工作。

意见收集截止日期为 2013 年 8 月 18 日。

To strengthen and standardize the administration on supportive industry for domestic waterway transportation, the Ministry of Transportation (MOT) promulgated the Administrative Provisions on Supportive Industry for Domestic Waterway Transportation (Draft for Comments) (the "Provisions") on July 18, 2013 and is now publicly soliciting for comments.

According to the Provisions, the MOT will implement industry administration on supportive activities for nationwide waterway transportation. The dispatched offices of MOT shall, entrusted by the MOF, engage in competent administration.

Any feedback shall be submitted before August 18, 2013.

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

国务院发布《关于废止和修改部分行政法规的决定》

State Council Releases Decision on Abolishment and Amendment of Some Administrative Regulations

为了依法推进行政审批制度改革和政府职能转变，2013 年 7 月 18 日，国务院发布《国务院关于废止和修改部分行政法规的决定》(《决定》)，自公布之日起施行。

《决定》废止了《煤炭生产许可证管理办法》(1994 年 12 月 20 日国务院公布)；同时对《中华人民共和国对外合作开采海洋石油资源条例》等 25 件行政法规的部分条款予以了修改。

To promote the reform of administrative examination and approval system and transformation of government functions according to laws, the State Council released the Decision of the State Council on Abolishment and Amendment of Some Administrative Regulations (the "Decision") on July 18, 2013, which will come into effect as of its promulgation date.

The Decision abolished the Administrative Measures for Coal Production

Licenses (promulgated by the State Council on December 20, 1994) and amended some clauses of 25 pieces of administrative regulations including the Regulations of the People's Republic of China on Sino-Foreign Cooperative Offshore Petroleum Resources Exploitation.

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

案例分析 CASE STUDY

承运人提供集装箱对承运人责任的影响和认定——太平洋日升国际公司诉海贸国际运输有限公司、中远集装箱运输有限公司、上海泛亚航运有限公司海上货物运输合同纠纷案

The determining liability of carriers would be affected if containers are provided by them

【要点提示】**Points to note**

托运人接受在集装箱设备交接单上签字接受空箱，只能证明集装箱表面状况良好。承运人所做的装货前验箱和商检进行的验箱不足以证明承运人在船舶开航前和开航当时，已对集装箱进行了谨慎处理，以使集装箱能安全地收受、载运和保管货物。在承运人责任期间内，承运人对其提供的集装箱应尽到与对待货物相同的义务。

A shipper accepted empty containers and signed on an equipment interchange receipt for freight containers which just could prove the surface of these containers looks good. The carrier's pre-loading inspection of containers and commodity inspection insufficient to prove that the carrier has, before and at the beginning of the voyage, exercised due diligence to containers in which goods are carried, fit and safe for

their reception, carriage and preservation. During the period of the carrier is in charge of the goods, the carrier shall take same liability with goods to containers which were provided by him.

【案例索引】**Case Index**

一审：大连海事法院（2009）大海商外初字第 23 号民事判决（判决时间 2010 年 8 月 10 日）

【案情】

原告：太平洋日升国际公司（PACIFIC SUNRISE INTERNATIONAL CORPORATION）。

被告：海贸国际运输有限公司（SEA TRADE INTERNATIONAL, INC.）。

被告：中远集装箱运输有限公司。

被告：上海泛亚航运有限公司。

大连海事法院经审理查明：2008 年 8 月 8 日，原告太平洋日升国际公司（PACIFIC SUNRISE INTERNATIONAL CORPORATION）（以下简称原告）与大连应捷食品有限公司（以下简称应捷公司）签订买卖合同，约定应捷公司向原告出售重量约 95 040 磅的太平洋鳕鱼，分两个集装箱装载。2008 年 8 月 28 日，根据被告中远集装箱运输有限公司（以下简称中集公司）的委托，大连鑫三利集装箱有限公司对涉案 CRLU1808571 号集装箱进行了预检。9 月 2 日，应捷公司从被告中集

公司提取 CRLU1808571 号集装箱后装入 1106 箱鳕鱼并开具发票，总计到岸价格为 143534 美元。9 月 4 日，应捷公司将该集装箱货物交给被告海贸国际运输有限公司（SEA TRADE INTERNATIONAL, INC.）（以下简称海贸公司）。

