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新法速递 NEW LAWS AND REGULATIONS WATCH

国家海洋局发布《关于完善国家海洋局直接受理项目用海审查工作有关问题的通知》

State Oceanic Administration Promulgates the Circular on Relevant Issues Concerning Improving Review of Sea Utilization under the Projects Directly Accepted by the State Oceanic Administration

2013 年 3 月 4 日, 国家海洋局发布《国家海洋局关于完善国家海洋局直接受理项目用海审查工作有关问题的通知》(《通知》)。

《通知》要求严格建设项目用海预审制度。国务院或国务院投资主管部门审批或核准的建设项目需要使用海域的, 项目申请人应当在项目可行性研究阶段或项目申请报告核准之前, 办理用海预审手续。用海预审意见是审批建设项目可行性研究报告或者核准项目申请报告的必要文件。

On March 4, 2013, the State Oceanic Administration (the "SOA") promulgated the Circular on Relevant Issues Concerning Improving Review of Sea Utilization under the Projects Directly Accepted by the State Oceanic Administration (the "Circular").

The Circular requires that the pre-review system with respect to sea utilization under construction projects shall be strengthened. For the sea areas necessary to be utilized by the construction projects approved by the State Council or the competent investment authority of the State Council, the project applicant shall, at the stage of the feasibility study of the projects or prior to the approval of the projects, complete

the sea utilization pre-review formalities. The pre-review opinion on sea utilization is the requisite document for the approval of the feasibility report or project application report of a construction project.

(Source: www.soa.gov.cn)

四部门发布《关于完善石脑油、燃料油生产乙烯、芳烃类化工产品消费税退税政策的通知》

Four Departments Promulgate the Circular on Improving the Policies of Refunding Consumption Tax for Naphtha, Fuel Oil-made Ethylene and Aromatic Hydrocarbon Chemical Products

近日，财政部等四部门联合发布《财政部、中国人民银行、海关总署、国家税务总局关于完善石脑油、燃料油生产乙烯、芳烃类化工产品消费税退税政策的通知》（《通知》）。

《通知》规定，我国境内使用石脑油、燃料油生产乙烯、芳烃类化工产品的企业，仅以自营或委托方式进口油品生产化工产品，向进口消费税纳税地海关申请退还已缴纳的消费税。办理退税时，海关根据使用企业生产化工产品实际耗用的油品数量核定应退税金额，开具收入退还书，使用“进口成品油消费税退税”科目（101020221）退税。

Recently, four departments including the Ministry of Finance ("MOF") have jointly promulgated the Circular of the Ministry of Finance, the People's Bank of China, the

General Administration of Customs and the State Administration of Taxation on Improving the Policies of Refunding Consumption Tax for Naphtha, Fuel Oil-made Ethylene and Aromatic Hydrocarbon Chemical Products (the "Circular").

According to the Circular, the enterprises in China which use naphtha, fuel oil-made ethylene and aromatic hydrocarbon chemical products, and import oil products only through self-operation or entrustment to manufacture chemical products, may apply with the customs of the place where import consumption tax is paid for the refund of consumption tax. At the time of handling tax refund, customs shall determine the amount to be refunded in accordance with the quantity of the oil actually consummated for the production of chemical products by enterprises, issue refund letter and refund under the item "consumption tax refund for imported refined oil" (101020221).

(Source: www.js-n-tax.gov.cn)

国际海事组织《〈1973 年国际防止船舶造成污染公约〉1978 年议定书》等强制性文件修正案生效公告

[Announcement on the Coming into Effect of the Amendments to IMO Mandatory Documents including MARPOL 73/78](#)

2013 年 3 月 7 日，交通运输部发布 关于国际海事组织《〈1973 年国际防止船舶造成污染公约〉1978 年议定书》等强制性文件修正案生效公告 。

根据《公告》，《〈1973 年国际防止船舶造成污染公约〉1978 年议定书》（《防污公约》）附则的修正案（关于《防污公约》附则 I、II、IV 和 V 中港口接收设

施的区域性安排) 和《经 1978 年议定书修订的〈1973 年国际防止船舶造成污染公约〉的 1997 年议定书》附则的修正案(关于附则 VI 中港口接收设施的区域性安排和《2008 年氮氧化物技术规则》中设有选择性催化还原系统的船用柴油机的发证), 上述修正案已于 2013 年 2 月 1 日被视为默认接受, 并将于 2013 年 8 月 1 日生效, 并对我国具有约束力。

On March 7, 2013, the Ministry of Transport ("MOT") promulgated the announcement on the coming into effect of the amendments to mandatory documents of the International Maritime Organization ("IMO") including the International Convention for the Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978 (the "Announcement").

