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新法速递 NEW LAWS AND REGULATIONS WATCH

国务院发布《船舶工业加快结构调整促进转型升级实施方案(2013-2015年)》

The State Council Promulgates Implementation Plans on Accelerating Structural Adjustment and Promoting Transformation and Upgrading of the Shipbuilding Industry (2013-2015)

2013 年 7 月 31 日,国务院发布《船舶工业加快结构调整促进转型升级实施方案(2013-2015 年)》(《方案》)。

《方案》明确了今后3年船舶工业结构调整和转型升级的主要任务:一是加快科技创新,实施创新驱动。二是提高关键配套设备和材料制造水平。三是调整优化船舶产业生产力布局。四是改善需求结构,加快高端产品发展。五是稳定国际市场份额,拓展对外发展新空间。六是推进军民融合发展。七是加强企业管理和行业服务。

On July 31, 2013, the State Council promulgated Implementation Plans on Accelerating Structural Adjustment and Promoting Transformation and Upgrading of the Shipbuilding Industry (2013-2015) (the "Plan").

The "Plan" clarifies the main tasks of structural adjustment,

transformation and upgrading of the shipbuilding industry in the next

three years: The first is to speed up scientific and technological

innovation and implement drive by innovation. The second is to improve

the manufacturing level of key equipment and materials. The third is to

adjust and optimize the distribution of productive forces of shipbuilding

industry. The fourth is to improve the demanded structure to accelerate

the development of high-end products. The fifth is to stabilize

international market share and develop new space of foreign

development. The sixth is to promote the integrated development of

soldiers and civilians. The seventh is to strengthen enterprise

management and service of the industry.

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

人力资源社会保障部发布《劳务派遣若干规定(征求意见稿)》

Ministry of Human Resources and Social Security Issues Several

Provisions on Labor Dispatch (Draft for Comments)

为了贯彻《全国人大常委会关于修改〈中华人民共和国劳动合同

法〉的决定》,进一步规范劳务派遣,2013年8月7日,人力资源社

会保障部发布《劳务派遣若干规定(征求意见稿)》(《规定》),公开

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征求意见。

《规定》的第七条至第二十八条规定了劳动合同期限、协商订立

无固定期限劳动合同、试用期、同工同酬、劳动合同解除、经济补偿

以及劳务派遣单位与用工单位的义务等相关内容。

In order to implement the Decision of the Standing Committee of the

National People's Congress on the Revision of the Labor Contract Law of

the People's Republic of China, and further standardize labor dispatch,

the Ministry of Human Resources and Social Security of the People's

Republic of China (MOHRSS) issued the Several Provisions on Labor

Dispatch (Draft for Comments) (the "Provisions") on August 7, 2013, to

seek public comments until September 7, 2013.

Article 7 to Article 28 of the Provisions provide for the relevant contents

such as the term of a labor contract, negotiation and conclusion of a

unfixed-term labor contract, probation period, equal pay for equal work,

termination of a labor contract, economic compensation and obligations

of labor dispatching units and employing units.

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

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两部门联合发布《关于停止执行民航国际航班使用进口保税航空燃油 政策的通知》

Two Departments Jointly Release Circular on Ceasing Implementing Policy Relating to the Use of Imported Bonded Jet Fuel in International Flights of Civil Aviation

随着交通运输业营业税改征增值税改革在全国范围内实施, 航空 公司购进航空燃油所含的增值税将允许抵扣。经国务院批准,财政部、 国家税务总局联合发布《关于停止执行民航国际航班使用进口保税航 空燃油政策的通知》(《通知》)。

根据《通知》,自2013年8月1日起,对中国航空油料有限责任 公司在北京首都国际机场、广州新白云国际机场、上海虹桥机场等 11 个机场设立的航空油料保税仓库,销售给民航国际航班的进口保 税航空燃油恢复征收增值税,原免征增值税的政策停止执行。

Along with the nationwide implementation of the reform on collection of value-added tax ("VAT") in lieu of business tax in transportation industry, VAT on the jet fuel purchased by airline companies will be offset. Upon approval by the State Council, the Ministry of Finance and the State Administration of Taxation jointly released the Circular on Ceasing Implementing Policy Relating to the Use of Imported Bonded Jet Fuel in International Flights of Civil Aviation (the "Circular").

According to the Circular, from August 1, 2013, VAT will resume on imported bonded jet fuel sold to international flights of civil aviation from the bonded storages for jet fuel established by China National Aviation Fuel Corporation Limited in 11 airports including Beijing Capital International Airport, Guangzhou Baiyun International Airport and Shanghai Hongqiao International Airport, and the original VAT exemption policy will cease.