2008 年 9 月 4 日，被告海贸公司签发编号为 COSU0102970340 的提单，载明：托运人应捷公司，收货人凭指示，通知方原告，装货港大连，卸货港美国波士顿，船舶航次“PAN HE”轮 410S，货物为一个 40 尺冷藏集装箱的冻鳕鱼，箱号 CRLU1808571，温度-18℃，托运人设置。该提单背面条款第 8 条第（4）款载明：“承运人不保证集装箱在整个航程中都能妥当地通风、制冷或加温，承运人也不对由于集装箱、船舶、运输工具或其属具或其他设施的潜在缺陷、部分或全部故障、制冷设备故障等引起的货物损坏或灭失承担赔偿责任，只要承运人在开航前或开航当时谨慎处理使集装箱处于有效工作状态。”同日，被告中集公司签发编号为 COSU0102970340 的海运单，载明：托运人被告海贸公司大连办公室，收货人被告海贸公司新泽西州办公室，装货港大连，卸货港美国波士顿，船舶航次“PAN HE”轮 410S，货物为一个 40 尺冷藏集装箱的冻鳕鱼，温度-18℃，托运人设置。应捷公司支付了该航次的运费，从被告海贸公司取得提单，并将提单转让给原告。

该集装箱货物于 9 月 4 日在大连装上“PAN HE”轮起运，9 月 6 日运至上海港卸下，9 月 12 日装上二程船“COSCO KOBE”轮继续运输。9 月 15 日，船员发现该集装箱的压缩机不制冷，压缩机的进气

端非常热后，尝试添加氟利昂。9 月 16 日，船员再次添加氟利昂，温度下降到-13℃。9 月 17 日该集装箱内温度升高到-9℃，船员对集装箱冷机系统的所有重要部件进行测漏，发现蒸发器盘管处泄露氟利昂。船员认为该故障在船上不可能修好，故与被告中集公司的箱管部门技术人员联系，并按其指示继续添加氟利昂以维持故障集装箱的温度，但因系统泄漏严重，集装箱内温度升高很快，自 9 月 20 日起一直在-2℃左右。9 月 24 日，船员根据指示关闭了该集装箱的供电。

10 月 14 日，上述集装箱货物运到波士顿港，并于次日卸船。原告于 10 月 22 日提货，同时委托检验人 Frank Gair Macomber Claims Agency, Inc.的 Douglas B. Mentuck（以下简称检验人）对货物损失进行检验，承运人派代表参加了检验。11 月 11 日，检验人出具《货损检验报告》，载明：集装箱铅封完好，集装箱外表没有发现任何可见的缺陷，但散发着一种鱼腥及腐烂的味道；航程温度记录表在-18℃以上显示明显的偏移，没有找到任何标签显示该集装箱在装货之前做过预冷操作，且该集装箱的通风设施是关闭的；集装箱内温度过高，鳕鱼肉已完全解冻，并且腐烂的味道非常强烈，该批货物已经全损，没有施救价值和残值，货物被作为垃圾处理。检验结论为：集装箱在“COSCO KOBE”轮运输期间，冷冻设备的不工作致使温度升高，导致货物的损坏。

被告上海泛亚航运有限公司（以下简称泛亚公司）是“PAN HE”轮的船舶所有人，被告中集公司是“COSCO KOBE”轮的船舶经营人，是该轮涉案运输期间的实际承运人。

原告诉称：被告海贸公司作为货物承运人，被告中集公司和被告泛亚公司作为实际承运人，应当对原告的一切损失承担赔偿责任。请求法院判令三被告赔偿原告货物损失及其他损失共 149 624.26 美元（按起诉日美元与人民币的汇率 1：6.827 计算折合人民币 1 021 484.82 元）及自 2008 年 10 月 22 日至给付之日按中国人民银行 6 个月以内短期贷款年利率计算的利息，并承担诉讼费用。

被告海贸公司和被告中集公司辩称：1、其已谨慎处理，提供了合格的集装箱。该集装箱在装箱前已经检测并通过了适载检验，证明该箱工作正常，适合装运冷冻食品；该空箱交给托运人使用时，托运人代表在集装箱设备交接单上签字确认了集装箱及设备在交接时是完好的。2、其在航程中及时发现了涉案集装箱存在的问题并已尽到谨慎妥善照管货物的义务。货损是由于谨慎处理仍无法发现的集装箱潜在缺陷造成的，被告海贸公司和被告中集公司可以免除赔偿责任。3、提单背面条款免除了承运人对集装箱在整个航程中因潜在缺陷、部分或全部故障、制冷设备故障等引起的货物损坏或灭失的赔偿责任。被告泛亚公司辩称：本案货损发生在其责任期间之外，故其不应承担赔偿责任。

