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目录

新法速递 REAL-TIME INFORMATION	2
国家海事局发布《关于加强船舶进出港许可业务代理诚信管理的通知》	2
《仓储业管理办法（征求意见稿）》公开征求意见	3
国际海事组织经修正的《1974 年国际海上人命安全公约》等多项修正案生效	4
财政部商务部等五部门发布《现代服务业综合试点工作绩效评价管理办法》	4
交通运输部就《水路粮食运输保障应急预案》等 3 个专项预案征求意见	5
海关总署公告 2013 年新增港澳享受零关税货物原产地标准表	6
财政部国税总局发布《关于交通运输业和部分现代服务业营业税改征增值税试点应税服务范围 围等若干税收政策的补充通知》	7
国务院印发《服务业发展“十二五”规划》	8
实时资讯 REAL-TIME INFORMATION	10
马士基提价应对东海岸罢工	10
中远航运成立美洲欧洲分公司	10
11 月份全球船舶新接订单量回升	11
顶级远洋教学实习船投用可同时供 160 名学生海上实习	12
中国最大 5800 吨级渔政船入列将赴东海护渔维权	14
案例分析 CASE STUDY	15
苏忠伟、杨克珍诉李日坤、杨克凤船舶共有纠纷案	15
资讯选编 INFORMATION SELECTION	21
COGSA can contractually kick in only after carrier takes custody	21

新法速递 REAL-TIME INFORMATION

国家海事局发布《关于加强船舶进出港许可业务代理诚信管理的通知》

MSA Promulgates the Circular on Strengthening the Credit Management for the Agency Business of Permits for the Arrival and Departure of Vessels

11 月 5 日, 国家海事局发布《中华人民共和国海事局关于加强船舶进出港许可业务代理诚信管理的通知》(《通知》), 要求各单位加强对从事船舶进出港许可业务代理人信息的掌握, 提高代理从业人员的业务素质, 强化日常监管。

《通知》请各单位参照《船舶进出港许可业务代理诚信管理工作指南》, 收集本辖区内从事船舶进出港许可业务代理人的信息, 对现有的代理人信息于 2012 年 12 月 31 日前录入到船舶动态管理系统或者其他海事业务信息系统, 建立数据库。同时将代理人名单按统一格式在本单位外网公布并及时更新。

On November 5, the Maritime Safety Administration ("MSA") promulgated the Circular on Strengthening the Credit Management for the Agency Business of Permits for the Arrival and Departure of Vessels, requiring the agents engaged in the business of vessel arrival and departure permits to strengthen the information management, to improve the professional qualities of the agents and reinforce routine supervision.

According to the Circular, authorities shall, with reference to the Guidelines of Credit Management for the Agency Business of Permits for Arrival and Departure of Vessels, collect the information of the agents engaging in the business of vessel arrival and departure permits in the respective jurisdiction, and enter the agent information at hand into the vessel dynamic management system or other maritime information system by December 31, 2012 to establish database. Meanwhile, the name list of agents shall be published in a uniform format and updated without delay on the external network of the authorities.

《仓储业管理办法 (征求意见稿)》公开征求意见

Public Comments Sought for the Administrative Measures for the Warehousing Industry (Draft for Comments)

11 月 14 日, 商务部发布了《〈仓储业管理办法 (征求意见稿)〉公开征求意见》, 现向社会公开征求意见, 截止日期为 2012 年 12 月 14 日。

意见稿规定, 仓储经营企业注册后 30 日内应向当地商务主管部门办理企业信息备案登记。提供仓储服务的企业, 应当对货主的商业信息承担保密义务, 保证物品在储存期间的安全, 保证物品不灭失、不短少、不损坏, 保证存储物品的账实相符、信息传输准确。提供仓库租赁服务的企业, 应当与承租人约定仓库租赁使用过程中的安全责任。

On November 14, the Ministry of Commerce ("MOFCOM") promulgated the Circular on Seeking Public Comments for the Administrative Measures for the Warehousing Industry (Draft for Comments). The MOFCOM is seeking public comments, and the closing date is on December 14, 2012.

According to the Draft for Comments, a warehousing enterprise shall file its enterprise information with its local competent commerce authority for record within 30 days after its registration. An enterprise providing warehousing services shall keep confidential of the commercial information for the consignor, ensure the safety of the goods during the warehousing without any loss, shortage or damage, and guaranty that the inventory of the stored goods is true and accurate. An enterprise providing warehouse leasing services shall agree with the lessee on the safety responsibility which incurs during the use of the leased warehouse.

