



中国海事仲裁委员会上海总部

CHINA MARITIME ARBITRATION COMMISSION SHANGHAI HEADQUARTERS

# 中国海事仲裁委员会上海总部 企业出海案例集

Case Collection on Enterprises' Global Expansion  
by CMAC Shanghai Headquarters

《《《《 二零二五年 十月 》》》》



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# 前言

当今世界经济全球化在曲折中深化发展, 共建“一带一路”倡议的扎实推进, 中国企业在新能源、高科技、高端制造等领域的全面崛起, 推动着一轮波澜壮阔的中国企业出海大潮, 为世界经济发展注入了强劲的“中国动力”。与国际巨头们数百年的全球化经验相比, 中国企业的出海征程仍处于“青春期”, 在展现巨大活力与韧性的同时, 也面临着前所未有的、错综复杂的风险挑战。

知往鉴今, 以启未来。在这样的时代背景下, 中国海仲上海总部积极作为, 汇聚众智, 筛选出具有代表性的7个典型案例, 编纂《中国海仲上海总部企业出海案例集》, 予以发布。案例主要涉及重大件租船合同、海上货物运输合同、船舶建造担保合同等多发性纠纷。每一个案例都力求还原事实本貌, 聚焦核心法律争点, 提炼出具有普遍指导意义的风险提示。中国海仲上海总部相信, 这种基于中国视角、解决中国企业实际问题的案例研究, 可以帮助出海企业切实提升法律风险防控的能力, 为中国出海企业提供前沿的实践经验总结, 提高出海企业对法律纠纷裁判思路的可预期性, 从而引导出海业务可持续发展。

尤为重要的是, 通过发布企业出海案例集, 中国海仲上海总部期待引起行业对“争议解决”前置化思维的重视。风险防控的终极目标, 并非仅仅是为了在争议中“赢”, 更是为了在交易之初就通过精巧的合同设计、恰当的准据法与仲裁地选择, 最大限度地避免争议的发生, 或将争议解决的成本与不确定性降至最低。这是一种更高维度的、贯穿项目始

终的战略性风控。

中国企业出海,是一场考验智慧、勇气与韧性的长征。中国海仲作为中国最早投身于国际商事海事争议解决的机构之一,六十余年来,我们始终与中国的经贸航运事业同频共振,见证了无数中国企业从“走出去”到“走上去”的辉煌历程,也亲历了他们在国际舞台上的风雨坎坷。发布此案例集,是中国海仲上海总部服务国家战略、助力企业国际化发展的务实举措。唯愿案例展现的经验与智慧,能化作出海企业航程中的点点星火,照亮前路,规避险滩,助出海企业在全球化的大潮中,踏浪前行,基业长青!

## 【重大件运输合同中, 双方互免责任条款(Knock for knock clause)的效力?--某重工有限公司与某海运公司航次租船合同违约纠纷仲裁案】

关键词:【重大件运输】【双方互免责任条款】【故意或重大过失】

### 一、裁决要旨

申请人与被申请人就运输两套门座式起重机货物签订《运输合同》, 被申请人负责安排船舶, 申请人支付相应运费。后, 货物在卸货港吊装过程中发生倾覆, 产生货损。双方围绕着《运输合同》中双方互免责任条款(Knock for knock clause)责任条款及效力问题产生争议。该条款常见于海洋工程和海上油气开采项目涉及的重大件设备海上运输合同中。因该领域海上运输的重大件设备一般都技术含量高、专业性强、结构复杂, 故在海上运输中发生事故后, 查明原因、判明责任, 往往耗时费钱且不易。通过事先在运输合同中订立互免责任条款, 旨在简化事故的处理, 符合重大件运输的行业惯例。仲裁庭认为, 申请人未能举证证明被申请人对货物倾覆事故的发生存在故意或者重大过失。需要指出的是, 船员操作船吊、调整压载水、未针对潮汐涨落采取补偿作业等行为, 即使存在过失, 或者存在重大过失, 也不等于船东(被申请人)本身存在故意或者重大过失。本案申请人及被申请人自愿在合同中订立互免责任条款, 条款内容也无与我国法律、行政法规强制性规定相悖的情形。为此, 仲裁庭认为, 本案《运输合同》中的Knock for knock clause有效。