According to the Announcement, the amendments to the annexes of the International Convention for the Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978 (MARPOL 73/78) (in relation to the Regional Arrangements for the Port Reception Facilities in Annexes I, II, IV and V of MARPOL 73/78) and the amendments to the annexes of Protocol of 1997 of MARPOL 73/78 (in relation to the Regional Arrangements for the Port Reception Facilities in Annex VI and the Issuance

of Certificates for the Certification of Marine Diesel Engines Fitted with Selective Catalytic Reduction Systems under the NO_x Technical Code 2008) were accepted by implication on February 1, 2013, and will take effect on August 1, 2013 with legal binding force in China.

(Source: www.moc.gov.cn)

国家税务总局发布明确《出口货物劳务增值税和消费税管理办法》有关问题

SAT Clarifies Issues Concerning the Administrative Measures for Value-added Tax and Consumption Tax on Export Goods and Services

2013 年 3 月 13 日, 国家税务总局发布《国家税务总局关于〈出口货物劳务增值税和消费税管理办法〉有关问题的公告》, 细化、完善了《出口货物劳务增值税和消费税管理办法》有关条款。

《公告》对于出口退(免)税资格认定、出口退(免)税申报、适用免税政策的出口货物劳务申报、有关单证证明办理等相关事项和材料报表进行了详细说明。

On March 13, 2013, the State Administration of Taxation ("SAT") promulgated the Announcement of the State Administration of Taxation on Issues Concerning the Administrative Measures for Value-added Tax and Consumption Tax on Export Goods and Services (the "Announcement"), elaborating and improving the relevant provisions in the Administrative Measures for Value-added Tax and Consumption Tax

on Export Goods and Services.

The Announcement elaborates the determination of the qualifications of export rebates (exemption), application for export rebates (exemption), declaration for the export goods and services to which tax exemption policies are applicable, handling of the relevant documents and certificates, as well as other relevant matters, materials and statements.

(Source: www.chinatax.gov.cn)

商务部发布《商务部关于 2013 年全国吸收外商投资工作的指导意见》

MOFCOM Promulgates the Guiding Opinions on the Attraction of Foreign Investment throughout China in 2013

2013 年 3 月 14 日，商务部发布《商务部关于 2013 年全国吸收外商投资工作的指导意见》（《意见》）。

《意见》提出，2013 年的工作目标是：引导外商投资高附加值制造领域，扩大服务业对外开放，强化外商投资作为引进技术和智力的重要载体作用；促进东部地区吸收外资转型升级、中西部地区承接国内外产业转移，优化利用外资区域结构；深化政府职能转变，积极稳妥推进简政放权，着力构建服务型政府；在稳定利用外资规模的基础上提高利用外资质量等。

On March 14, 2013, the Ministry of Commerce ("MOFCOM") promulgated the Guiding Opinions of the Ministry of Commerce on the Attraction of Foreign

Investment throughout China in 2013 (the "Opinions").

According to the Opinions, the goals of the work in 2013 are: guiding foreign investment in high value-added manufacturing sector, promoting opening-up in service sector and strengthening the role of foreign investment as an important carrier for the introduction of technologies and talents; promoting transformation and upgrading of the absorption of foreign investment in eastern region as well as the acceptance of domestic and international industrial relocation by western and central regions to optimize the regional structure of foreign capital utilization; deepening the transformation of government functions and actively and prudently promoting administration streamlining and power delegation to build the service-oriented government; and improving the quality in foreign capital utilization based on its stabilized scale.