Source: www.mof.gov.cn

国务院发布《国务院关于改革铁路投融资体制加快推进铁路建设的意 见》

State Council Releases Opinions of the State Council on Reforming Railway Investment and Financing Systems and Accelerating Railway Construction

2013 年 8 月 9 日, 国务院发布《国务院关于改革铁路投融资体 制加快推进铁路建设的意见》(《意见》)。

《意见》要求,推进铁路投融资体制改革,多方式多渠道筹集建 设资金;不断完善铁路运价机制,稳步理顺铁路价格关系;建立铁路 公益性、政策性运输补贴的制度安排,为社会资本进入铁路创造条件:

加大力度盘活铁路用地资源,鼓励土地综合开发利用;强化企业经营 管理,努力提高资产收益水平;加快项目前期工作,形成铁路建设合 力。

On August 9, 2013, the State Council released the Opinions of the State Council on Reforming Railway Investment and Financing Systems and Accelerating Railway Construction (the "Opinions").

According to the Opinions, efforts shall be made to push forward the reform of railway investment and financing systems to raise construction capitals through multiple methods and channels; to constantly improve the price mechanism for railway transportation to steadily straighten out railway transportation price relationships; to make the institutional arrangement for subsidizing non-profit or policy-based transportation to create conditions for the entry of social capital in the railway sector; to increase more support on unleashing the resources of land for railway construction to encourage comprehensive development and utilization of land; to strengthen enterprise operation and management to improve assets incomes; and to accelerate the preliminary work of projects to form joint force for railway construction.

Source: www.gov.cn

多部门及省市政府联合公布《"十二五"期推进全国内河船型标准化工作实施方案》

Several Ministries and Governments of Several Provinces and Municipalities Jointly Announce Implementation Plan for Promoting National Standardization of Inland Ships During the 12th Five-Year Plan Period

2013 年 8 月 11 日,交通运输部、财政部和黑龙江省、上海市、 江苏省、浙江省、安徽省、福建省、江西省、山东省、河南省、湖北 省、湖南省、广东省、广西壮族自治区、重庆市、四川省、贵州省、 云南省、陕西省人民政府联合制定了《"十二五"期推进全国内河船 型标准化工作实施方案》(《方案》),自 2013 年 10 月 1 日起施行。

根据《方案》,"十二五"期内河船型标准化工作的重点是在《全国内河航道与港口布局规划》确定的"两横一纵两网十八线"范围内全面推进船型标准化工作。

On August 11, 2013, the Ministry of Transport, the Ministry of Finance and the People's Governments of the provinces, autonomous regions and municipalities of Heilongjiang, Shanghai, Jiangsu, Zhejiang, Anhui, Fujian, Jiangxi, Shandong, Henan, Hubei, Hunan, Guangdong, Guangxi,

美西航线 (W/C AMERICA SERVICE) 1061.91 (2013年9月6日)

Chongging, Sichuan, Guizhou, Yunnan and Shaanxi jointly formulated the

Implementation Plan for Promoting National Standardization of Inland

Ships During the 12th Five-Year Plan Period (the "Plan"), effective as of

October 1, 2013.

According to the Plan, the standardization of inland ships during the 12th

Five-Year Plan period focuses on comprehensively promoting the

standardization of inland ships within the range of "two horizontal river

systems, one vertical river system, two high-grade waterway systems and

eighteen high-grade waterways of main and tributary streams"

determined in the National Layout Planning for Inland Waterways and

Ports.

Source: www.moc.gov.cn

商务部、海关总署公布《取消的自动进口许可管理货物目录》

Ministry of Commerce and General Administration of Customs Announce

the Catalogue of Goods with Cancelled Automatic Import Licensing

Administration

2013年8月26日,商务部、海关总署联合发布公告,公布取消

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的自动进口许可管理货物目录。

根据公告,商务部、海关总署决定调整《2013 年自动进口许可 管理货物目录》,取消部分货物自动进口许可管理,自 2013 年 9 月 1

日起执行。

On August 26, 2013, the Ministry of Commerce (MOFCOM) and the

General Administration of Customs (GAC) jointly announced the

catalogue of goods with cancelled automotive import licensing

administration.

According to the announcement, the MOFCOM and the GAC decided to

adjust the Catalogue of Goods with Automatic Import Licensing

Administration of 2013, and to cancel the automotive import licensing

administration of some goods, effective as of September 1, 2013.