## 二、基本案情

2020年10月,申请人与被申请人就运输两套门座式起重机货物签订《运输合同》,约定被申请人使用指定船舶将前述起重机货物自中国镇江运往法属圭亚那蒂格雷德斯坎纳港,运费总数为2,120,000美元。2021年4月14日,被申请人向申请人确定载运船舶为“A”轮,制作并告知了配载方案与装卸港吊装、绑扎、索具等全部方案。

2021年4月20日,被申请人就涉案货物运输发送分工明细表,其中明确:1)货物的配载、吊装、绑扎、安装方案均由被申请人负责;2)货物的装船、绑扎作业均由被申请人负责;3)货物解绑、吊卸船吊操作指挥、货物目的港上下结构落位及卸船安装作业均由被申请人负责。

2021年5月10日,“A”轮于太仓港装载涉案货物运往目的港,本案两套起重机货物均拆分为上部吊机结构及下部门座结构,并附部分配件以集装箱包装进行运输。2021年6月22日至6月23日,涉案两套起重机的下部门座部分及配件货物分批卸离船舶至目的港。

2021年6月24日,在“A”轮船吊卸吊安装门座式起重机上部机构过程中,船吊起吊的货物倾覆掉落并压在其配套的下半部结构及其他已经卸至岸上的财产上。在此过程中,吊装方案曾发生过两次变更。事故发生后,“A”轮拒绝将在船剩余的一件门座式起重机上部结构于目的港卸载交付,并于2021年11月将该剩余货物回运至中国太仓港。

申请人提出仲裁请求如下:

(一)请求被申请人向申请人赔偿货款5,424,900.76欧元及利息(利

息自2021年6月24日起计算至裁决生效之日止,利率按同期中国银行欧元存款利率确定);

(二) 请求被申请人向申请人退还未完成运输而退运货物对应的海运运费655,424.05美元及利息(利息自2021年6月24日起计算至裁决生效之日止,利率按同期中国银行美元存款利率确定);

(三) 请求被申请人向申请人支付因解决本案争议而产生的办案律师费用,暂计人民币300,000元;

(四) 本案仲裁费由被申请人承担。

上述金额共计人民币42,936,891.50元(欧元汇率按照1:7.05,美元汇率按照1:6.70换算)。

### 三、主要争议焦点及仲裁庭结论

本案主要争议焦点为涉案《运输合同》中互免责任条款的效力与适用。

申请人认为:被申请人在涉案货物倾覆事故中存在故意或重大过失。理由是:(1)擅自改动方案D;(2)被申请人持续不断地降低船吊载荷、松钩卸载;(3)大副采用左右压载水舱调整方式,降低船吊载荷;(4)被申请人未针对潮汐降落采取补偿作业。根据《中华人民共和国民法典》(以下简称“《民法典》”)第五百零六条规定,合同中的免责条款无效。申请人因此向被申请人提出返还未完成运输而退运货物的对应运费。在中国法下,并无所谓的“视为赚取运费”的法律依据。相反,根据《民法典》第五百八十二条规定,当事人一方不履行合同义务,受害方可

以选择减少价款的违约责任承担形式。

被申请人认为:根据合同载明的互免责任条款,申请人即使在本次货物运输中存在货物损失,也应当自行承担,无权要求被申请人承担赔偿责任。根据《运输合同》第二部分第11款约定,货物一经装好,运费即视为取得。货物已经装船,申请人无权要求被申请人返还部分运费。

仲裁庭认为:《运输合同》第二部分第21条1、2两款是船货双方互免责任条款(Knock for knock clause),一般出现在重大件货物运输合同中。条款的主要内容是船东和承租人各自对对方的船舶或货物遭受的任何性质和原因的损失、损害或延误不负赔偿责任。简言之,就是船东与承租人各自承担自己的损失,不向对方追偿,而不问船舶或货物遭受的损失、损害或延误的原因与性质,即所谓的船东与承租人互免责任条款。该条款常见于海洋工程和海上油气开采项目涉及的重大件设备海上运输合同中。因该领域海上运输的重大件设备一般都技术含量高、专业性强、结构复杂,在海上运输中发生事故后,查明原因、判明责任,往往耗时费钱且不易。通过事先在运输合同中订立互免责任条款,旨在简化事故的处理。