国际海事组织经修正的《1974 年国际海上人命安全公约》等多项修正案生效

IMO's Several Amendments such as the Revised International Convention for the Safety of Life at Sea, 1974 Come into Force

11 月 15 日, 交通运输部发布交通运输部 2012 年 53 号公告, 发布国际海事组织经修正的《1974 年国际海上人命安全公约》等多项修正案。上述修正案已于 2012 年 7 月 1 日被视为默认接受, 并将于 2013 年 1 月 1 日生效, 对我国具有约束力。

我国是《安全公约》的缔约国, 在上述修正案通过后未提出任何反对意见, 因此修正案对我国具有约束力。现将修正案的中文本予以公告, 请遵照执行。

On November 15, the Ministry of Transport ("MOT") issued the Announcement ([2012] No. 53) to promulgate several amendments of the International Maritime Organization ("IMO"), such as the revised International Convention for the Safety of Life at Sea, 1974 (the "ICSLS"). The said amendments were deemed as being given tacit consent on July 1, 2012, and will come into force on January 1, 2013 and be binding upon China.

As a contracting party to the ICSLS, China has not proposed any counterview against the aforesaid Amendments since its adoption. Therefore, the Amendments shall have binding force on China. We hereby announce the Chinese versions of such amendments, and please implement them accordingly.

财政部商务部等五部门发布《现代服务业综合试点工作绩效评价管理办法》

Five Ministries including MOF and MOFCOM Promulgate the Administrative Measures for Comprehensive Performance Appraisal of the Pilot Program in the Modern Service Sector

2012 年 11 月 12 日, 财政部、商务部等五部门发布了《现代服务业综合试点工作绩效评价管理办法》(《办法》)。

《办法》明确, 现代服务业综合试点绩效评价采取量化打分方式, 绩效评价结果与中央财政支持资金安排直接挂钩。绩效评价实行 100 分制, 其中试点工作组织评价、试点项目建设评价、资金政策集成及创新评价、绩效目标达成评价各占 25 分。绩效评价可采用部门评价、委托第三方机构评价、委托专家评价等多种方法进行。

On November 12, 2012, the Ministry of Finance ("MOF"), the Ministry of Commerce ("MOFCOM") and other three ministries promulgated the Administrative Measures for Comprehensive Performance Appraisal of the Pilot Program in the Modern Service Sector (the "Measures").

The Measures specify that the performance appraisal of the comprehensive pilot program in the modern service sector will be graded by the quantitative method, and the results of performance appraisal will be linked directly with the support funds of the central finance. The performance appraisal will cover 100 points, among which the appraisal on the organization of the pilot program, the construction of the pilot project, the integration and innovation of the fund policies and the realization of the performance target will cover 25 points respectively. The performance appraisal can be conducted by the methods of appraisal by relevant authorities, by an entrusted third party institution and by the entrusted experts, etc.

[交通运输部就《水路粮食运输保障应急预案》等 3 个专项预案征求意见](#)

MOF Solicits Opinions on the Three Special Contingency Plans Including the Contingency Plan for Guaranteeing the Waterway Transportation of Grain

2012 年 11 月 30 日, 交通运输部发布了《水路粮食运输保障应急预案》、《水

路原油运输保障应急预案》、《水路交通非重点物资运输保障应急预案》等 3 个专项预案，现征求各单位意见。意见反馈的截止日期是 12 月 7 日。

On November 30, 2012, the Ministry of Transport ("MOF") distributed the Contingency Plan for Guaranteeing the Waterway Transportation of Grain, the Contingency Plan for Guaranteeing the Waterway Transportation of Crude Oil and the Contingency Plan for the Waterway Transportation of Non-key Materials to seek for comments and the closing date is on December 7, 2012.

海关总署公告 2013 年新增港澳享受零关税货物原产地标准表

General Administration of Customs Announces the Schedule on Standards of the Place of Origin of Newly-Added Goods Entitled to Zero Tariff Preference in Hong Kong and Macao in 2013

11 月 30 日，海关总署发布了《2013 年 1 月 1 日起新增香港享受零关税货物原产地标准表》和《2013 年 1 月 1 日起新增澳门享受零关税货物原产地标准表》。

该两表使用了简化的货物名称，其范围与 2012 年《中华人民共和国进出口税则》中相应税号的货品一致，自 2013 年 1 月 1 日起执行。

On November 30, the General Administration of Customs issued the Schedule on Standards of the Place of Origin of Newly-Added Goods Entitled to Zero Tariff Preference in Hong Kong from January 1, 2013 and the Schedule on Standards of the Place of Origin of Newly-Added Goods Entitled to Zero Tariff Preference in Macao from January 1, 2013.