Source: www.mofcom.gov.cn

实时资讯 REAL-TIME INFORMATION

全国人大常委会通过《关于授权国务院在中国(上海)自由贸易试验 区暂时调整有关法律规定的行政审批的决定》

Standing Committee of National People's Congress Adopts Decision on Authorizing the State Council to Temporarily Adjust Administrative Examination and Approval of Relevant Laws in China (Shanghai) Free Trade Zone

2013年8月30日,第十二届全国人大常委会第四次会议通过《全国人大常委会关于授权国务院在中国(上海)自由贸易试验区暂时调整有关法律规定的行政审批的决定》(《决定》),自2013年10月1日起施行。

《决定》要求,授权国务院在上海外高桥保税区、上海外高桥保税物流园区、洋山保税港区和上海浦东机场综合保税区基础上设立的中国(上海)自由贸易试验区内,对国家规定实施准入特别管理措施之外的外商投资,暂时调整《中华人民共和国外资企业法》、《中华人民共和国中外合资经营企业法》和《中华人民共和国中外合作经营企业法》规定的有关行政审批。上述行政审批的调整在三年内试行,对实践证明可行的,应当修改完善有关法律;对实践证明不宜调整的,

恢复施行有关法律规定。

On August 30, 2013, the Decision of the Standing Committee of the National People's Congress on Authorizing the State Council to Temporarily Adjust Administrative Examination and Approval of Relevant Laws in China (Shanghai) Free Trade Zone (the "Decision") was adopted at the Fourth Session of the Standing Committee of the 12th National People's Congress, effective as of October 1, 2013.

According to the Decision, the State Council is authorized to temporarily adjust relevant administrative examination and approval of the Law of the People's Republic of China on Wholly Foreign-owned Enterprises, the Law of the People's Republic of China on Sino-Foreign Equity Joint Ventures, and the Law of the People's Republic of China on Sino-Foreign Cooperative Joint Ventures in respect of foreign investment that are not subject to special administrative measures for market access according to the provisions of the State within Shanghai Free Trade Zone established based on Shanghai Waigaogiao Free Trade Zone, Shanghai Waigaoqiao Bonded Logistics Park, Yangshan Free Trade Port Area and Shanghai Pudong Airport Free Trade Zone. The adjustment to the above administrative examination and approval is piloted in three years. If the practice shows that such pilot is feasible, relevant laws shall be revised

and improved; if the practice shows that the adjustment is inappropriate, the resumption of the implementation of the provisions of the relevant laws shall be made.

Source: www.npc.gov.cn

财政部、国家发展改革委联合发布《关于免收出口商品检验检疫费等 有关问题的通知》

Two Departments Jointly Release Circular on Exemption from Inspection and Quarantine Fees on Export Commodities and Other Issues

为落实《国务院办公厅关于促进进出口稳增长、调结构的若干意 见》(国办发[2013]83号),2013年8月15日,财政部、国家发展改 革委联合发布《关于免收出口商品检验检疫费等有关问题的通知》 (《通知》)。

《通知》规定,自 2013 年 8 月 1 日起至 2013 年 12 月 31 日,对 所有出境货物、运输工具、集装箱及其他法定检验检疫物免收出入境 检验检疫费(不包括对出境人员预防接种和体检收取的费用,以及企 事业单位承担与出境检验检疫有关的商业性自愿委托检测和鉴定、出 境检疫处理、动物免疫接种工作收取的费用)。

714.05

(2013年9月6日)

香港航线 (HONGKONG SERVICE)

In order to implement the Certain Opinions of the General Office of the

State Council on Promoting Steady Import and Export Growth and

Structural Adjustment (Guo Ban Fa [2013] No. 83), the Ministry of

Finance and the National Development and Reform Commission jointly

released the Circular on Issues Concerning Exemption from Inspection

and Quarantine Fees on Export Commodities (the "Circular") on August

15, 2013.

According to the Circular, all the outward goods, means of transportation,

containers and other statutory inspection and quarantine objects are

exempt from any entry-exit inspection and quarantine fees (excluding

the fees on preventive inoculation and physical examination of outward

personnel, as well as the fees on commercially and voluntarily authorized

and examination, exit quarantine treatment and

immunization relating to exit inspection and quarantine which are paid

by enterprises and public institutions) from August 1, 2013 to December

31, 2013.