(Source: www.mofcom.gov.cn)

海关总署决定从 2013 年 3 月 15 日起实施与新加坡互认安排

GAC Decides to Implement the Mutual Recognition Arrangement with Singapore from March 15, 2013

2013 年 3 月 14 日，海关总署发布总署公告 2013 年第 13 号。

2012 年 6 月，海关总署与新加坡关税局正式签署了《中华人民共和国海关总署和新加坡关税局关于〈中华人民共和国海关企业分类管理办法〉和〈新加坡安全贸易伙伴计划〉互认的安排》。经与新加坡关税局协商，海关总署决定从 2013 年 3 月 15 日起全面实施该互认安排。

从 2013 年 3 月 15 日起, 我国海关接受新加坡关税局认证的 STP-Plus 企业为新加坡的“经认证的经营者”(AEO)企业, 新加坡关税局接受我国海关认证的 AA 类企业为我国的 AEO 企业。

On March 14, 2013, the General Administration of Customs ("GAC") promulgated the Announcement of the General Administration of Customs No. 13 of 2013.

In June 2012, the GAC and the Singapore Customs officially signed the Arrangement of the General Administration of Customs and the Singapore Customs on the Mutual Recognition of the Measures of the Customs of the People's Republic of China for Classified Administration of Enterprises and the Secure Trade Partnership of Singapore. After negotiation with the Singapore Customs, the GAC has decided to carry out the mutual recognition arrangement in all aspects from March 15, 2013.

From March 15, 2013, the Chinese customs will regard the STP-Plus enterprises accredited by the Singapore Customs as Authorized Economic Operators (AEOs) of Singapore, and the Singapore Customs will regard the AA enterprises accredited by the Chinese customs as the AEOs of China.

(Source: www.customs.gov.cn)

商务部发布《规范对外投资合作领域竞争行为的规定》

MOFCOM Promulgates the Provisions on Regulating Competitive Behavior in Foreign Investment and Cooperation

2013 年 3 月 22 日，商务部发布《规范对外投资合作领域竞争行为的规定》，提出将会同有关部门建立对外投资合作不良信用记录制度，因不正当竞争行为被记录在案的企业 3 年内不得享受国家有关支持政策。

根据《规定》，对外投资合作领域不正当竞争行为包括以商业贿赂争取市场交易机会，以排挤竞争对手为目的的不正当价格竞争行为，串通投标，诋毁竞争对手商誉，虚假宣传业绩以及其他依法被认定为不正当竞争的行为。

On March 22, 2013, the Ministry of Commerce ("MOFCOM") promulgated the Provisions on Regulating Competitive Behavior in Foreign Investment and Cooperation, specifying that it will, in concert with the relevant departments, establish a poor credit record system of foreign investment and cooperation. An enterprise which has been placed on record for unfair competition shall not enjoy the benefits of relevant national supporting policies for three years.

According to the Regulations, unfair competition in foreign investment and cooperation includes the acts of seeking market transaction opportunities through commercial bribe, unfair price competition for the purpose of excluding competitors, bid-rigging, degrading competitors' goodwill, publicizing false business performance and other acts regarded as unfair competition by the law.

(Source: www.mofcom.gov.cn)

四部门联合发布《关于调整重大技术装备进口税收政策有关目录的通知》

Four Departments Jointly Promulgate the Circular on Adjusting the Catalogues Relating to Import Duties Policies of Major Technical Equipment

2013 年 3 月 25 日，财政部、工业和信息化部等四部门发布《关于调整重大技术装备进口税收政策有关目录的通知》（《通知》）。

《通知》明确，自 2013 年 4 月 1 日起，对符合规定条件的国内企业为生产国家支持发展的直流场设备、高速铁路信号系统、生活垃圾精分选成套系统装备、举高消防车、染色机、新型农业机械、太阳能电池设备、集成电路关键设备、新型平板显示器件生产设备、锂离子动力电池设备、电子元器件生产设备等装备而确有必要进口部分关键零部件、原材料免征关税和进口环节增值税。

On March 25, 2013, four departments including the Ministry of Finance and the Ministry of Industry and Information Technology jointly promulgated the Circular on Adjusting the Catalogues Relating to Import Duties Policies of Major Technical Equipment (the "Circular").