Simplified names of goods are used in the two schedules; and the scope thereof is consistent with the goods of corresponding tariff codes under the Import and Export Tariff of the People's Republic of China in 2012. The schedules shall be effective as of January 1, 2013.

财政部国税总局发布《关于交通运输业和部分现代服务业营业税改征增值税试点应税服务范围等若干税收政策的补充通知》

MOF and SAT Promulgate the Supplementary Circular on the Taxable Services Scope and Several Other Tax Policies in the Pilot Collection of Value Added Tax in Lieu of Business Tax in Transportation Industry and Some Modern Services Industries

12 月 4 日，财政部、国税总局发布了《关于交通运输业和部分现代服务业营业税改征增值税试点应税服务范围等若干税收政策的补充通知》（《通知》），除第三条另有规定外，自 2012 年 12 月 1 日起执行。

《通知》明确了一系列有关税收政策，如建筑图纸审核服务、环境评估服务、医疗事故鉴定服务，按照“鉴证服务”征收增值税；代理记账服务按照“咨询服务”征收增值税等。

《通知》明确，营改增试点地区的试点纳税人提供的往返台湾、香港、澳门的交通运输服务以及在台湾、香港、澳门提供的交通运输服务，适用增值税零税率。

On December 4, the Ministry of Finance ("MOF") and the State Administration of Taxation ("SAT") promulgated the Supplementary Circular on the Taxable Services Scope and Several Other Tax Policies in the Pilot Collection of Value Added Tax in Lieu of Business Tax in Transportation Industry and Some Modern Services Industries (the "Circular"), effective as of December 1, 2012, unless other provided in Article 3 thereof.

The Circular specifies a series of relevant tax policies, for example, the value-added tax (VAT) shall be collected under the item "Assurance Services" for

construction drawings review services, environmental assessment services and medical malpractice appraisal services, and under the item "Consulting Services" for bookkeeping agent services.

According to the Circular, for the services of transportation to and fro, or within Taiwan, Hong Kong and Macao provided by pilot taxpayers of the area subject to the pilot collection of VAT in lieu of business tax, zero VAT rate shall apply.

国务院印发《服务业发展“十二五”规划》

State Council Prints and Distributes the 12th Five-Year Development Plan for the Service Sector

2012 年 12 月 1 日, 国务院印发《服务业发展“十二五”规划》。

《规划》提出, 要大力发展资本市场, 完善多层次资本市场体系, 推进建立全国性场外交易市场。加快发展债券市场, 完善大宗商品期货和金融期货的品种体系。充分发挥保险业的功能作用, 积极发展责任保险、信用保险, 探索建立国家政策支持巨灾保险体系。创新保险营销服务方式, 推进中小保险公司差异化发展, 规范发展保险中介市场, 推进再保险市场建设。

On December 1, 2012, the State Council printed and distributed the 12th Five-Year Development Plan for the Service Sector (the "Plan").

The Plan states that efforts shall be made to energetically develop the capital market by improving multi-level capital market system and promoting the establishment of national Over-the-Counter ("OTC") markets, to accelerate the development of bond market by improving the varieties system of bulk commodity futures and financial futures, to give full play to the functions of the insurance industry by actively developing liability insurance and credit insurance and exploring the way to establish catastrophe insurance system supported by national policies, and to innovate insurance marketing services by promoting the differentiation

development of small and medium insurance companies, regulating and developing insurance age.

实时资讯 REAL-TIME INFORMATION

马士基提价应对东海岸罢工

Maersk prepares to raise the price to deal with the strikes of the east coast

马士基航运已准备好了对美国的进出口货物课以重附加费，如果当地罢工影响到美东港口运营的话。

公司已经提醒消费者如果罢工继续，公司将对 20 尺箱征收 800 美元附加费，对 40 尺箱征收 1000 美元。45 尺箱的提价标准为 1266 美元。货主们被告知这项港口拥堵附加费将在 12 月 29 日生效。马士基已经在 9 月末将这项附加费在美国联邦海事委员会备案。在东海岸港口的工会和雇主的新合同谈判未能取得进展后，马士基备案了提价以防万一。不过，公司向消费者承诺如果港口运营未遭到影响，没有出现延迟的情况，将不会执行这项加费。马士基在通知中称：“为妥善处理 12 月 29 日或以后日子里因劳工问题引发的港口拥堵之潜在风险，马士基已经备案了一项适用于所有抵离美国货物的港口拥堵附加费。这同样适用于取道加拿大进口美国的货物。”长滩和洛杉矶两大港口的办公室职员罢工实际上已导致这两个港口在月初停转了数日。现在，东海岸港口也面临停转，除非美国港口工会联盟与美国海运联盟（US Maritime Alliance）能在未来数周内达成协议。