Source: www.mof.gov.cn

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交通运输部水运局发布《沿海港口码头靠泊安全管理办法》(征求意见稿)

Waterway Transportation Bureau of Ministry of Transport Releases

Administrative Measures for Berthing Safety in Wharfs of Coastal

Harbors (Draft for Comments)

2013年8月21日,交通运输部水运局发布《沿海港口码头靠泊安全管理办法》(征求意见稿)(《办法》)。

《办法》仅适用于货运船舶停靠沿海港口码头泊位。《办法》中 靠泊等级是指港口码头泊位安全停靠最大船舶吨级。交通运输部负责 指导全国港口码头安全靠泊管理工作。省级港口行政管理部门负责辖 区港口码头安全靠泊管理工作。港口所在地港口行政管理部门负责港 口码头安全靠泊监管工作。

On August 21, 2013, the Waterway Transportation Bureau of the Ministry of Transport (MOT) released the Administrative Measures for Berthing Safety in Wharfs of Coastal Harbors (Draft for Comments) (the "Measures").

The Measures only apply to the berthing of cargo ships at the wharfs of coastal harbors. In the Measures, berthing level refers to the maximum tonner which can safely berth at the wharf of a coastal harbor. The MOT

is responsible for directing the administration of safe berthing at the wharfs of coastal harbors nationwide. The port administrative departments at the province level are responsible for the administration of safe berthing at the wharfs of coastal harbors within their jurisdiction. The port administrative department at the place where a port is located is responsible for the supervision of safe berth of the port.

Source: www.moc.gov.cn

海关总署发布《关于对褐煤等商品进口关税税率进行调整的公告》

General Administration of Customs Releases Announcement on Adjusting Import Duty Rates of Lignite and Other Commodities

2013年8月29日,海关总署发布《关于对褐煤等商品进口关税 税率进行调整的公告》(《公告》)。

《公告》规定,取消褐煤(税号: 27021000、27022000)的零进 口暂定税率,恢复实施3%的最惠国税率。取消空载重量在25吨及以 上但不超过 45 吨的客运飞机(税号: 88024010)的 1%进口暂定税率, 恢复实施 5%的最惠国税率。自 2013 年 8 月 30 日起,申报进口税号 27021000 和 27022000 项下的褐煤, 其商品编号仍分别填报为 2702100000、2702200000: 申报进口税号 88024010 项下的飞机, 商

品编号一律填报为 8802401000。

On August 29, 2013, the General Administration of Customs (GAC)

released the Announcement on Adjusting Import Duty Rates of Lignite

and Other Commodities (the "Announcement").

According to the Announcement, the provisional zero import duty rate of

lignite (tariff codes: 27021000 and 27022000) is cancelled, and the

implementation of the most-favored-nation rates of duty of 3% is

resumed. The provisional import duty rate of 1% of passenger, (tariff

codes: 88024010) with the empty weight of not less than 25 tons and

not more than 45 tons is cancelled, and the implementation of the

most-favored-nation rates of duty of 5% is resumed. From August 30,

2013, when declaring lignite under the tariff codes of 27021000 and

27022000, its commodity codes shall be 2702100000 and 2702200000

respectively; and, when declaring aircrafts under the tariff code of

88024010, the commodity code thereof shall be 8802401000.

Source: www.customs.gov.cn

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案例分析 CASE STUDY

海上货物运输合同承运人的认定

Identification of carrier in a contract of carriage of goods by sea

--中基宁波集团股份有限公司诉敏航公司、海联国际船务有限公司海 上货物运输合同案

原告:中基宁波集团股份有限公司(以下简称"中基公司")

被告: 敏航公司 (AGILITY SHIPPING COMPANY)

被告:海联国际船务有限公司(SEALINK SHIPPING COMPANY, LIMITED) (以下简称"海联公司")

【基本案情】

2010年10月21日,原告(买方)与 CHINA HUA DONG GORP LIMITED(鑫诚有限公司)(卖方)在上海就购买70000湿吨(卖方选择+/-10%)铁矿砂签订 NBWXIO20101021号买卖合同,约定:装货港为波斯湾,目的港为中国基本港(包括青岛港和日照港),装运时间不迟于2010年11月30日,价格条件为 CFR 中国主要港口。 2010年10月29日,原告申请中国银行宁波分行开立了以鑫诚有限公司为受益人的不可撤销的 LC92A10C1565号跟单信用证,货物单价为每干吨108美元(基于含铁比例达到60%),信用证金额为756万美元。鑫

诚有限公司在 2010 年 11 月 15 日临时发票中注明: 货物共 83972.099 吨,扣除水分含量 567.651 吨后,发票重量为 83404.448 干吨,100%CFR 中国基本港价格为 8917603.58 美元, 98%货物价值为 8739251.51 美 元。2011年1月28日,原告在信用证项下向鑫诚有限公司支付货款 8739251.51 美元, 并支付银行利息 37698.95 美元。

1523.89

该批铁矿砂由马绍尔群岛籍"海敏"轮(M.V SEA AGILITY)承运, 被告敏航公司为"海敏"轮船舶所有人。"海敏"轮于1987年在日本 建造,净吨位 18462,总吨位 51087,船籍港为马绍尔群岛共和国 Majuro港。