According to the Circular, from April 1, 2013, eligible domestic enterprises that import necessary key parts and components or raw materials for manufacturing such equipment of which the development is supported by the State such as direct-current equipment, signaling systems for rapid transit railways, complete systems/equipment for sorting domestic waste, fire engines with elevating equipment, dyeing machine, new agricultural machinery, solar battery equipment, key equipment for integrated circuits, equipment for manufacturing new flat panel displays, lithium-ion powered

battery equipment, and equipment for manufacturing electrical components are exempted from customs duties and import value-added tax.

(Source: www.mof.gov.cn)

交通运输部发布《国内水路运输经营资质管理规定（征求意见稿）》

MOT Promulgates the Administrative Provisions on the Operating Qualifications for Domestic Waterway Transportation (Draft for Comments)

2013 年 3 月 27 日，交通运输部发布了《国内水路运输经营资质管理规定（征求意见稿）》，现公开征求意见。意见收集截止日期为 2013 年 4 月 27 日。

外商投资企业申请从事国内水路运输，除满足本规定第六条规定的经营资质条件外，还应当符合下列条件：

- （一）拟经营的范围内，现有国内水路运输经营者无法满足需求；
- （二）出资方中的外方投资者应当具有经营水路运输业务的良好业绩和运营经验；
- （三）出资方中的外方投资者，在该企业中的出资比例之和不得超过 49%。

On March 27, 2013, the Ministry of Transport ("MOT") promulgated the Administrative Provisions on the Operating Qualifications for Domestic Waterway Transportation (Draft for Comments). The MOT is seeking public comments and the closing date is on April 27, 2013.

In addition to the operating qualification conditions specified in Article 6 of the

Provisions, a foreign-funded enterprise applying to operate domestic waterway transportation shall also meet the following conditions:

1. Existing domestic waterway transportation operators are unable to meet the demands in the proposed scope of business;
2. The foreign investor(s) of the contributing party possesses good performance results and operational experience in waterway transportation services; and
3. The total capital contribution of all the foreign investors of the contributing party shall not exceed 49 percent.

(Source: www.chinalaw.gov.cn)

中国保监会发布《中国保监会关于进一步发挥保险经纪公司促进保险创新作用的意见》

CIRC Promulgates the Opinions on Further Playing the Role of Insurance Brokers in Promoting Insurance Innovation

中国保监会近日发布《中国保监会关于进一步发挥保险经纪公司促进保险创新作用的意见》(《意见》), 鼓励保险经纪公司充分发挥优势, 进一步丰富保险产品、增强市场活力、促进市场发展、保护被保险人利益。

《意见》表示, 保险经纪公司贴近市场、贴近保险消费者和熟悉特定领域风险, 可以推动创新承保机制, 拓宽保险覆盖面; 可以推动开发保险产品, 有效满

足保险消费者需求；可以推动改进保险服务体系，提升保险业服务水平。

Recently, the China Insurance Regulatory Commission ("CIRC") has promulgated the Opinions of the China Insurance Regulatory Commission on Further Playing the Role of Insurance Brokers in Promoting Insurance Innovation (the "Opinions"), encouraging insurance brokers to give full play to their strength to further diversify insurance products, increase market vigor, promote market development and protect the benefits of the insured.

According to the Opinions, based on market and insurance clients and being familiar with the risks in specific field, insurance brokers may promote the innovation of underwriting mechanism to expand insurance coverage, drive the development of new insurance products to effectively meet the needs of insurance clients, and advance and improve the insurance service system to advance the quality in services in the insurance industry.

