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新法速递 REAL-TIME INFORMATION

交通运输部公布《港口危险货物安全管理规定》

MOT Promulgates the Administrative Provisions on the Safety of Hazardous Goods in Ports

2012 年 12 月 11 日,交通运输部公布《港口危险货物安全管理规定》(《规定》),自 2013 年 2 月 1 日起施行。

《规定》适用于在港口内进行装卸、过驳、储存、包装危险货物或者对危险货物集装箱进行装拆箱等作业活动。新建、改建、扩建从事港口危险货物作业的建设项目由港口行政管理部门进行安全条件审查。未经安全条件审查通过,港口建设项目不得开工建设。

On December 11, 2012, the Ministry of Transport ("MOT") promulgated the Administrative Provisions on the Safety of Hazardous Goods in Ports (the "Provisions"), effective as of February 1, 2013.

The Provisions are applicable to the loading, unloading, barging, storage, or package of hazardous goods, or vanning or devanning of the containers of hazardous goods, or any other operations within the ports. The new construction, renovation or expanded renovation of the construction projects engaged in the operations of hazardous goods at ports shall be examined by port administrative departments in respect of safety conditions. No port construction project may be under construction before passing the examination in terms of safety conditions.

交通运输部公布《水运工程建设项目招标投标管理办法》

MOT Promulgates the Administrative Measures on Bid Invitation and Bidding for Water Carriage Engineering Projects

2012年12月20日，交通运输部公布《水运工程建设项目招标投标管理办法》（《办法》），自2013年2月1日起施行。

《办法》规定，水运工程建设项目招标投标活动不受地区或者部门的限制。任何单位和个人不得以任何方式非法干涉招标投标活动，不得将依法必须进行招标的项目化整为零或者以其他任何方式规避招标。

On December 20, 2012, the Ministry of Transport ("MOT") promulgated the Administrative Measures on Bid Invitation and Bidding for Water Carriage Engineering Projects (the "Measures"), effective as of February 1, 2013.

The Measures stipulate that bid invitation and bidding for water carriage engineering projects shall not be restricted on the basis of region or sector. No entity or individual may illegally interfere with proper bid invitation and bidding activities in any way, or may divide any project which must undergo bid invitation procedure as required by law, or otherwise avoid bid invitation.

商务部发布《关于加快国际货运代理物流业健康发展的指导意见》

MOFCOM Promulgates the Guiding Opinions on Accelerating the Healthy Development of International Freight Forwarding and Logistics Industry

2013年1月16日，商务部发布了《商务部关于加快国际货运代理物流业健康发展的指导意见》（《意见》）。

《意见》提出，“十二五”期间，要在转变方式、提高质量的同时，实现规

模以上企业营业额年均增长12%左右。通过并购重组、扶优选强，打造若干个主营业务突出、经营模式先进、海外网络健全、具有较强竞争力的大型国际物流企业。培育一批功能完善、设施完备、资源整合能力强的大中型物流商。推动形成一支品牌效应突出、业务优势明显的中小型专业货代商队伍。基本形成结构合理、业态多样、服务优质、竞争有序的国际货代物流市场。

On January 16, 2013, the Ministry of Commerce ("MOFCOM") promulgated the Guiding Opinions of the Ministry of Commerce on Accelerating the Healthy Development of International Freight Forwarding and Logistics Industry (the "Opinions").

According to the Opinions, during the 12th Five-Year Plan, in addition to pattern transformation and quality improvement, the annual turnover growth of large-scale enterprise shall be around 12 percent. Through acquisition and reorganization, as well as the support and selection of the strong, efforts shall be made to build several large international logistics enterprises characterized by outstanding major business, advanced business model, sound overseas network and high competitiveness, to cultivate a group of large and medium-sized logistics operators with complete functions and facilities, and strong resource integration capability, to promote the formation of a team of small and medium-sized professional freight forwarders boasting prominent brand effect and obvious business strength, and to fundamentally form the international freight forwarding and logistics market orderly in competition with reasonable structure, a variety of business types and high service quality.