【审判】

大连海事法院经审理认为：本案当事人都同意适用中国法律，故本案纠纷适用中国法律。

原告与被告海贸公司之间的海上货物运输合同关系依法成立有

效，应受到法律保护，原告是提单持有人，被告海贸公司是签发提单的承运人。被告泛亚公司和被告中集公司是分段运输的实际承运人。本案货损发生在被告中集公司承运期间，不能证明发生在被告泛亚公司的责任期间，故被告泛亚公司对货损不承担赔偿责任。

涉案集装箱由被告中集公司提供，运输该集装箱的船舶由被告中集公司经营，该集装箱应视为船舶属具。被告海贸公司所签提单的背面第 8 条第（4）款免除了承运人在船舶航行过程中保证集装箱适载的责任，但没有免除承运人在开航前或开航当时谨慎处理使集装箱处于有效工作状态的责任。因此，作为被告海贸公司和被告中集公司在船舶开航前和开航当时，依法应当谨慎处理，使该集装箱适于并能安全收受、载运和保管货物。

托运人接受空集装箱时在集装箱设备交接单上签字，只能证明集装箱表面状况良好，不能证明托运人认可集装箱适于并能安全收受、载运和保管货物。被告中集公司在将该集装箱交给托运人前，对集装箱进行了预检，该检验是所有冷藏集装箱在装货前必经的常规检验，是通过目测和降温检测集装箱能否适合装载冷藏货物。被告海贸公司和被告中集公司所主张的出入境检验检疫局对集装箱进行的适载检验，同样也是所有冷藏集装箱必经的初步检验。这两项检验不足以证明被告中集公司作为集装箱提供人在船舶开航前和开航当时，已对集装箱进行了谨慎处理，即谨慎地采取适当方法检查并维修集装箱，以使集装箱能安全收受、载运和保管货物。

被告海贸公司和被告中集公司关于集装箱冷机系统的故障是潜

在缺陷，可以免责的理由，因其不能举证证明冷机系统故障是非由于承运人或者承运人的受雇人、代理人的过失造成的其他原因引起的，不能当然地将该故障归结集装箱的潜在缺陷。因此，被告海贸公司作为承运人，对涉案集装箱内货物在其承运期间发生的损失，应当承担赔偿责任。被告中集公司作为发生损失区段的实际承运人，对该损失应承担连带赔偿责任。

原告请求的货物损失（包括成本和运费）143534 美元，符合法律规定，予以支持。原告请求的报关费没有证据证明，不予支持。原告请求的货物卸载费用 225 美元、码头工人卸货工时费 600 美元、集装箱清洁费用 50 美元、残骸处理费用 3133.20 美元、检验费 1412.60 美元、文件费 65 美元，已由原告付出，而且原告因本案货物损坏而不能在销售利润中弥补这些费用，故对原告请求这些费用，予以支持。综上，被告海贸公司与被告中集公司应向原告连带赔偿货物损失 143534 美元、货物卸载费用 225 美元、码头工人卸货工时费 600 美元、集装箱清洁费用 50 美元、残骸处理费用 3133.20 美元、检验费 1412.60 美元、文件费 65 美元，共计 149019.80 美元。按本案原告起诉日美元与人民币的汇率 1：6.827 计算，折合人民币 1017358.17 元。原告主张该损失自 2008 年 10 月 22 日原告提货时起至给付之日按中国人民银行 6 个月以内短期贷款年利率计算的利息的请求，本院亦予以支持。依照《中华人民共和国海商法》第三条第二款、第四十六条第一款、第四十七条、第四十八条、第五十一条第一款第（十一）项和第（十二）项、第五十五条第一款和第二款、第六十条第一款、第

六十一条、第六十三条、第七十八条第一款、第二百六十九条、《中华人民共和国合同法》第一百一十三条第一款的规定，判决：

一、被告海贸国际运输有限公司于本判决生效之日起十日内一次性向原告太平洋日升国际公司赔偿货物损失及其他费用损失共计人民币 1017358.17 元及自 2008 年 10 月 22 日至给付之日按中国人民银行 6 个月以内短期贷款年利率计算的利息；