(Source: www.circ.gov.cn)

实时资讯 REAL-TIME INFORMATION

杨传堂：航运企业将获更有力扶持

Chuantang Yang pointed out: Shipping Enterprise will obtain more support

针对航运企业亏损较为严重的状况，交通运输部部长杨传堂 5 日接受中国证券报记者采访时表示，航运企业现在需要慢慢地调整，这与国际形势、国内转变经济增长方式等多种因素有关，为此，国家已经出台了一些政策来扶持航运企业，“真金白银”还不多，但下一步会有。不过，他并没有透露扶持政策出台的具体时间，只是笑称“什么时候出来什么时候就有”。

对于交通相关部门整合的问题，他没有正面回答，只是称机构改革和政府职能的转变是此次会议的重要议题之一。他同时透露，机构改革的结果大约在 3 月 14 日会公布。

杨传堂还表示，今年的交通投资与往年差不多，大约 1.4 万亿元，并且投资会向中西部倾斜。

For severely negative profit of the shipping industry, Chuantang Yang states that, the minister of Ministry of Transport of the People's Republic of China, the Chinese shipping enterprises are adjusting tardily which is influenced by the national and international economic tendency. Under the current situation, the government will make some policies to support shipping industry; capital is scarce at present but would be abundance in the follow-up process. However, he did not point out the exact time that policies would be promulgated and, just said, "When it is published that

would have. Both institutional reform and the transformation of government functions are two of main issues in this conference, he indicated. Meanwhile, he said that the result of institutional reform will be public around 14th of March, 2013.

Chuantang Yang also stated that this year's budget of transport investment is approximately 1.4 trillion yuan (RMB) which is similar with former years and, the interior (central and western China) will be the main investment areas of this year.

来源: <http://stock.sohu.com/20130306/n367894646.shtml>

今年港航管理总任务锁定“五新”

The Port and Ship Administrative Bureau will focus on “Five New aspects” as this year's main task

3月1日,全国港航局长第四次联席会议在灵渠之畔广西兴安召开。会议明确今年港航管理工作的总任务是积极推进“新战略、新发展、新法律、新平台、新管理”五位一体建设,促进水运事业安全、高效、协调、创新发展。

交通运输部水运局局长宋德星表示,要完成这个总任务,一是推进水运发展新战略,加快推进海运发展上升为国家战略,深入实施内河水运发展的国家战略,深化“优港口”内涵、调查研究港口发展战略的政策储备。二是促进水运经济新发展。研究制定邮轮、游艇发展的指导意见,加快上海、天津、大连国际航运中心和重庆长江上游、武汉长江中游航运中心建设,加快推进“十二五”水运结构调整示范项目,大力推进集装箱铁水联运示范项目等工作。三是推动出台水运新

法律。四是构建水运信息化新平台，推进水运信息综合平台建设。五是强化水运行业新管理，树立务实创新的管理理念。

来自全国 25 个省、自治区、直辖市的港航代表结合实际，就如何继续提升水运发展质量、效益、竞争能力和服务水平进行了互动交流，并就港航管理人才队伍建设、水运行业信息化建设、水运行业新闻宣传工作三项议题进行了专题研讨。

The forth joint meeting of chiefs of all domestic Port and Ship Administration Bureaus was held in Xingan, Guangxi Province on March 1, 2013. The general target of Port and Ship Administration Bureaus in this year is actively impel that ‘ New strategies, New Development, New Statute, New Stage, New management’ five aspects as an unity to be established for advancing the development of shipping industry safe, productive, harmonize and innovational.

Dexing Song, the chief of Water Transport Office of Ministry of Transport of the People’s Republic of China, pointed out that the five blow aspects shall be followed for achieving this target. Firstly, to make new strategy of shipping development, the shipping development shall be upgraded as a national strategy and the national strategy of inland waterway transportation should be followed going on. In the second place, to improve the economic development of shipping, the new directive advices would be made on passenger liner and yacht; quicken construction of shipping in the following regions, Shanghai, Tianjin and Dalian as international shipping centers and, Chongqing (upper reaches of Yangzte River) and Wuhan (middle reaches of Yangzte River) as interior shipping centers. Speed up demonstration projects of waterway transportation restructuring in ‘The 12th Five-year Plan’, for instance, the demonstration project of container railway-river combined transportation etc. Thirdly,

new waterway transportation statute would be made. Fourthly, a new waterway transportation information network would be created. Last but not least, pragmatic and innovated management thoughts shall be produced in the new management of waterway transportation industry.