交通运输部发布《国内水路运输经营资质管理规定》

MOT Promulgates the Provisions on Administration of Operating Qualification for Domestic Waterway Transportation

2013 年 1 月 17 日，交通运输部发布《国内水路运输经营资质管理规定（第二次征求意见稿）》，现向相关单位征求意见，截止日期是 2013 年 2 月 1 日。

意见稿规定，除在省、自治区、直辖市行政区域内的封闭通航水域经营客船运输外，国内水路运输企业自有并经营的适航船舶总运力规模应当分别满足下列最低要求：经营省际沿海普通货船运输的：普通货船 5000 总吨；经营省内沿海普通货船运输的：普通货船 1000 总吨；经营内河普通货船运输的：普通货船 600 总吨，其中经营范围涵盖长江干线的，不低于 3000 总吨，经营范围涵盖西江干线的，不低于 2000 总吨。

On January 17, 2013, the Ministry of Transport ("MOT") promulgated the Provisions on Administration of Operating Qualification for Domestic Waterway Transportation (Second Draft for Comments). The MOT is seeking comments from relevant entities, and the closing date is on February 1, 2013.

According to the Draft for Comments, in addition to the operation of the waterway passenger transportation in the closed navigable waters in the administrative regions of provinces, autonomous regions and municipalities directly under the Central Government, the domestic waterway transportation enterprises shall own and operate the seaworthy ships with total transport capacity satisfying the following minimum requirements respectively: the enterprises operating inter-provincial and coastal common cargo transportation shall have 5,000 gross tons of common cargo ships; the enterprises operating costal common cargo transportation in relevant province shall have 1,000 gross tons of common cargo ships; the enterprises operating common cargo transportation in inland river shall have 600 gross tons of common cargo ships, among which, the enterprises' operation scope covering main line of the Changjiang River shall have at least 3,000 gross tons of common cargo ships and the enterprises' operation scope covering main line of the Xijiang River shall have at least 2,000 gross tons of common cargo ships.

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）》

MOT Promulgates the Administrative Provisions on Supplementary Services of Domestic Waterway Transportation (Draft for Comments)

2013 年 1 月 17 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）》，现向相关单位征求意见，截止日期是 2013 年 2 月 1 日。

意见稿规定，水路运输辅助业务，包括船舶管理、船舶代理、水路旅客运输代理、水路货物运输代理和船舶经纪。经营国内船舶管理业务，应当具备下列条件：具备企业法人资格，有固定的办公场所和相应的组织机构；有与其管理的船舶种类和运力规模相适应的海务、机务管理人员，相关人员应当满足本规定第七条、第八条的要求；有健全的安全生产管理制度等。

On January 17, 2013, the Ministry of Transport ("MOT") promulgated the Administrative Provisions on Supplementary Services of Domestic Waterway Transportation (Draft for Comments). The MOT is seeking comments from the relevant entities, and the closing date is on February 1, 2013.

According to the Draft for Comments, the supplementary services of water transportation include ship management, ship agency, waterway passenger transport agency, waterway cargo transport agents and ship brokers. To operate the management of domestic ships, an entity shall meet the following requirements: (1) being a qualified corporate body with permanent office and corresponding organizational structure; (2) having the management personnel of maritime and machinery affairs corresponding to the types and transport capability of the ships under its control, in which the relevant personnel shall meet the requirements specified in Articles 7 and 8 of the Provisions; and having complete safety management system.

交通运输部发布《关于无船承运业务经营者保证金责任保险承保机构的通告》

MOT Promulgates the Circular on the Underwriters of the Deposit Liability Insurance of Non-Vessel Operating Common Carriers

2013 年 2 月 16 日，交通运输部发布《关于无船承运业务经营者保证金责任保险承保机构的通告》，公布了三家无船承运业务经营者保证金责任保险承保机构名单：中国人民财产保险股份有限公司、中国太平洋财产保险股份有限公司、中国平安财产保险股份有限公司。

On February 16, 2013, the Ministry of Transport ("MOT") promulgated the Circular on the Underwriters of the Deposit Liability Insurance of Non-Vessel Operating Common Carriers, announcing three underwriters of the deposit liability insurance of non-vessel operating common carriers, namely, PICC P&C (Peoples Insurance Company of China Property and Casualty), China Pacific Property Insurance Co., Ltd. and Ping An Property & Casualty Insurance Company of China, Ltd.