中远航运成立美洲欧洲分公司

Cosco Shipping have established its branches in Europe and America

日前，中远航运股份有限公司美洲公司、欧洲公司分别在美国休斯敦、荷兰

鹿特丹正式成立。这是中远航运实施走出去战略，拓展海工及重大件运输业务的重大举措，旨在利用子公司的欧美地缘优势，加大营销力度，为广大客户提供更加优质的服务。

该两家公司由中远航运与 NMA Maritime & Offshore Contractors B.V. 合资成立。中远航运与 NMA 在海工及重大件运输领域有着长达 25 年的紧密合作，在全球范围内为客户提供了安全、高效的服务。本次成立合资公司，融合了各自的优势资源，进一步深化了双方的合作。中远航运是世界上唯一一家同时拥有大型半潜船队及重吊船队的船东，多用途重吊船和半潜船是公司的两大核心业务，目前，中远航运建立的半潜船 POOL 拥有 2、3、4、5 万吨级共 6 艘新型半潜船，适货能力普遍覆盖，可为全球客户提供各个层级的运输及安装的高端服务；拥有多用途船及重吊船 51 艘，另有 8 艘抬吊达 700 吨的重吊船明后年即将交付使用，特种船运输实力稳居世界前列。公司拥有远东至波斯湾红海、欧洲地中海、非洲、南美、印度孟加拉以及东南亚等六条传统航线，加上 2010 年新开发的北美航线以及今年首航的澳洲航线，航线覆盖面之广全球其他特种船公司难以比肩，能够为客户提供最广范围的运输服务。以打造“全球特种船领域最强综合竞争力”为战略目标，中远航运股份有限公司及其新成立的合资公司，将一如既往地以客户的需求为己任，为客户提供专业、多元化的海工及重大件运输服务。

11 月份全球船舶新接订单量回升

The orders for ships worldwide seem to be picking up in November

据统计数据显示，11 月全球造船行业新接订单量继续回升，国内、国外新接

船舶订单总数为 227 艘，较上月大幅增加了 92 艘，其中，中国船舶业新接订单量回升幅度较为明显。

具体看来，2012 年 11 月份中国业界的新签船舶订单 153 艘，较 2012 年 10 月份的数量大幅增加了 94 艘，船东仍以国外居多，国内船东依然较少。其中，执法快艇新接订单数量达到了 64 艘，占国内订单总数将近一半；化学品船有 16 艘；散货船新接订单数量有 12 艘，比上月减少了 3 艘；集装箱船数量有 8 艘；高附加值的海工钻井平台有 2 艘，其余多为一些低附加值船。

国外方面，2012 年 11 月份新签船舶订单 74 艘，较 2012 年 10 月份的数量略有下滑，减少了 2 艘。

其中，11 月份韩国造船业界新接订单量达到 29 艘，数量较上月继续减少，但其接单量依旧保持在领先的地位，船东多以欧洲为主，船型也多以高附加值船舶为主；荷兰造船厂本月新接订单量仍然为 16 艘；而日本造船厂接单数量有 11 艘，数量较上月增 4 艘；其余一些国外船厂新接订单量仍较少。

虽然 11 月份国内、国外新接船舶订单数量继续好转，尤其是国内船舶行业接单量明显上升。仔细看可以发现，本月国内船舶行业接单量之所以大幅上升，主要是受政府造船的支撑。

顶级远洋教学实习船投用可同时供 160 名学生海上实习

The top teaching and training ship is put into use, which can provide marine practice for one hundred and sixty students at the same time

由中国海运集团所属中海工业公司承建的 4.8 万吨世界最先进远洋教学实习

船，在上海港国际客运中心码头正式命名为“育明”轮并交付上海海事大学。

作为世界最先进的远洋教学实习船，“育明”轮突出学生实习和实训功能，可同时供 160 名学生海上实习。实习船模拟校园环境，教室、研究室、阅览室、健身娱乐房等教学、生活设施一应俱全。为方便学生实习，“育明”轮设置了两个驾驶台，第 10 层有一个与 11 层生产驾驶台大小一样、具备同样功能的“实习驾驶台”，双层驾驶台结构可实现“无扰动切换”。