2010年11月11日,货物在波斯湾港装上"海敏"轮,船舶代 理 EASTERN SEA PASHA(ESP) SHIPPING CO.代表船长施礼岗签发了 01 号 清洁指示提单。提单记载: 托运人 CHINA HUA DONG GORP LIMITED(鑫 诚有限公司),收货人凭指示,通知方凭指示,货物为 83972.099 湿吨 散装铁矿砂,卸货港中国基本港,运费预付。提单背面首要条款约定, 如起运港所在国参加了1924年海牙规则,则适用海牙规则;如起运 港所在国未加入该规则(公约),则适用目的港国家的法律。原告经 托运人鑫诚有限公司背书受让了该提单。

2010 年 11 月 18 日, "海敏" 轮在航行过程中中轴断裂。2010 年 12 月 1 日及 2011 年 1 月 29 日,被告敏航公司与海马拖航国际贸 易有限公司(Seahorse Towage International Pte Ltd.)在新加坡分别签 订国际海上拖航合同及附约,约定由海马拖航国际贸易有限公司提供 "SALVISCOUNT"轮将"海敏"轮由斯里兰卡科伦坡安全锚地拖带至

中国青岛安全锚地。

被告敏航公司于 2010 年 12 月 3 日发出共同海损声明,要求货方 在船舶抵达目的港前提供共损协议书及担保函,并载明:在提供令船 方满意的共同海损担保之前、货物将不会被交付收货人。

原告提供被告敏航公司于 2011 年 2 月 1 日发出的留置货物通知 传真件, 载明: 为保护我方权益, 船东将在收到共损担保前在船留置 货物。

2011年2月2日1600时, "SALVISCOUNT" 轮船长在青岛港3号 锚地将安全锚泊的"海敏"轮移交给"海敏"轮船长。被告敏航公司 确认已向海马拖航国际贸易有限公司支付拖航费用90万美元。

2011 年 **3** 月 **8** 日,应原告的诉前保全申请,本院作出(**2011**) 青海法保字第8号民事裁定书,对"海敏"轮予以扣押。

2011年5月4日,在本院的主持下,三方当事人各派代表签署 《"SEA AGILITY"轮靠泊备忘录》,确定以下事项: 1、在船舶靠泊前, 被告海联公司同意退还 2011 年 3 月 16 日接受的 2011 年 3 月 14 日签 发的共损担保函及共损协议书。原告同意在被告海联公司退还前述担 保函和协议书的同时,向被告敏航公司提供二被告共同认可的有公章 和签字/保单章,并填写地址和有效联系方式的共损协议书及共损担 保函,否则,本备忘录无效。各方同意的交换新、旧担保函及协议书 的地点为夏礼文律师事务所上海办事处。2、原告同意为该轮靠泊垫 付所需费用,具体数额依实际所需,凭相关费用单据支付。原告同意 在各方签署本备忘录的 24 小时内安排划付所需款项付至被告海联公

司船舶代理人青岛远大船务有限公司账户。3、各方同意在本备忘录 签订后,立即协助安排"海敏"轮靠泊卸货;船舶靠泊卸货后,被告 海联公司将提单 NO.1 项下货物交付原告。4、原告保证上述垫付的靠 泊费用在原告货物应当分摊的共损费用中抵扣。同日,应原告的申请, 本院作出(2011)青海法海商初字第73号解除扣押船舶命令,解除 了对"海敏"轮的扣押。

2011年5月5日、5月6日,张家港保税区降龙投资有限公司受 原告委托,分别向青岛远大船务有限公司垫付"海敏"轮靠泊费用人 民币 280 万元、200 万元。

"海敏"轮于 2011 年 5 月 10 日开始靠港卸货, 2011 年 5 月 12 日卸货完毕并交付原告。

2011年5月26日,中华人民共和国黄岛出入境检验检疫局做出 370200111029597 号重量证书,载明:通过核查船舶水尺和卸货前后 与货物数量有关的因素量,并根据经过必要修正的载重标尺,我们计 算出卸下的货物的重量是83472公吨,扣除卸货时货物含水量0.78%, 折算干吨重量 82820.9 公吨。

2011 年 6 月 1 日, 中华人民共和国青岛海关出具 422720111277027428 号进口货物报关单,载明:货物毛重 83972099 千克,数量 83404448 千克,总价 8917603.58 美元。