海关总署发布《关于对原产于新西兰的 11 个税则号列项下的农产品实施特殊保障措施》

GAC Promulgates the Special Safeguards for the Agricultural Products Originated from New Zealand under 11 Tariff Codes

2013 年 1 月 28 日，海关总署发布《海关总署公告 2013 年第 4 号——关于对原产于新西兰的 11 个税则号列项下的农产品实施特殊保障措施》。

2013 年 1 月 24 日，海关总署公布了实施特保措施管理的固状和浓缩非固状乳及奶油（税则号列：04021000、04022100、04022900 和 04029100）进口数量已

接近 2013 年触发标准的情况。至 2013 年 1 月 28 日, 上述农产品进口申报数量已达到 75367.401 吨, 超过 2013 年 71060.895 吨的特保措施触发标准。

因此, 自 2013 年 1 月 29 日起, 对上述协定项下进口的原产于新西兰的上述农产品按最惠国税率征收进口关税。对于在途农产品的税率适用和其他有关事宜, 按照海关总署公告 2008 年第 91 号的规定执行。

On January 28, 2013, the General Administration of Customs ("GAC") promulgated the Announcement of the General Administration of Customs No. 4 of 2013—Special Safeguards for the Agricultural Products Originated from New Zealand under 11 Tariff Codes.

On January 24, 2013, the GAC announced that the import quantity of solid and non-solid condensed milk and cream (tariff codes: 04021000, 04022100, 04022900 and 04029100) subject to the special safeguards was approaching to the trigger level for 2013. By January 28, 2013, the quantity of declared imports of the aforesaid agricultural products had reached 75,367.401 tons, which exceeds the trigger level of 71,060.895 tons subject to the special safeguards for 2013.

Therefore, import duties will be levied from January 29, 2013, at the most-favored-nation rates of duty on the aforesaid agricultural products originally produced in New Zealand and imported under the aforesaid agreement. The Announcement of the General Administration of Customs No. 91 of 2008 is applicable in terms of the applicable tariff rates and other related matters of in-transit agricultural products.

海关总署发布《关于中华人民共和国进出口税则本国子目注释》2013 年版

GAC Promulgates the Annotations on Domestic Items under the Customs Import and Export Tariffs of the People's Republic of China (2013 Version)

2013 年 1 月 16 日, 海关总署发布《海关总署公告 2013 年第 5 号——关于中华人民共和国进出口税则本国子目注释》, 自 2013 年 2 月 1 日起执行, 海关总署公告 2010 年第 62 号同时废止。

《中华人民共和国进出口税则本国子目注释》是海关和有关政府部门、从事与进出口贸易有关工作的企(事)业单位以及个人进行商品归类的法律依据之一。

On January 16, 2013, the General Administration of Customs ("GAC") promulgated the Announcement of the General Administration of Customs No. 5 of 2013 — Annotations on Domestic Items under the Customs Import and Export Tariffs of the People's Republic of China (2013 Version), effective as of February 1, 2013. The Announcement of the General Administration of Customs No. 62 of 2010 will be abolished simultaneously.

The Annotations on Domestic Items under the Customs Import and Export Tariffs of the People's Republic of China are a basis for customs, relevant government authorities, as well as the enterprises, public institutions and individuals engaging in the relevant work of imports and exports to classify their commodities.

[中国保监会发布《保险专业代理机构基本服务标准》《保险经纪机构基本服务标准》《保险公估机构基本服务标准》](#)

[CIRC Promulgates the Basic Service Standards for Professional Insurance Agencies, the Basic Service Standards for Insurance Brokers and the Basic Service Standards for Insurance Loss Assessors](#)

2013 年 1 月 16 日, 中国保监会发布了《保险专业代理机构基本服务标准》、《保险经纪机构基本服务标准》、《保险公估机构基本服务标准》。三个基本服务标准为保险消费者在购买保险产品、接受服务提供参考。

《保险专业代理机构基本服务标准》从首次接洽客户、售前、售中、售后、协助索赔、处理投诉等流程出发,对代理机构提出诚实信用、专业胜任、勤勉尽责等要求。

《保险经纪机构基本服务标准》将经纪服务的流程划分为建立保险经纪服务关系、评估风险、拟定投保方案、为客户选择保险公司、办理投保手续、保险期内服务、协助索赔、处理投诉,提出了以客户利益最大化为服务宗旨,诚实守信、专业胜任、勤勉尽责的要求。

《保险公估机构基本服务标准》从建立公估服务关系、为委托方风险评估、查勘、定责定损、处理投诉几个角度出发,对各类业务共有的服务环节提出了诚实信用、专业胜任、客观公正、勤勉尽责的要求。

On January 16, 2013, the China Insurance Regulatory Commission ("CIRC") promulgated the Basic Service Standards for Professional Insurance Agencies, the Basic Service Standards for Insurance Brokers and the Basic Service Standards for Insurance Loss Assessors, which will provide the insurance customers with the references in purchasing the insurance products or accepting services.