These representatives had a specialized seminar based on the management team building, information construction of waterway transportation and the press campaign of the waterway transportation.

来源: http://www.jsd.gov.cn/art/2013/3/6/art_3956_717415.html

《政府工作报告》海洋维权——维护国家海洋权益

The protection of marine rights is mentioned as the first time in *Government Annual Report 2013*.

【摘要】 温家宝在报告中说：“加强海洋综合管理，发展海洋经济，提高海洋资源开发能力，保护海洋生态环境，维护国家海洋权益。”

【解读】 对比 2012 年的《政府工作报告》，今年对海洋的表述更加具体。中国人民大学国际关系学院副院长金灿荣称，今年工作报告中的三个新提法，表明我国不断完善自己的海洋战略。“保护海洋权益”与当前的局势有关，去年钓鱼岛问题和南海问题引起广泛关注。周边一些国家希望借美国“回归亚太”谋取一些利益，中国坚定地表态，对于打消其幻想有好处。“提高海洋资源开发能力”则是在不断深化近年来一直提出的走向海洋战略。谈到“保护海洋生态环境”，

金灿荣教授举例说现在“西沙旅游”的概念比较热，但是不能随便开发，因为西沙生态很脆弱。

Compared with *The Government Annual Report 2012*, this year's report described marine problems in details. Canrong Jin, the vice dean of School of International Studies of Renmin University of China, said that the three new descriptions in ocean shows that our government keeps at improving the marine strategy. 'Protection of Marine Rights' relates at the current situation, issues of Diaoyu Islands and South China Sea drew more attention in the world last year. 'Improve the capacity of marine resource development' further the development of the Oceanic strategy as a hot spot issue in recent years. Further to 'Protection of marine eco-environment', 'Xisha Islands Tourism', as an example, is a popular proposal but, it cannot be exploited unplanned based on its vulnerable eco-environment.

来源: <http://politics.people.com.cn/n/2013/0306/c70731-20687713.html>

案例分析 CASE STUDY

冷冻集装箱机器故障能否构成免责原因的认定

【要点提示】 Points to Note

承运人没有举证证明集装箱冷机系统故障的发生原因,即尚未说明该故障发生的原因系因集装箱的缺陷时,不能将该故障归类为其经谨慎处理仍未发现的集装箱潜在缺陷。

The carrier did not provide evidence to prove what made the malfunction of the container refrigeration system, which means if the malfunction was caused by faults of the container that is not illustrated and then this malfunction is not an undiscovered potential fault of the container under the duty of care.

【案例索引】

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

【案情】

原告:太平洋日升国际公司(PACIFIC SUNRISE INTERNATIONAL CORPORATION,以下简称日升公司)。

被告:海贸国际运输有限公司(SEA TRADE INTERNATIONAL, INC.,以下简称

海贸公司)。

被告：中远集装箱运输有限公司（以下简称中集公司）。

被告：上海泛亚航运有限公司（以下简称泛亚公司）

大连海事法院经审理查明：2008 年 8 月 8 日，日升公司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，约定应捷公司向日升公司出售重量约 95 040 磅的太平洋鳕鱼，分两个集装箱装载。9 月 2 日，应捷公司就其中部分货物出具发票，载明：集装箱号 CRLU1808571，内装 1 106 箱鳕鱼，其中冷冻鳕鱼切片 920 箱，重 36 800 磅，到岸价格 3.4 美元／磅；冷冻太平洋鳕鱼肉块 186 箱，重 12 276 磅，到岸价格 1.5 美元／磅，总计到岸价格（成本加运费）143 534 美元。同日，应捷公司从中集公司提取空集装箱（箱号为 CRLU1808571），装入 1 106 箱共 49 076 磅冷冻鳕鱼切片和冷冻太平洋鳕鱼肉块后，于 9 月 4 日将该集装箱货物交付给海贸公司。应捷公司取得了该货物的货物产地证明、健康证书。