二、被告中远集装箱运输有限公司对上述第一项判决款项承担连带赔偿责任；

三、驳回原告太平洋日升国际公司对被告海贸国际运输有限公司、被告中远集装箱运输有限公司的其他诉讼请求；

四、驳回原告太平洋日升国际公司对被告上海泛亚航运有限公司的诉讼请求。

一审判决做出后，原告与三被告均未提起上诉。

【评析】

本案各方当事人之间的法律关系明确，其争议在于承运人对其提供的集装箱是否尽到了《中华人民共和国海商法》（以下简称《海商法》）所规定的适航、适货和管货义务。对与争议事实有关的涉案集装箱设备交接单和预检的证据进行审核判断，确定证据有无证明力和证明力的大小是本案判定承运人承担赔偿责任的重要依据和理由。

民事诉讼中证据的证明力，亦称证据力，是指证据证明案件事实所具有的效力，即证据的实际价值。证明力包括证据本身是否值得相

信，以及证据能否证明待证事实以及在多大程度上证明待证事实。根据《最高人民法院关于民事诉讼证据的若干规定》第六十四条的规定，法院在审核证明力时，既强调法官依照法定程序和法律规定，又强调法官的“自由心证”原则。本案中承运人举出的集装箱设备交接单和预检这两组证据，是在集装箱运输实务中集装箱投入使用前的通用文件。承运人主张的待证事实是在船舶开航前和开航当时尽到了谨慎处理，使集装箱处于有效工作状态。合议庭根据法律的规定，运用逻辑和日常生活经验对两组证据的证明力分别做出了认定，并根据认定的相关事实和法律判定承运人和实际承运人连带承担赔偿责任。

1、预检，包括自检和委托商检。从法律规定上看，自检和委托商检对证明集装箱适货的效力并不是绝对的。自检是通过目测和调温检测当时集装箱是否适合运输所需，仅是常规检测。出入境检验检疫局对集装箱进行的适载检验是集装箱投入使用的必经程序，反映的仅是检验当时的表面状况，故这种检验也只是初步检验，而对集装箱适货的要求则是一段比较长的时间和过程，并不能代表集装箱绝对适于收受、载运和保管货物。而本案集装箱在使用中确有发生故障不能正常工作的客观事实。因此，预检的证据对本案承运人主张的待证事实不具有充分的证明力。

2、集装箱设备交接单，在集装箱设备交接时使用。法律法规对集装箱设备交接单并没有做出在交接单上签字即视为认可集装箱适于收受、载运和保管货物的规定。设备交接时的通常经验做法是采用目测的方法，故设备交接单的证明力只能限于接受集装箱时的表面状

况。

3、承运人主张的预验均是在空箱交给托运人之前，距离托运人实际接受空箱装货，以及船舶开航前和开航当时必然会有时间和空间上的差异。而根据《海商法》第三条第二款、第四十七条的规定，承运人提供的集装箱，可以视为船舶属具，从这一角度，承运人的义务是在集装箱装载货物前尽到谨慎处理，使集装箱适于并能安全收受、载运和保管货物。因此，从法律对承运人义务的规定和运输的实际情况来看，集装箱设备交接单和预检证据的证明作用远不能满足谨慎处理使集装箱适货对承运人提出的要求，对这一法律事实不具有充分的证明力。

最后，承运人提供的集装箱受载货物后，其主要用途是存放和保管货物，其特点是附在货物本身并可与船舶分离，且在开箱卸货前与货物不可分，因此这时的集装箱附随并服务于货物运输。此种情况下，承运人对于集装箱功能及使用上的注意义务应与对待货物相同，亦应完全履行《海商法》第四十八条的规定。承运人以集装箱存在潜在缺陷为由的主张既无证据支持，亦与法律规定相悖，故其所做的免责抗辩没有得到法院的支持。

来源：http://www.ccmt.org.cn/shownews.php?id=12733

资讯选编 INFORMATION SELECTION

A change in the tides or a drop in the ocean: how will a recent decision by the Suzhou Intermediate People's Court affect arbitration in China?

by Ik Wei Chong (Clyde & Co., Shanghai)

The Suzhou Intermediate People's Court recently refused to enforce an arbitration decision of the Shanghai International Economic and Trade Arbitration Commission (SHIAC), in a ruling that could have a profound impact on the status of both SHIAC and its break away partner the Shenzhen Court of International Arbitration (SCIA).