宁波市永欣公证处公证书原件及所附光盘记载: 2011 年 1 月 31 日伊朗 61%磁粉矿港口现货车板价为人民币 1190-1210 元/湿吨,2011 年 2 月 9 日伊朗 61%磁粉矿港口现货车板价为人民币 1190-1210 元/

湿吨,2011年5月12日伊朗61%磁粉矿港口现货车板价为人民币1180-1200元/湿吨。

另查明: 2007 年 12 月 28 日,被告海联公司与上海远洋船舶管理有限公司签订船舶委托管理协议书,约定由上海远洋船舶管理有限公司管理"海敏"轮。2008 年 3 月 5 日,被告海联公司与上海远洋对外劳务有限公司在上海签订《船员雇佣协议书》,约定由上海远洋对外劳务有限公司派遣船员赴"海敏"轮工作。

2011年8月9日,"海敏"轮因另案当事人的申请被本院依法拍卖,原告在本院裁定强制拍卖船舶的公告期间,就本案相关债权进行了登记。

【案件焦点】

本案系在海上运输合同履行过程中产生的相关违约和侵权纠纷,存在不同的法律关系,其中包括海上货物运输合同项下短重争议、非法留置货物侵权损害赔偿及靠泊费用垫款争议。因本案所涉争议基于同一事实产生,故本院对本案分别依据不同的法律关系一并予以审理。争议焦点在于:一、海上货物运输合同项下短重争议项下:1、承运人的确定,2、货物短重责任的承担;二、非法留置货物侵权损害赔偿项下:1、留置行为人的确定,2、留置是否合法的问题,3、非法留置货物责任的承担;三、靠泊费用垫款应由哪一方返还。

【法院裁判要旨】

一,海上货物运输合同项下短重争议。

第一、承运人的确定。原告在庭审中主张被告敏航公司为涉案货物承运人,而被告敏航公司主张被告海联公司为承运人。本案相关事实表明,被告海联公司不仅委托上海远洋船舶管理有限公司管理"海敏"轮,而且委托上海远洋对外劳务有限公司派遣船员赴"海敏"轮工作,并指定青岛远大船务有限公司为"海敏"轮本航次在青岛港的船舶代理人。据此,本院认为,被告敏航公司的该项主张成立,被告海联公司是该轮的船舶经营人,应被认定为涉案货物的承运人。

第二、货物短重责任的承担。原告经托运人鑫诚有限公司背书受 让了涉案提单,成为提单合法持有人,是收货人,其与被告海联公司 之间构成海上货物运输合同关系。被告海联公司作为承运人应当按照 提单记载的数量向收货人交付货物,并对在承运人责任期间内发生的 货物短少承担违约责任。涉案提单记载货物总重量为83972.099公吨, 而根据黄岛出入境检验检疫局出具的重量证书: 货物到港后经水尺计 重总重量为83472公吨,则涉案货物短少500.099公吨。中华人民共 和国进出口商品检验行业标准《进出口商品重量鉴定规程-水尺计重》 规定: 水尺计重的允许误差可以在 5%之内, 因此, 扣除 5%的误差 后, 涉案货物短少 80.239 公吨, 该部分货物装船时的价值按每公吨 106.2 美元计算为 8521.38 美元 (按 2010 年 11 月 11 日 1 美元对人民 币汇率中间价 6.6242 元折合人民币 56447.33 元)。综上,被告海联公 司未能依据提单记载的数量交付货物,应赔偿原告货物短重损失人民 币 56447.33 元。

二、非法留置货物侵权损害赔偿。

第一、留置行为人的确定。原告主张被告敏航公司留置涉案货物,但被告敏航公司对此予以否认。本院认为,被告海联公司既没有宣告共同海损要求原告提供共损担保,也没有证据表明其宣示对货物行使了留置权;而被告敏航公司在支付90万美元的拖航费用后,于2010年12月3日发出共同海损声明,不仅要求原告提供共损担保,而且声明中明确载明:"在提供令船方满意的共同海损担保之前,货物将不会被交付收货人",另结合原告提交的证据8留置通知传真件,足以认定被告敏航公司对涉案货物进行了留置。

第二、留置是否合法的问题。《中华人民共和国海商法》第八十七条规定:"应当向承运人支付的运费、共同海损分摊、滞期费和承运人为货物垫付的必要费用以及应当向承运人支付的其他费用没有付清,又没有提供适当担保的,承运人可以在合理的限度内留置其货物。"被告敏航公司并非本案货物的承运人,其无权行使承运人的留置权,因此,被告敏航公司对涉案货物的留置是非法留置。