就上述 1 106 箱货物，9 月 4 日，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，通知方日升公司，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，中集公司签发编号为 COSU0102970340 的海运单，载明：托运人海贸公司大连办公

室，收货人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，从海贸公司取得提单，并将提单转让给日升公司。

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电源。

10 月 14 日，上述集装箱货物运到波士顿港，并于次日卸船。日升公司于 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，但散发着一股鱼腥及腐烂的味道；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。《货损检验报告》后附了日升公司为该货物支付的价款和费用。结合日升公司提供的发票，这些价款和费用包括：货物到岸价格 143 534 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 3 133.20 美元、检验费 1 412.60 美元、文件费 65 美元。

泛亚公司是“PAN HE”轮的船舶所有人，中集公司是巴拿马籍“COSCO KOBE”轮的船舶经营人，是“COSCO KOBE”轮运输期间的实际承运人。另查，箱号为 CRLU1808571 的涉案集装箱于 2008 年 8 月 28 日根据中集公司的委托由大连鑫三利集装箱有限公司进行了预检。

【审判】

大连海事法院经审理认为：本案当事人和海上货物运输合同的履行地具有涉外因素，合同当事人可以选择处理合同争议所适用的法律。日升公司 and 三被告都同意适用中国法律，故本案纠纷适用中国法律审理。日升公司与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，日升公司是提单持有人，海贸公司是签发提单的承运人。海贸公司又委托泛亚公司和中集公司分段运输日升公司的货物，前者履行从大连至上海的航程，后者履行从上海至波士顿的航程，泛亚公司和中集公司是实际承运人。涉案集装箱货物在中集公司实际承运期间发生损坏，与泛亚公司无关，故泛亚公司对日升公司的损失不承担赔偿责任。现承运人海贸公司和实际承运人中集公司均没有举证证明该集装箱冷机系统故障系

可免责的原因,故海贸公司和中集公司对涉案集装箱内货物在其承运期间发生的损失,应当承担连带赔偿责任。

日升公司请求的货物损失(包括成本和运费)143 534 美元,符合法律规定,本院予以支持。日升公司请求的报关费没有证据证明,不予支持。日升公司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 3 133.20 美元、检验费 1 412.60 美元、文件费 65 美元,已由日升公司付出,而且日升公司因本案货物损坏而不能在销售利润中弥补这些费用,故对日升公司请求这些费用,予以支持。综上,海贸公司与中集公司应向日升公司连带赔偿货物损失 143 534 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 3 133.20 美元、检验费 1 412.60 美元、文件费 65 美元,共计 149 019.80 美元。按本案日升公司起诉日美元与人民币的汇率 1: 6.827 计算,折合人民币 1 017 358.17 元。日升公司主张该损失自 2008 年 10 月 22 日日升公司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,判决如下:一、海贸公司于本判决生效之日起十日内一次性向日升公司赔偿货物损失及其他费用损失共计人民币 1 017 358.17 元及其自 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、中集公司对上述第一项判决款项承担连带赔偿责

任；三、驳回日升公司对海贸公司、中集公司的其他诉讼请求；四、驳回日升公司对泛亚公司的诉讼请求。各方当事人均未上诉，一审判决已生效并执行完毕。

【评析】

本案是一起涉外海上冷藏集装箱货物运输合同纠纷，涉及到冷藏集装箱的专业技术问题，需要研究承运人在运输途中冷藏集装箱发生故障时如何才能免责的认定。本文分析如下：

涉案集装箱由中集公司提供，运输该集装箱的船舶由中集公司经营，该集装箱应视为船舶属具。海贸公司所签提单的背面条款第 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，作为承运人的海贸公司和作为实际承运人的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。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。海贸公司和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。

海贸公司和中集公司认为,涉案集装箱冷机系统的故障是经谨慎处理仍未发现的集装箱潜在缺陷,属于承运人的免责事由。该理由不能成立,理由如下:作为众所周知的事实,该故障在运输过程中发生,可能是集装箱本身的缺陷所引起,也可能是集装箱照料、维修、保养不当所致,也可能是集装箱在运输包括装卸、转运过程中为外力所致,或者其他可以免责或不能免责的原因所致。现海贸公司和中集公司没有举证证明该集装箱冷机系统故障的发生原因,即尚未说明该故障发生的原因系因集装箱的缺陷,更不能当然地将该故障归类为其经谨慎处理仍未发现的集装箱潜在缺陷。海贸公司和中集公司亦没有举证证明该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。因此,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。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。