The Basic Service Standards for Professional Insurance Agencies provide for the requirements such as good faith, professional competency and due diligence for the insurance agencies with regard to the flow charts including contacting the clients for the first time, pre-sale, in-sale, after-sale, assistance in claims and complaints disposal.

The Basic Service Standards for Insurance Brokers divide the flow chart of the broker services into establishment of the insurance broker service relation, risk assessment, preparation of an insurance plan, selection of insurance companies for the clients, completion of procedures for taking out insurance policies, services during the insurance period, assistance in claims and complaints disposal, and provide for the service tenet of maximizing the benefits of clients and the requirements of good faith,

professional competency and due diligence.

The Basic Service Standards for Insurance Loss Assessors, from the points of view of establishment of the assessment service relations, assessment of risks for the principals, investigation, determination of liability and losses, and complaints disposal, put forward the requirements of good faith, professional competency, objectiveness and fairness, and due diligence in respect of the common service processes in various types of business.

国家税务总局发布《国家税务总局关于中央财政补贴增值税有关问题的公告》

SAT Promulgates the Announcement on Issues concerning the Value Added Tax on Central Financial Subsidies

2013 年 1 月 8 日, 国家税务总局发布《关于中央财政补贴增值税有关问题的公告》(国家税务总局公告 2013 年第 3 号)。

《公告》明确, 按照现行增值税政策, 纳税人取得的中央财政补贴, 不属于增值税应税收入, 不征收增值税。

《公告》自 2013 年 2 月 1 日起施行。此前已发生未处理的, 按本公告规定执行。

On January 8, 2013, the State Administration of Taxation ("SAT") promulgated the Announcement of the State Administration of Taxation on Issues concerning the Value Added Tax on Central Financial Subsidies (Announcement of the State Administration of Taxation [2013] No. 3) (the "Announcement").

The Announcement specifies that pursuant to the current value added tax ("VAT") policies, the central financial subsidies obtained by the tax payers are not VAT taxable incomes and are not subject to the VAT.

The Announcement will take effect as of February 1, 2013. Any matters which

that occurred but are not handled before the effectiveness of this Announcement shall be subject to this Announcement.

实时资讯 REAL-TIME INFORMATION

民事诉讼法修订完成

Civil Procedural Law Amended

8 月 31 日，第十一届全国人民代表大会常务委员会第二十八次会议通过《全国人民代表大会常务委员会关于修改〈中华人民共和国民事诉讼法〉的决定》，自 2013 年 1 月 1 日起施行。

公益诉讼制度首次写入修改后的民事诉讼法，对污染环境、侵害众多消费者合法权益等损害社会公共利益的行为，法律规定的机关和有关组织可以向人民法院提起诉讼。

修改后的民事诉讼法规定了小额诉讼制度，并将小额诉讼的标的额确定为相对数——标的额为各省、自治区、直辖市上年度就业人员年平均工资百分之三十以下。

On August 31, the Standing Committee of National People's Congress has adopted the decision on the amendment of the Civil Procedural Law of the People's Republic of China at the 28th session of the 11th National People's Congress, which will come into force as of January 1, 2013.

Public interest litigation system has been incorporated into the amended Civil Procedural Law for the first time. The relevant agencies and organizations authorized by the law may take legal action at the people's court against the acts that harm the social or public interest such as environmental pollution, or infringement upon the lawful rights and interests of the masses of consumers.

The amended Civil Procedural Law provides for a small claims litigation system, and sets up a relative amount in terms of the subject amount of small-claims litigation - the amount claimed shall be less than 30% of the employee's average wage for the

previous year in the provinces, autonomous regions and municipalities directly under the Central Government.

国家税务总局发布《关于规范税务行政裁量权工作的指导意见》

SAT Issues the Guiding Opinions on Regulating the Administrative Discretion of Taxation Authorities

7 月 3 日, 国税总局发布了《国家税务总局关于规范税务行政裁量权工作的指导意见》(《意见》)。

《意见》规定因国家利益、公共利益或者其他法定事由需要撤销或者变更税务决定的, 应当依照法定权限和程序进行, 对纳税人因此而受到的财产损失依法予以补偿。《意见》明确了规范税务行政裁量权的基本要求, 规定税务机关行使行政裁量权应当依照法定权力、条件、范围、幅度和程序进行。

The Opinions provide that if it is necessary to revoke or alter any administrative decision due to consideration of State interests, public interests or any other legally allowable reasons, statutory provisions on the authorization and procedure of such revocation or alteration must be followed, and property loss of taxpayers incurred therefrom should be properly compensated.