第三、非法留置货物责任的承担。被告敏航公司非法留置涉案货物,已构成侵权,对于原告由此产生的货款利息损失、货物市场行情下跌损失应承担赔偿责任;同时,被告海联公司作为承运人,未依照海上货物运输合同向原告交付货物,应认定其实际实施了协助被告敏航公司非法留置船载货物的行为,其与被告敏航公司已构成共同侵权,应当对原告的损失承担连带赔偿责任。原告已在信用证项下向鑫诚有限公司支付货款 8739251.51 美元(按 2011 年 2 月 9 日 1 美元对人民

币汇率中间价 6.585 元折合人民币 57547971.19 元), 自 2011 年 2 月 2日"海敏"轮抵达青岛港起至2011年5月12日涉案货物交付原告 止共 99 天, 因非法留置产生的货款利息损失按当时金融机构一年期 贷款基准利率 6.06%计算为人民币 945899.45 元:根据宁波市永欣公 证处公证书原件及所附光盘的记载,2011年2月2日伊朗61%磁粉 矿港口现货车板均价为人民币 1200 元/湿吨, 2011 年 5 月 12 日伊朗 61%磁粉矿港口现货车板均价为人民币 1190 元/湿吨, 非法留置期间 产生的货物市场行情下跌损失按货物到港重量 83472 公吨、每吨下降 10 元计算为人民币 834720 元。综上,被告敏航公司、被告海联公司 应连带赔偿原告货款利息损失人民币 945899.45 元、货物市场行情下 跌损失人民币 834720 元。另外,《中华人民共和国海商法》第二十二 条规定:"下列各项海事请求具有船舶优先权:……(五)船舶在营 运中因侵权行为产生的财产赔偿请求。"因此,原告主张的货款利息 损失、货物市场行情下跌损失的给付请求具有船舶优先权,可自"海 敏"轮拍卖价款中优先受偿。

三、靠泊费用垫款争议。

三方当事人于 2011 年 5 月 4 日签署《"SEA AGILITY"轮靠泊备忘录》后,原告已委托张家港保税区隆龙投资有限公司向青岛远大船务有限公司垫付"海敏"轮靠泊费用人民币 480 万元。本院认为,被告海联公司作为承运人和船舶经营人,应当负责将涉案货物从波斯湾运至中国青岛港,"海敏"轮在青岛港靠泊的费用也应由其承担。被告海联公司应当支付的靠泊费用由原告垫付,双方之间已实际构成了借

款合同法律关系,原告主张由被告海联公司返还该费用,理由正当,本院予以支持。青岛远大船务有限公司作为被告海联公司的船舶代理人代为收取了该款项,对于如何对外支付及费用是否合理,属于双方船舶代理合同的履行事宜,与本案争议无关。原告垫付费用的行为与被告敏航公司并无法律上的利害关系,原告对被告敏航公司的该项诉讼请求不能成立,本院不予支持。至于原告认为其为"海敏"轮靠泊垫付的该费用应当从船舶拍卖所得价款中先行拨付,因不属于《中华人民共和国海商法》第二十四条规定的相关费用,因此,对于该主张本院不予支持。

经本院审判委员会研究决定,并依照《中华人民共和国民事诉讼 法》第一百三十条、《中华人民共和国海事诉讼特别程序法》第一百 一十一条、《中华人民共和国海商法》第四十六条、第五十五条、第 七十一条、七十七条、七十八条、《中华人民共和国侵权责任法》第 六条、第八条、《中华人民共和国合同法》第二百零六条的规定,判 决如下:

- 一、被告海联国际船务有限公司赔偿原告中基宁波集团股份有限公司货物短重损失人民币 56447.33 元:
- 二、被告敏航公司、被告海联国际船务有限公司连带赔偿原告中基宁波集团股份有限公司货款利息损失人民币 945899.45 元;
- 三、被告敏航公司、被告海联国际船务有限公司连带赔偿原告中基宁波集团股份有限公司货物市场行情下跌损失人民币834720元:

四、被告海联国际船务有限公司返还原告中基宁波集团股份有限

公司为"海敏"轮靠泊垫付的费用人民币 480 万元:

五、驳回原告中基宁波集团股份有限公司的其他诉讼请求。

【法官后语】

本案的难点在于承运人的确定。

本案提单由船舶代理公司代表船长施礼岗签发,从表面证据不能确定承运人身份,且原告在庭审中主张被告敏航公司为涉案货物承运人,而被告敏航公司主张被告海联公司为承运人,当事人分歧较大,因此有必要通过相关的事实予以认定。本案中,被告敏航公司仅在"海敏"轮中轴断裂时与拖航公司签订国际海上拖航合同及附约,并未实际参与海上货物运输合同的履行,因此其虽然处于船舶所有权人的地位,但并非船舶的实际经营人。而结合被告海联公司委托上海远洋船舶管理有限公司管理 "海敏"轮,委托上海远洋对外劳务有限公司派遣船员赴"海敏"轮工作,并指定青岛远大船务有限公司为"海敏"轮本航次在青岛港的船舶代理人等事实,可以认定被告海联公司为船舶的实际经营人。