Background:

Since the China International Economic and Trade Arbitration Commission (CIETAC) sub-commissions in Shanghai and Shenzhen, now referred to as SHIAC and SCIA respectively, declared their independence from CIETAC Beijing, their status as arbitration bodies has been in the balance. Both institutions have received the backing of their respective Departments of Justice. Various court rulings enforcing arbitration decisions reached by these bodies, including a previous ruling in Suzhou, appear to have paved the way for SHIAC and SCIA to become legitimate but autonomous arbitration commissions. However, this recent decision can be seen as a setback and again throws the situation into confusion.

The case:

The initial dispute involved Jiangxi LDK Solar Hi-Tech Co Ltd and Suzhou Canadian

Solar Inc regarding a contract for the sale of wafers for PV (photovoltaic) systems. The contract between the parties provided for arbitration of any disputes to be conducted by CIETAC Shanghai sub-commission. When the dispute was filed with CIETAC Shanghai in July 2010, the arbitration commission was still operating under the umbrella of CIETAC. However, in late 2011, CIETAC Shanghai broke away from CIETAC Beijing to become an independent arbitration commission, now known as SHIAC. In 2012, the newly formed SHIAC found in favour of LDK Solar and awarded them substantial damages. In February 2013, LDK Solar went to court in Suzhou to enforce SHIAC's decision. However, the Intermediate People's Court in Suzhou ruled that SHIAC no longer had jurisdiction in this instance as a result of it becoming an independent arbitration body in 2012 and so the award was unenforceable.

The decision:

The decision did not consider whether SHIAC's split from CIETAC was legal and had created a valid arbitration commission. Rather, it focused on whether SHIAC could be considered as having jurisdiction in this instance. The court decided that it did not.

There appear to be two reasons for the Suzhou Intermediate People's Court's refusal to uphold SHIAC's decision. The first is party autonomy. At the time of contracting, both parties had intended that any dispute between them be arbitrated by CIETAC and the concomitant rules. However, as a result of SHIAC's split from CIETAC, the second half of the arbitration and the decision of the commission were in fact not conducted by CIETAC but by SHIAC, contrary to the arbitration clause. While SHIAC, when operating as a sub-commission of CIETAC, had initially had jurisdiction over the case, its subsequent independence also resulted in its losing jurisdiction as it no longer represented CIETAC and any decision it reached was not enforceable in this case.

The second reason outlined by the court was that parties who refer their disputes to

SHIAC or SCIA have the right to know about the arbitration body's new status and confirm their desire to continue with the same or re-apply to another CIETAC branch. The SHIAC and SCIA arbitration bodies also have a duty to inform users of their new status. In this instance, this had not happened.

A true reflection of the current situation?

It is possible that this decision by the Suzhou Intermediate People's Court will in fact not be significant. Viewed in the broader context it can be seen as just another decision that further confuses an already intractable situation. This decision directly contradicts a previous Suzhou court decision, amongst others, that enforced SHIAC and SCIA decisions. Real clarity would probably not be seen until a higher power steps in, perhaps the Chinese Ministry of Commerce or the Supreme People's Court.

Arguably, the more significant interpretation is that this decision in fact reflects the likelihood of how cases will be decided outside of Shanghai or Guangdong. SHIAC and SCIA are new arbitration bodies, albeit with the backing of their local Departments of Justice, and need to build up their reputation. Many favourable previous court rulings have come from Guangdong and Shanghai, enforcing SHIAC and SCIA decisions, and could themselves be seen as protectionist of the local arbitration bodies and an attempt to validate them. As a result, this decision by an Intermediate court may be seen as a more accurate reflection of the status of both the Shanghai and Shenzhen arbitration bodies nationally. Outside of their hometowns, courts may consider as not having jurisdiction in similar situations. It is also pertinent to note that the party against whom the SHIAC award was sought to be enforced is an entity registered and paying tax in Suzhou. As the writer understands it, an appeal has been filed against the decision of the Suzhou Intermediate People's Court.

Given the Chinese legal system does not adopt the principle of binding case-precedent, it is hard to predict how this situation will end up. Other courts are not bound to

follow this recent decision by the Suzhou Intermediate People's Court (with an appeal underway), although it will carry some weight. Irrespective of whether there is a reversal of that decision by the higher court, it may take a groundswell of cases either for or against SHIAC and SCIA to determine the matter conclusively. Alternatively, refusal or acceptance by parties to use the two arbitration commissions to settle their disputes could prove decisive.