The Opinions also clarify fundamental requirements in connection with standardizing taxation administrative discretion, specifying that the taxation authorities shall exercise their administrative discretion according to their legal power and the conditions, scope, extent and procedure of such discretion.

国家发改委对境外投资和外商投资项目核准管理办法征求意见

NDRC Seeks Public Comments on Measures for the Examination and Approval of

Overseas Investment and Foreign Investment Projects

国家发展改革委利用外资和境外投资司发布了《境外投资项目核准暂行办法》(征求意见稿)和《外商投资项目核准暂行办法》(征求意见稿), 公开征求意见, 意见反馈截止日期为 2012 年 9 月 15 日。

外商投资方面, 按照《外商投资产业指导目录》分类, 总投资 3 亿美元及以上的鼓励类、允许类项目和总投资 5000 万美元及以上的限制类项目, 由国家发展改革委核准项目申请报告。外国投资者并购境内企业项目涉及国家安全的, 应当按照国家有关规定进行安全审查。

办法强调, 未经核准的外商投资项目, 行业管理、国土资源、城乡规划、质量监管、安全生产监管、工商、海关、税务、外汇管理等部门不得办理相关手续。

The Department of Foreign Capital Utilization and Overseas Investment of the National Development and Reform Commission ("NDRC") promulgated the Interim Measures for the Administration of the Examination and Approval of Overseas Investment Projects (Draft for Comments) and the Interim Measures for the Administration of the Examination and Approval of Foreign Investment Projects (Draft for Comments) to seek public comments, and the closing date is on September 15, 2012.

In respect of foreign investment, for an encouraged or permitted project whose total investment amounts to USD300 million or more, or a restricted project whose total investment amounts to USD50 million or more based on the Catalogue for the Guidance of Foreign Investment Industries, the project application report shall be examined and approved by the NDRC. In the event that a project of acquiring domestic enterprise by a foreign investor involves national security, security examination shall be carried out in accordance with the relevant national provisions.

船舶业信贷违约风险增大或将出现普遍亏损

The shipping credit-default swaps are increasing. A widely loss may be reported.

局部行业的信贷违约风险继续暴露。据知情人士透露，2012 年，银行的逾期贷款和关注类贷款均在上升。

该知情人士称，船舶行业的贷款质量也在呈现下降趋势。截至 2012 年末，造船行业贷款 125.63 亿元，不良余额为 4.37 亿元，不良率 3.5%。

受国际航运低迷影响，上海船舶行业生产大幅下滑已令造船行业贷款质量明显下降，其中钢贸贷款风险尤为突出。具体到业务层面，预付款保函业务、贸易融资项下发生的信用证垫款等业务风险亦引起银行关注。

对此，监管层近期也明确要求，2013 年要加大对重点行业风险的监控，防范企业集群风险。各银行要按照最大限度保护债权的原则，加大贷款计提拨备和呆坏账核销力度，并积极探索大宗商品贸易融资风险控制的有效方法。

监管层提醒，当前应高度关注铜、石材、木材等大宗商品市场的波动，密切跟踪外贸行业下行期间进出口企业违法违规套取资金冲动上升的风险，持续关注光伏、造船等行业产能过剩风险。

其中，监管层还特别明确提及要加强贷后管理，严格监测贷款用途，提高走访客户的频率，动态掌握企业及主要负责人的最新情况。

案例分析 CASE STUDY

上诉人衡水斯凯澜进出口有限公司因与被上诉人全球航海服务责任有限公司海上货物运输合同纠纷一案

【要点提示】 Points to Note

提单是承运人据以交付货物的单证。承运人负有凭其签发的正本提单交付货物的义务，记名收货人应凭正本提单提取货物。记名收货人在提货时未提交正本提单，其提交的换单保函中承诺因无正本提单放货产生的一切责任、经济损失均由其承担。

The bill of lading is the document with which to deliver the goods. The carrier has responsibility to deliver the goods depending on the original B/L. The consignee should take delivery of the goods with the original B/L. If the consignee take delivery of the goods without the original B/L, he need to assume all the liabilities arising from delivery of cargo without original bills of lading.