“海上课堂”随时随地连着一个“陆上课堂”，全船集国际船舶高新科技于一身，整条船装有三四百个传感器，实时采集、分析船行状态。“我们在学校就能直接看到航行视频，主机运行参数等数据也都能直观显示。”上海海事大学教学实习船监造组组长许乐平教授介绍，“育明”轮还是海上科研平台，不仅设有科研学术交流场所，还配备了船舶姿态检测仪、船舶雷达波浪检测仪、水位测距仪等科研设备，以作科研之用。

“育明”轮承担教学实习、科学研究、国际交流和散货运输等任务。上海海事大学的“准海员”们将在这艘“海上课堂”中，接触最先进的航行技术并亲自掌舵驾船。

值得一提的是，这艘实习船开创了“产学同船”的新模式，实现可持续发展。

“育明”轮配有 5 个大货舱、4 台电动液压吊车，可装载粮食、矿砂、煤炭、钢材等各种散货。中海集团相关负责人表示，该集团揽下了“育明”轮 10 年的货运任务，可减轻上海海事大学维护、保养教学实习船的负担，同时也让学生在运输生产中增加实战经验。“育明”轮可在提供上课、实训等功能的同时，载着“准海员”们赴全球码头“跑货”。

中国最大 5800 吨级渔政船入列 将赴东海护渔维权

The largest 5,800-ton fishery patrol ship is delivered for use and will go to East Sea for protection and fishery

12 月 11 日，5800 吨级“中国渔政 206 船”入列及首航仪式在上海举行。此举标志着中国渔政 206 船正式编入渔政船序列，我国渔政能力建设得到大力加强。中国渔政 206 船入列中国渔政东海总队，将赴我国东海海域执行护渔维权任务。

中国渔政 206 船是我国目前吨位最大、性能最先进的大型渔政船之一。该渔政船的入列，将进一步提升中国渔政专属经济区巡航和护渔维权执法能力，对有效保护渔民合法权益和生产财产安全、维持海洋正常渔业生产秩序、维护国家海洋权益具有重要意义。

从农业部渔业局了解到，为了改变当前我国渔政船数量偏少、吨位偏小、性能不足的现状，切实保障海上护渔维权任务的顺利开展，国家加快渔政船建设的步伐，加大了渔政投入力度，渔政装备条件有望得到较大改善。

案例分析 CASE STUDY

苏忠伟、杨克珍诉李日坤、杨克凤船舶共有纠纷案

【要点提示】 Points to Note

船舶所有权证书记载的共有状况是对外的效力，共有人内部之间所占份额的效力还必须依赖于内部的约定，在没有内部约定的情况下，应以各自出资比例来确定所有权的份额。

The certificate of ownership records the joint ownership has legal effect against a third party, however, the validity of internal shares of co-owner shall rely on the internal agreement between them. In the absence of an internal agreed agreement, the shares of each co-owner shall be determined by the ratio of contributions.

【案情】

原告：苏忠伟、杨克珍。

被告：李日坤、杨克凤。

2007 年 2 月，苏忠伟、杨克珍出资 905910 元，李日坤、杨克凤出资 2620380 元，在广西渔轮厂建造案涉渔船。9 月 19 日建成。9 月 29 日渔业总公司出具该船所有权属于李日坤、苏忠伟的证明（未写原、被告所占股份）。同日，李日坤持该证明向广西渔港监督局申请办理船舶所有权证书，并填写了《渔业船舶所有权、国籍登记申请表》，但该申请表上只填写船舶所有人为李日坤、苏忠伟，而“所有权股份情况”一栏则为空白。9 月 30 日，广西渔港监督局为该渔船颁发了《渔业船舶所有权证书》，船名“北渔 60012”号，船舶所有权人李日坤、苏忠

伟 (各占 50%的股份)。2008 年 1 月 17 日,“北渔 60012”号渔船在南沙海域进行生产作业时,被印尼抓扣,未予归还。“北渔 60012”号渔船被抓扣后,我国政府视其一直在南沙从事生产作业,除按规定给予该渔船柴油补贴款外,还给予相应的损失补助。从 2008 年 1 月 17 日船舶被印尼抓扣后,该船舶获得政府各项补贴款 4555097.44 元,均汇入该船的挂靠单位渔业总公司帐户。2008 年 7 月 9 日,李日坤在渔业总公司领走该船南沙涉外损失补助款、南沙柴油补贴、用油补助款、涉外保险理赔款合计 783784.20 元,尚有 3771313.24 元未领取。