In the meantime:

Much of the content to be found in our previous newsletter 'Arbitral Institutions at War – Beijing v Shanghai and Shenzhen' (September 2012) remains unaffected by the ruling discussed.

The one thing that is clear from this case is that it re-affirms the need for clarity in arbitration clauses. Parties wishing to have disputes arbitrated by CIETAC must say so explicitly. It may be wise to use foreign arbitral commissions where possible, such as the Hong Kong International Arbitration Centre or the ICC Court for Arbitration.

Similarly, efforts should be made to change arbitration clauses that currently make reference to Shanghai or Shenzhen. Parties should try to agree to enter into a collateral agreement nominating CIETAC or CIETAC Beijing as the seat of arbitration. The new 2012 Rules mean that nominating Beijing as the seat does not mean the case will have to be heard there. It is still strongly recommended that legal advice is sought in such a situation. It is still possible for parties to have their disputes heard by SHIAC or SCIA if they wish, but they may be subject to similar issues of enforceability.

Where arbitration is already under way before SHIAC or SCIA, it is necessary that all parties be made aware of the split with CIETAC and that they are offered the option either to re-affirm their willingness for the case to be heard by that body (not

recommended given the current enforcement issues) or withdrawing the case and starting the process again through CIETAC. CIETAC now has a branch / operational office in Shanghai to take over the work originally covered by CIETAC Shanghai Sub-Commission (or SHIAC now). Therefore, according to CIETAC, arbitration to be started under CIETAC rules in Shanghai as per the parties' arbitration agreement can now be handled by the new CIETAC branch / operational office in Shanghai.

Conclusion:

The lack of clarity and certainty on the long term impact of the Suzhou Intermediate People's Court's decision (with an appeal underway), reflects the confusing nature of the CIETAC v SHIAC/SCIA situation as a whole. Until the status of the break away arbitral bodies is clear and parties can be safe in the knowledge that their awards will be universally regarded as enforceable in a court of law (by no means a guarantee at this stage), it is recommended that parties exercise caution when deciding SHIAC or SCIA as seat of arbitration.

Source: http://www.forwarderlaw.com/library/view.php?article_id=899

Please click below links if you would like to read more articles:

Reform of German maritime law

A fundamental reform to the German Commercial Code (Handelsgesetzbuch, "HGB") ensures Germany remains a Hague Rules state although many substantive changes to the Code are relevant for forwarders and are concisely reviewed by Marco Remiorz, our Member for Germany, here: http://www.forwarderlaw.com/library/view.php?article_id=900

Federal Court of Appeal extends application of Hague-Visby Rules in Canada

The Canadian *Marine Liability Act* incorporates the Hague-Visby Rules not only for international carriage but also, in certain circumstances, in respect of carriage of goods domestically. The decision of the Federal Court of Appeal in *Mercury XII (Ship) v. MLT-3 (Belle Copper No. 3)* , 2013 FCA 96 may impose a

broader application of the Hague Visby Rules in domestic carriage than international carriage contracts. Gavin Magrath., General Editor and Member for Canada reviews the case here:
http://www.forwarderlaw.com/library/view.php?article_id=902

Cross border Insolvency: An impediment to a ship arrest in Australia?

An interesting decision by the Australian Federal Court puts into question whether the courts will enforce an arrest of a ship in Australia when insolvency proceedings exist against the owner in another jurisdiction. Frazer Hunt and Maurice Lynch explain that this new decision appears to open the door, at least for some types of *in rem* proceedings, to enforce the arrest of a ship.
http://www.forwarderlaw.com/library/view.php?article_id=901

A change in the tides or a drop in the ocean: how will a recent decision by the Suzhou Intermediate People's Court affect arbitration in China?

Enforceability is of central importance for the successful party of an arbitration. Ik Wei Chong, our contributor from Shanghai, highlights a recent decision by the Suzhou Intermediate People’ s Court disallowing the enforcement of an arbitration award of the newly formed arbitration body known as SHIAC. To find out why the award was not enforceable and what this means for parties considering this arbitration body read here:
http://www.forwarderlaw.com/library/view.php?article_id=899

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