【案情】

2010 年 3 月 23 日，斯凯澜公司与 HUTHADA CO., LTD（以下简称 HUTHADA 公司）签订国际贸易合同，约定斯凯澜公司购买 18 吨棉纱，CNF（中国新港）价格为 2.08 美元/千克，总金额 37440 美元（±10%）。付款方式为斯凯澜公司预付 30% 的货款，余款在收到提单副本后 3 天内付清。3 月 29 日，斯凯澜公司向 HUTHADA 公司预付了 11214 美元。涉案货物的商业发票记载货物重量为 14862.20 千克，单价 2.08 美元/千克，总价款 30913.38 美元。涉案货物的出

口报关申报价格重量为 14862.24 千克, 货物价值为 30913.46 美元。4 月 8 日, 全球公司就涉案运输签发了 HCM/XIN10041342 号提单, 提单记载: 托运人为 HUTHADA 公司, 收货人和通知方均为斯凯澜公司, 装货港越南海防港, 卸货港中国新港, 船名航次为 XIANG WANG V.2855E, 集装箱号 GESU5815628, 货物为 416 包棉纱, 总重 15238.88 千克。货物到达天津新港后, 斯凯澜公司在提交进口换单保函、盖章的提单复印件后, 提取了涉案货物。保函记载: 提单号为 HCM/XIN10041342, 凭我司的保函及所附提单副本办理放货手续, 由此产生的一切责任、经济损失及法律纠纷由我公司承担。

2011 年 5 月 12 日, 全球公司与 HUTHADA 公司签订协议书, 就双方因涉案货物无正本提单放货问题, 商定由全球公司赔偿 HUTHADA 公司 19681.46 美元。同日, HUTHADA 公司出具收据单, 确认已收到该款项。

全球公司以斯凯澜公司提货后一直没有获得正本提单, 全球公司因无正本提单放货赔偿托运人 19681.46 美元为由, 向原审法院提起诉讼, 请求斯凯澜公司赔偿其损失 19681.46 美元 (折合人民币 127929.49 元) 和利息及律师费人民币 10000 元; 诉讼费、保全费等相关费用由斯凯澜公司承担。

【审判】

一审法院认为, 本案为国际海上货物运输合同纠纷, 全球公司系承运人, 斯凯澜公司系收货人。关于本案的法律适用, 全球公司、斯凯澜公司均未提出适用他国法或国际公约的主张, 本案适用中国法。斯凯澜公司虽主张其与全球公司之间无任何法律关系, 但斯凯澜公司在提取涉案货物时提交了涉案提单的复印件并在背面盖章, 因此涉案提单能够作为双方当事人之间海上货物运输合同的证明, 双方成立海上货物运输合同关系。斯凯澜公司作为提单记载的收货人以及实际向

全球公司提取货物的人,应当在提货时依法提交正本提单,斯凯澜公司凭保函和提单复印件提货时承诺承担因无正本提单放货产生的一切责任、经济损失,应当在全球公司受到相应损失时承担赔偿责任。全球公司提交的证据表明其向托运人赔偿了涉案货物贸易余款的损失并收回了正本提单,斯凯澜公司应予赔偿,逾期赔偿应当偿还利息。斯凯澜公司以货物存在严重质量问题的贸易合同抗辩拒绝承担运输合同保函所承诺的赔偿责任,不能成立。关于损失金额,承运人因无正本提单交付货物造成的正本提单持有人损失的赔偿额,应当按照货物装船时的价值加运费和保险费计算。涉案货物出口报关单记载的价格与用于结算的商业发票不一致,应当按照实际买方应支付的货款额确定,即商业发票记载的 CNF 价格 30913.38 美元。扣减斯凯澜公司已预付的货款 11214 美元后,贸易合同未付余款为 19699.38 美元。全球公司经与托运人协商实际赔付了 19681.46 美元,应属合理。全球公司主张的美元兑人民币的折算汇率为 1: 6.5,低于赔付当日 2011 年 5 月 12 日中国人民银行公布的汇率中间价,予以支持。全球公司请求的律师费缺乏事实 and 法律依据,不予支持。