再查明,苏忠伟、杨克珍在提起本案诉讼后,向本院申请诉讼保全,本院认为根据苏忠伟、杨克珍的申请,将上述款项中的 538838.13 元提取到本院账户。

苏忠伟、杨克珍起诉称:“北渔 60012”号渔船系原、被告双方共同投资建造,各占 50%的股份。该船被印尼抓扣后。自 2009 年 1 月至 7 月,“北渔 60012”号渔船得到南沙生产柴油补贴款、南沙涉外损失补助款、南沙涉外理赔款 1051638.13 元。按各占 50%的比例分配,苏忠伟、杨克珍应分得 525819.06 元。但李日坤、杨克凤在领取其中的 312800 元后,未按苏忠伟、杨克珍占 50%的比例分配,对余下未领取的款项,李日坤、杨克凤也拒绝与苏忠伟、杨克珍一同去渔业公司签领(约定单方不得签领)。为此,提起诉讼,请求法院按 50%判令李日坤、杨克凤支付给苏忠伟、杨克珍“北渔 60012”号渔船南沙损失补助款、南沙生产柴油补贴款、南沙涉外保险理赔款等共计 525819.06 元。

李日坤、杨克凤辩称:双方于 2007 年共同出资建造“北渔 60012”号渔船并共同经营,苏忠伟、杨克珍出资 905910 元,李日坤、杨克凤出资 2620380 元。2008 年 1 月 17 日船舶被印尼抓扣,原、被告的共同经营关系因此终止。苏忠伟、杨克珍起诉主张的内容属对共有财产的分割,李日坤、杨克凤认为应当按双方的出

资比例分割，而不是按股权比例分割，故请求驳回苏忠伟、杨克珍的部分诉讼请求。

【审判】

北海海事法院经审理认为：本案属船舶共有纠纷。在建造船舶和办理所有权证的当时，苏忠伟、杨克珍出资 905910 元，李日坤、杨克凤出资 2620380 元，是双方不争的事实，关键在于事后苏忠伟、杨克珍是否补足 50% 的出资款的问题。苏忠伟、杨克珍认为已经补足出资的理由主要是：苏忠伟、杨克珍卖了第二条船得款 110 万元，其将应分得的出资份额 63 万元付给了李日坤、杨克凤，另外李日坤、杨克凤多领取了政府补贴款 217742.06 元，两笔款算作苏忠伟、杨克珍还给了李日坤、杨克凤垫付的出资款。但第二条船亦系原、被告共同出资建造，在原、被告双方对第二条船的出资额是多少、是否经李日坤、杨克凤同意出卖、卖船款实际是多少和卖船款如何分配等还存有较大争议的情况下，需要原、被告对第二条船进行结算，这属于第二船的权利义务范畴，故在本案中不作审理，原、被告可以另行向对方主张权利。关于李日坤、杨克凤多领取政府补贴款 217742.06 元，是否算作苏忠伟、杨克珍还给李日坤、杨克凤垫付的出资款问题。原、被告本身就对按何种比例分配政府补贴款存在较大争议，据此，苏忠伟、杨克珍还就此争议提起了本案之诉，在李日坤、杨克凤否认该 217742.06 元是算作苏忠伟、杨克珍还给李日坤、杨克凤垫付的出资款的情况下，苏忠伟、杨克珍的该主张缺乏充分的证据支持，其主张的理由不能成立。据此，认定在建造船舶及办证当时苏忠伟、杨克珍出资仅为 905910 元，其后也未补足 50% 的出资款。

关于原、被告按何种比例分配政府补贴款的问题。原、被告共同出资建造的“北渔 60012”号渔船依法应由原、被告按份共有，双方可按各自在共有中的份

额,对共有渔船主张权利,并承担义务。如何确定原、被告共有份额是本案的关键。案涉船舶所有权证书登记为原、被告双方各占 50%,从表象上看,似乎双方的共有份额是确定的即各占 50%。但事实上,苏忠伟、杨克珍仅出资 905910 元、李日坤、杨克凤出资 2620380 元,其原、被告的出资比例为: 25.69%和 74.31%。根据权利义务相一致的原则,苏忠伟、杨克珍应按其出资比例分配政府补贴款。苏忠伟、杨克珍主张按各占 50%的份额比例分配政府补贴款,因其出资额未补足 50%,又无事前各占 50%的书面约定,故对其主张应不予支持。李日坤、杨克凤抗辩按出资额比例分配的理由充分,予以采纳。案涉船舶在被印尼抓扣后,从 2008 年 1 月 17 日起至今,该船舶获得政府各项补贴款 4555097.43 元。但苏忠伟、杨克珍仅就其中的 1051638.13 元向提起诉讼,根据“不告不理”的原则,本案仅就此款进行处理,按照苏忠伟、杨克珍占 25.69%的比例分配,二人应分得 270166 元 ($1051638.13 \text{ 元} \times 25.69\%$)。苏忠伟、杨克珍该分得款从提取至本院帐户的 538838.13 元中支付。余下的款项扣除原、被告应承担的诉讼费用后退回渔业总公司与其他款项一并处理。综上,依照《中华人民共和国民事诉讼法》第七十八条第一、二款、《中华人民共和国物权法》第一百零三条、第一百零四条的规定,并经本院审判委员会讨论决定,作出如下判决: 1、原告苏忠伟、杨克珍就本案诉讼标的应分配 270166 元,从提取至本院帐户的 538838.13 元中支付。余下的本院提取的款项在扣除诉讼费用后退回广西北海海洋渔业总公司与其他款项一并处理; 2、驳回原告苏忠伟、杨克珍其他诉讼请求。