船舶经营人的概念,理论界存在不同观点。一种观点认为是指船舶所有人或光船承租人,或经正式转让承担所有人或光船承租人责任的企业法人,包括受船舶所有人委托经营管理其船舶的企业法人;另一种观点认为是指承运人、多式联运人、经纪人等;还有一种观点是指在航运实务上包括以自有船舶经营航运业务者、计时、计程佣船人、船舶租赁人及其他经营航运业务者。但不论适用哪一种观点,法律意

义上的船舶经营人均具有船舶占有、使用、收益及有条件的处分权能。因此,被告海联公司作为"海敏"轮的船舶经营人,足以认定为涉案货物运输合同的承运人。

一审合议庭组成人员:宋俊文/李华/郭俊莉 案例编写人:李华

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资讯选编 INFORMATION SELECTION

Is a Marine Port entitled to collect ports' fee differences from a customs agent through a bank clearing system, after the cargo has been released to the importer?

by Roy Gilad (Grossman Singer Gilad & Co. Law Offices and Notary)

1083.21

A customs agent handles for his client (the importer) the release from customs of goods imported via the sea. The client, through the customs agent, pays the Tax Authorities the import taxes and pays the Port the port fees for those goods. Following payment, the goods are released and handed over to the importer and with that the business relation between the customs agent and his client comes to an end.

Payment by the customs agent is affected with the means of a bank clearing system, intended to make the goods releasing process more efficient.

At times, after the goods have been released, the Tax Authorities raise a claim that payment to it was lacking, since the value of the goods was actually higher than the value declared by the importer. If such claim is proven, the Tax Authorities are entitled to receive from the importer an additional payment, and the Port will be entitled also to demand the port fee differentials from the importer.

The Tax Authorities contact the importer and conduct the proceedings to clarify its claim that the latter paid insufficient import tax directly with the importer.

The question for discussion is whether the Marine Port is entitled, as opposed to the Tax Authorities, to avoid contacting the importer and instead, to "dig into" the

customs agent's bank account – despite the fact that all his activity is as a service provider to the importer, and in spite of the fact that his function as a customs agent ended upon release of the goods – and to collect directly from the Customs agent any sum which the Port deems appropriate as the balance of the port fees?

The Israeli Supreme Court debated this matter in two cases before it over the last year.

In accordance with the Israeli Ports Ordinance in force at the relevant period for both cases which were the subject matter of the judgements (preceding 2011), the definition of the "The Owner of Goods" included also the owner's agents, including a customs agent. The Ordinance imposed the duty to pay the balance of the fee, if and when it transpires that the fees were lacking, on an "Owner of Goods" as defined above.

The Supreme Court held that as a matter of principle, the duty to pay the balance of the fee applied to the customs agent even after the cargo had been released, provided that the demand was issued within a reasonable time.

In one case heard by the Supreme Court, the demand for payment of the fee difference was issued three years from the date the cargo was released. The Supreme Court held that such period was unreasonable and thus the port was not entitled, after such a time lapse, to collect the balance of the port fees from the customs agent.

In the second case heard by the Supreme Court, it held that the port was entitled to collect the fee difference from the customs agent. In that case, collection was effected within several months after the investigation into the importer commenced. It should be noted that the Supreme Court in this matter referred to the time lapse from the commencement of the investigation into the importer, and not the date on which the cargo was released (as it did in the first case described above).

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The Court held that once the duty of the customs agent to pay the balance of the port

fee was determined, and thus that the port authorities were entitled to such monies,

there was nothing to prevent the collection thereof through the bank clearing

arrangements with the customs agent, just like any other debt. Though, in

circumstances in which the customs agent acted in bona fides, and was not personally

involved in the deficient payment, it would be appropriate for notice to be sent prior

to the charging of the account, so as to afford the customs agent an opportunity to act

as he deems fit vis-àvis the importer. However, failure to deliver the notice would not

affect the mere legality of the action to collect.

We note that in 2011, in a move which our firm accompanied, an amendment of the

Ports Ordinance was enacted, stipulating that a customs agent would be personally

liable for payment of port fees and imposts, only in the event that he aided the owner

of the goods in evading such payments.

Source: http://www.forwarderlaw.com/library/view.php?article_id=905

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