斯凯澜公司不服一审判决,提起上诉,请求将本案发回重审或予以改判。主要理由:(一)原审判决认定事实错误。1、涉案货物的交接事宜发生在斯凯澜公司和青岛思锐物流公司之间,全球公司并非涉案货物的承运人。2、斯凯澜公司和 HUTHADA 公司存在买卖合同,全球公司并非涉案货物的权利义务人,不具有诉权。3、涉案货物的诸多事项均未达到合同要求,全球公司按提单价值赔偿正本提单持有人的损失缺乏相关证据支持,全球公司行使代位权不符合相关法律规定。(二)原审程序不合法。1、斯凯澜公司自 HUTHADA 公司购货,从青岛思锐物流公司提货,为查清案件事实,本案应追加上述两公司参加诉讼。2、原

审判决认定斯凯澜公司“以货物存在严重质量问题的贸易合同抗辩拒绝承担运输合同保函所承诺的赔偿责任，不能成立。”但未提出相应的法律依据。3、原审法院在斯凯澜公司对管辖裁定不服期间采取了保全措施，剥夺了斯凯澜公司的相应诉讼权利。4、全球公司在原审中提交的起诉状没有全球公司印章及法人签字，不能表明原审诉讼是否是全球公司的真实意思表示，原审判决对此事实没有查清。5、全球公司在原审中提交的证据的中文译文中有诸多内容与原文不一致。（三）原审判决在管辖权、代位求偿权及利息损失的认定方面存在错误。

全球公司答辩称，涉案货物到达天津新港后，斯凯澜公司在没有取得正本提单的情况下，以出具保函、在提单后背书的方式提取货物，对此，斯凯澜公司应承担赔偿责任，斯凯澜公司和 HUTHADA 公司之间的买卖合同与本案无关。原审审理程序合法，认定事实清楚，适用法律正确，应驳回斯凯澜公司的上诉请求。

二审期间，斯凯澜公司补充提交两份证据。证据 1、打印的英文版网上聊天记录，证明涉案货物是用废品加工的，如果货物有问题，斯凯澜公司也可以向货运公司主张损失。证据 2、SGS 检验报告，证明涉案货物质量不合格。斯凯澜公司提供的上述两份证据均为英文版本，没有中文翻译件。

全球公司质证认为，对证据 1 的真实性不予认可，且该证据与本案无关。对证据 2 的真实性不予认可，本案是承运人赔偿后的追偿纠纷，与买卖合同无关。

二审法院综合分析当事人举证、质证意见后认为，斯凯澜公司补充提交的证据 1 网上聊天记录为英文版本，没有中文翻译。证据 2 英文版 SGS 检验报告，为斯凯澜公司在原审中提供的英文版 SGS 检验报告的原件。上述两份证据均没有中文译本，不符合《最高人民法院关于民事诉讼证据的若干规定》第十二条的规定。上述证据不能作为认定案件事实的依据。

二审法院经审理查明, 原审判决查明的事实属实, 予以确认。

本案为海上货物运输合同纠纷。全球公司系越南社会主义共和国企业, 故本案属于涉外案件, 应依照《中华人民共和国海商法》第十四章涉外关系的法律适用确定准据法。斯凯澜公司与全球公司未选择合同适用的法律, 根据《中华人民共和国海商法》第二百六十九条“合同当事人可以选择合同适用的法律, 法律另有规定的除外。合同当事人没有选择的, 适用与合同有最密切联系的国家的法律”的规定, 本案应适用与合同有最密切联系的国家的法律。由于涉案提单载明的卸货港为中国新港, 且收货人斯凯澜公司的住所地亦为中国, 因此, 本案应以中华人民共和国法律为准据法。

全球公司收取货物并签发涉案提单, 系涉案货物的承运人, 斯凯澜公司系提单记载的记名收货人。《中华人民共和国海商法》第七十一条规定, 提单是承运人据以交付货物的单证。因此, 全球公司作为承运人负有凭其签发的正本提单交付货物的义务, 斯凯澜公司作为记名收货人应凭正本提单提取货物。但在实际履行中, 全球公司在斯凯澜公司未提交正本提单, 仅提交斯凯澜公司盖章的提单复印件及进口换单保函的情况下交付货物, 违反了凭正本提单交付货物的基本原则, 由此给正本提单持有人造成的损失应承担违约责任。该责任应当按照货物装船时的价值加运费和保险费计算。全球公司提交的协议书、收据等证据能够证明其已向正本提单持有人赔偿了 19681.46 美元损失, 本院予以确认。