本案宣判后,双方均未上诉,服判息诉。

【评析】

本案事实比较简单, 争议焦点在于在苏忠伟、杨克珍与李日坤、杨克凤实际出资比例为 25.69%和 74.31%, 而船舶所有权证书又载明各占 50%的情况下, 是按船舶所有权证书载明的各占 50%的比例分配补偿款, 还是按实际出资比例分配。

根据《民法通则》第七十八条“财产可以由两个以上的公民、法人共有。共有分为按份共有和共同共有。按份共有人按照各自的份额, 对共有财产分享权利, 分担义务”和《物权法》第一百零三条“共有人对共有的不动产或者动产没有约定为按份共有或者共同共有, 或者约定不明确的, 除共有人具有家庭关系等外, 视为按份共有”的规定, 结合本案已查明的事实, 原、被告共同出资建造的“北渔 60012”号渔船依法应由原、被告按份共有, 双方可按各自在共有中的份额, 对共有渔船主张权利, 并承担义务。如何确定原、被告共有份额是本案的关键。案涉船舶所有权证书登记为原、被告双方各占 50%, 从表象上看, 似乎双方的共有份额是确定的即各占 50%。但根据法理, 船舶登记的法律效力表现在两个方面, 一是对内的效力, 即船舶共同所有人之间的效力, 能否根据登记确定共有人对船舶的共有份额? 二是对外的效力, 即登记是抗辩第三人的效力。依照我国《物权法》第二十四条的规定, 船舶物权的设立、变更、转让和消灭, 未经登记, 不得对抗善意第三人。如取得船舶所有权后, 未进行取得登记就不得对抗第三人。依据该规定, 我国《物权法》规定的“登记”是对外的效力。但对内不能仅依登记而确定双方权利, 登记并不必然产生内部确权的效力。在共有人内部之间发生权利争议时, 登记记载的权力状况不能当然产生确权的效力, 而应当根据真实权利状况确定权利。也就是说在双方出资比例不同的情况下, 只有双方对所有权份额有明确书面约定并按约定进行了船舶所有权登记, 才必须按约定并登记的所有权比例分享权利。这是因为书面约定是一种合约, 是双方真实意思表示, 对双方(对

内) 都具有法律约束力。

就本案而言, 船舶建造后, 原、被告双方没有就共同建造的船舶是共同共有还是按份共有作出约定。根据《物权法》第一百零三条“共有人对共有的不动产或者动产没有约定为按份共有或者共同共有, 或者约定不明确的, 除共有人具有家庭关系等外, 视为按份共有”的规定, 本案船舶应为按份共有。又根据《物权法》第一百零四条“按份共有人对共有的不动产或动产享有的份额, 没有约定或者约定不明确的, 按照出资额确定; 不能确定出资额的, 视为等额享有”的规定, 原、被告内部对按份共有的份额未作出约定, 故对双方按份共有的份额应按照出资额的比例确定。只有在不能确定出资额的情况下才能视为等额享有, 但本案的出资额是确定的, 即苏忠伟、杨克珍出资了 905910 元、李日坤、杨克凤出资了 2620380 元, 其原、被告的出资比例分别为 25.69%和 74.31%。

虽然船舶所有权证书上登记各占 50%, 但在登记前或登记后均没有各占 50% 的约定。从查明的事实看, 办理所有权登记的主要依据是所有权申请登记表和渔业总公司出具的用于船舶所有权登记的证明, 但所有权申请登记表上“所有权股份”一栏为空, 并没有填写各占 50%, 且渔业总公司出具的用于船舶所有权登记的证明也未有写明原、被告各占 50%。由此可见, 在内部并没有可以约束原、被告各占 50%的约定。在苏忠伟、杨克珍实际只出资 25.69%, 却要按船舶所有权证书上记载的各占 50%享有权利, 显然有违公平原则。据此, 根据权利义务相一致的原则和《物权法》第一百零四条的规定, 本案应按苏忠伟、杨克珍占 25.69%、李日坤、杨克凤占 74.31%的出资比例分配政府补贴款