(撰稿人: 大连海事法院海商庭 孙光)

来源: <http://www.ccmt.org.cn/shownews.php?id=12710>

资讯选编 INFORMATION SELECTION

The Iolcos Celebrity: Liability Insurer to pay for the charterers' claim against stevedores for salvage costs.

By Felipe Arizon (Arizon Abogados SLP)

The Māaga Court of Appeal has confirmed, by a judgment handed down on the 17 January 2013, the High Court ruling of 18 October 2010 where Mapfre Industrial S.A. (the insurer) was held liable under the contract of insurance it had with the claimant, a stevedoring Company.

The facts giving rise to this dispute took place by the end of 2005. A shore crane that was being prepared for the discharge operations of 55.000 tonnes of grain on board MV Iolcos Celebrity resulted severely damaged. The claimant (insured stevedoring firm), after seeking advice from the port Authority and the Harbour Master, decided to order the ship to evacuate the port in order to secure the crane and the berthing area, as it considered, there was a serious risk the crane would collapse and hit the vessel, a Panamax bulk cargo ship.

As a result of this order, the vessel had to wait outside the port for several days while the shore crane was secured, and expenses/damages were incurred in excess of EUR 140.000,00. These included, inter alia, the time charter hire, the tug services, and the fuel consumption during the days the ship had to wait outside the port. These claims were paid for by the stevedores to the charterers as it was clear their liability and extent.

In turn, the stevedoring sought redress from his liability insurers, but the latter refused

to pay for the claim on the ground that there was no "actual" damage suffered by third parties. Accordingly, the salvage costs were not recoverable under the terms of the insurance policy as the cover, they said, had not been triggered. During almost two years the stevedores tried to obtain settlement out of Court without success. The main argument of the stevedores was that under section 17 of the Spanish Insurance Act, the insurers must indemnify any salvage costs incurred by the insured in the attempt to minimize damages otherwise covered by the insurance contract. Furthermore, there is case law supporting the view that this indemnity also operates where the damages are not only reduced, but fully avoided.

Proceedings were commenced, and the High Court Judge refused all the arguments run by the liability insurers. The judge held that the salvage costs that arose from the stevedoring firm's decision to order the vessel to leave the port were incurred in order to prevent damages to third parties. Furthermore, the judge held that these costs were incurred under the scope of cover provided for by the terms of the insurance policy, and, accordingly, they were to be indemnified by the insurers.

The Court of Appeal has upheld the judgment of the High Court and has considered that the argument run of the liability insurers could lead to an absurd scenario, namely that the insured had to let the vessel next to the damaged shore crane so that its very expected collision would materialize and result in full cover of the damages the Panamax vessel as well as to the 55.000 tonnes of grain she had on board.

The development of this litigation case has been closely followed, and commented with fear, in the circles of Spanish insurers. The insurers said, a favorable judgment to the claimants opens up the doors to consider the policy terms of the liability insurance company as a sort of "preventive insurance". Against this "alarming" argument, it is submitted that key to accept the coverage of these salvages cost cases is the

assessment of the seriousness of the risk leading the insured to take a decision to minimize or avoid the damages.

In *The Iolcos Celebrity*, the risk of the crane collapsing against the Panamax was very serious, and had it not been prevented by the insured, the claims arising could have reached up to the full value of the ship, her cargo, and the damages resulting from the loss of use of one of the major docks in the port of Málaga. The salvage costs incurred in *The Iolcos Celebrity* were peanuts compared to the potential liabilities for the insured and insurer in case the serious risk of collision between the shore crane and the vessel materialized. Ed Note: Arizon Abogados SLP represented the stevedoring firm.

来源: http://www.forwarderlaw.com/library/view.php?article_id=880

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