斯凯澜公司作为记名收货人, 在提货时未提交正本提单, 而是凭盖有其公章的提单复印件及换单保函提取货物。其提交的换单保函中承诺因无正本提单放货产生的一切责任、经济损失均由其承担, 因此在全球公司向正本提单持有人进行赔偿并收回正本提单后, 斯凯澜公司应当赔偿全球公司因无正本提单放货造成的

损失 19681.46 美元。斯凯澜公司以涉案货物诸多事项未达买卖合同要求为由, 对抗其在换单保函中的承诺, 无事实与法律依据, 不予支持。

斯凯澜公司主张全球公司的起诉状未加盖公司印章, 对其真实性提出质疑。本院认为, 全球公司的起诉状是由其委托代理人赵存寿律师签名的。在全球公司向原审法院提交的经公证、认证的授权书中, 明确载明全球公司委托赵存寿律师办理与斯凯澜公司的诉讼问题, 委托范围包括同意起诉、代表公司准备法律公文、法院资料, 参加及处理法院的诉讼问题或其他有关法律的手续等内容。因此赵存寿律师在起诉状上签名属于全球公司的授权范围, 该起诉状应认定为全球公司的真实意思表示, 斯凯澜的该项主张与事实不符, 不予支持。

来源: <http://www.ccmt.org.cn/shownews.php?id=10710>

资讯选编 INFORMATION SELECTION

Does delay justify withholding payment for freight and charges?

by Gil Nadel, Gilad Paz (Gil Nadel Law Office)

The Stainalloy/Tele Tegelen case

The magistrates court of Haifa has recently decided to accept the lawsuit of a ground carrier vs. a company of Customs agents, for failure to pay shipment expenses. The defendants did not deny having ordered the shipment but they claimed the shipment had arrived a few hours in delay, which justifies withholding payment for it. The court overruled this claim and accepted the entire lawsuit.

The case and the claims made by the parties

A company which provides ground carrier services, sued a Customs agent for failure to pay a total of NIS 2,000 for a shipment that had been made from Ashdod Port to a factory in the Misgav industrial zone.

The Customs agent claimed the shipment had arrived to its destination at six p.m., instead of at three p.m. as the parties had agreed. The agent furthermore claimed that this delay warranted a refusal to pay for the shipment.

It was discovered that the delay was a result of the shipment being collected late, as well as the fact that the truck had another delivery to make in the same area. The Customs agent claimed that this was a complete breach of the agreement made between the parties, thereby warranting a failure to pay for the shipment.

Since the lawsuit was submitted as a summary procedure, the defendants did not automatically have the right to submit a statement of defense. Instead, they were required to request permission to defend themselves.

The rule determined by the verdict was that the defendants must be permitted to defend themselves in this proceeding, provided they had some sort of defense claim, however insubstantial, and as long as it's not a fictitious defense.

The Customs agent further claimed that he agreed to pay for a regular shipment and not for a special one.

The court's ruling

The court ruled that the Customs agent's claim that time was of the utmost importance in this shipment- is not corroborated by documents. In other words, it was not proven that the Customs agent had indicated in the work order that it was important for the shipment to arrive within a certain amount of hours.

The court noted that the shipment had been supplied, and even on the same day, and so there is no conflict, and yet the Customs agent decided to withhold payment for the

shipment. Furthermore, it was noted that the Customs agent had charged a third party (his client) with shipping expenses.

The court determined that the Customs agent had not proven the difference between the fee for a regular shipment as opposed to a special shipment, and therefore, this claim must be rejected.

In the end the court decided that the Customs agent's defense claim is insubstantial and unconvincing, and constitutes a fictitious defense, whereby the lawsuit was accepted in its entirety.

Ref: Summary procedure (magistrates court of Haifa) 43273-12-10. Registrar Ephraim Chizik, decision of June 18, 2012, party representatives were not mentioned.

Notes:

In this case the court made an implied criticism of the Customs agent in light of the fact that the shipment was in fact supplied and on the same day, and yet the Customs agent did not pay for this service, not even in part.

It is certainly possible that should the Customs agent have made even a part of the payment to the ground carrier, and then defended himself in court regarding the rest of the sum which he claims to be exempt from paying due to the delay, the court would have permitted him to defend himself in this lawsuit.

November 2, 2012

来源: http://www.forwarderlaw.com/library/view.php?article_id=852

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