来源: <http://www.ccmt.org.cn/shownews.php?id=10709>

资讯选编 INFORMATION SELECTION

COGSA can contractually kick in only after carrier takes custody

By Steve Block (Foster Pepper PLLC)

Much case law has followed recent high court developments regarding applicability of the U.S. Carriage of Goods by Sea Act (COGSA) to connecting or preceding land-based hauls. But just how far back or forward can those standard Paramount and Himalaya Clauses extend COGSA to losses? The U.S. District Court for the Southern District of Florida recently took a look at that issue in the context of freight that was stolen by an imposter who identified himself as an ocean carrier's subcontracted truck driver assigned to dray a load to port. Neither the ocean carrier, nor anyone it actually had engaged, ever touched the freight before it was stolen.

Shipper Circuit Zone engaged forwarder FEI Logistics to arrange transit of cargo from Florida to Trinidad. FEI, in turn, booked the freight with ocean carrier SeaTruck, which provided a container for the freight at a warehouse FEI also had arranged. Somehow, the imposter learned the freight's booking number, identified himself as a SeaTruck driver, and convinced the warehouse to release it to him. Circuit Zone's subrogated insurer sued in Florida state court to recover the some 243 grand it paid its insured under its policy. It alleged that SeaTruck negligently allowed a thief access to information enabling him to convince the warehouseman to give him Circuit Zone's goods. SeaTruck removed to federal court, citing admiralty jurisdiction under COGSA.

The insurer moved to remand, claiming COGSA never kicked in, and there was no other basis of federal jurisdiction. Why should COGSA apply, when neither the ocean carrier, nor any of its agents, ever even touched, much less had custody of the freight? SeaTruck hadn't issued a bill of lading (the freight was stolen before it could do so), although the parties agreed that SeaTruck's standard bill of lading, had it been issued, contained a Clause Paramount extending COGSA to the ocean carrier's land-based service providers. This renders the bill of lading's terms applicable based on the parties' actual understanding of contractual terms intended to govern the transport.

Resisting remand, SeaTruck urged that COGSA can be, and typically is, contractually extended to drayage operators. It saw no reason why that extension shouldn't apply to claims for pilferage that take place before freight actually reaches a vessel when they involve the dishonest acts of a trucker.

But as the insurer argued, and the court agreed, no previous decision has ever extended COGSA to a point prior to when a ocean carrier or any of its agents ever touched the freight. Here, the imposter was not a SeaTruck agent, even though he claimed he was. COGSA is first and foremost intended to cover losses occurring "tackle to tackle," or between the times when cargo crosses a vessel's rail during on- and offloading. In other words, "custody and care and handling" of cargo are trigger points of the statute's

applicability. Its capacity to be contractually extended beyond its location aboard a vessel is still defined by possession in the hands of a vessel operator's agent engaged for purposes of effecting a service essential to the ocean haul. While cases hold COGSA can be extended to "pre-loading," at least in the court's view, all such cases were post-custody.

We have to draw the line somewhere about applicability of a liability statute designed for ocean cargo. By SeaTruck's interpretation of prevailing law, ocean carriers could extend COGSA to any point they wish, such that any kind of wrongdoing resulting in lost or damaged freight would be subject to federal admiralty jurisdiction. That's just not the statute's intent, even recognizing the modern realities of multimodal shipping. The threshold of actual custody by a carrier or its agents provides a "practical limit," one that can easily be understood and applied, as to how far COGSA may be extended. The court also noted that even were it possible for a carrier to extend COGSA to an imposter's alleged theft of freight, SeaTruck's standard bill of lading didn't go that far, at least not clearly, and any ambiguity in a contract will be interpreted against its drafter.

This case properly goes back to state court, which is fully qualified to analyze a tortious negligence claim without impacting the national uniformity in maritime law which federal admiralty jurisdiction seeks to ensure. The ultimate significance to these parties may be that COGSA's package limitation of liability won't apply either.

Ref: Underwriters at Interest under Bailee Insurance Police No. 09RTAMIA1158 as assignee of Circuit Zone, Ltd. v. SeaTruck, Inc., et al.[Vi], 858 F.Supp.2d 1334 (S. D. Fla. 2012).

December 4, 2012

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