本案中,申请人与被申请人签订的运输合同虽以“BIMCO HEAVYCON”格式为基础,但双方就合同内容进行了协商,对多达九个条款做了修改或删除。所以涉案《运输合同》是双方当事人在自愿基础上达成的协议,不是格式合同。申请人与被申请人对包括互免责任条款在内的合同内容及其法律效力应当是清楚的。在合意基础上达成的协议对双方当事人均具有约束力。双方在《运输合同》第一部分第29条约定,合同应在合同第一部分(包括商定并

写在第28栏内的附加条款)和第二部分的条件下执行。如果条件有抵触时,第二部分应服从于第一部分和任何附加条款的规定。互免责任条款列于合同第二部分第21条,是关于双方互免责任的约定,与第一部分(包括商定并写在第28栏内的条款)并无抵触。

故意的含义不言自明,是在过错中属于主观恶性性最大的一种,也是过错程度最严重的一种。重大过失意指行为人明知可能造成损失而轻率地作为或者不作为,或者说是一种间接故意,明知自己的行为可能发生危害的结果,且放任结果的发生。行为人对他人的权益极端不负责任或漠不关心,实施了极不合理的行为,强调的是行为人的主观状态。申请人已经提供的证据材料难以支持其认为的被申请人在货物倾覆事故中存在故意或者重大过失。

申请人递交的被申请人卸货港代理制作的《事实陈述》记载,“A”轮6月21日抵达卸货港后,于当天下午船长、大副、申请人工作人员确认当天工作计划,并就热加工事宜召开安全会议;6月22日上午0700时,船长、大副、申请人工作人员卸货前举行会议,同日中午1230时,再次举行会议讨论整个卸货流程;6月23日1300时,船方与申请人工作人员就卸货流程举行会议;6月24日发生事故当天,上午0750-0830时,大副与申请人工作人员卸货前举行工作会议确认该日工作计划,下午1310-1330时,船长、大副与申请人工作人员再次开会确认卸货操作及岸上准备工作。结合船方二次调整货物吊装方案,出发点是希望安全地吊装或吊卸货物。由此可见,被申请人对申请人的权益并未表现出极端不负责任或漠不关心,双方在卸货港倾覆事故发生前的沟

通也无不妥。

《民法典》第五百零六条规定，因故意或者重大过失造成对方财产损失的，合同中的免责条款无效。《中华人民共和国海商法》（以下简称“《海商法》”）第五十九条明确，经证明，货物的灭失、损坏或者延迟交付是由于承运人的故意或者明知可能造成损失而轻率地作为或者不作为造成的，承运人丧失享受赔偿责任限制的权利。依据谁主张，谁举证的原则，主张一方当事人在货损事故中存在故意或重大过失的，主张方应当负举证之责。本案中，申请人未能举证证明货物倾覆事故的原因，自然也就未能举证证明被申请人对货物倾覆事故存在故意或重大过失。即使如申请人所说的是因为被申请人擅自改动货物吊装方案D，持续不断地降低船吊载荷、松钩卸载，大副采用左右压载水调整方式降低船吊载荷，被申请人未对潮汐涨落采取补偿作业，以及船舶不适航等原因造成货物倾覆事故，但申请人未能举证证明被申请人对货物倾覆事故的发生存在故意或者重大过失。需要指出的是，船员操作船吊、调整压载水、未针对潮汐涨落采取补偿作业等行为，即使存在过失，或者存在重大过失，也不等于船东（被申请人）本身存在故意或者重大过失。

根据《海商法》第九十四条规定，该法第四章除提供适航船舶和不能不合理绕航的规定外的其他有关合同当事人之间的权利、义务的规定，仅在航次租船合同没有约定或者没有不同约定时，适用于航次租船合同的出租人和承租人。也就是说，根据该法第九十四条规定，除第四章第四十七条和第四十九条的规定外，该章的其他条款规定都是任意

性条款。本案申请人及被申请人自愿在合同中订立互免责任条款，条款内容也无与我国法律、行政法规强制性规定相悖的情形。为此，仲裁庭认为，本案《运输合同》中的互免责任条款有效。依据该条款规定，申请人应自行承担货物倾覆事故造成的与货物有关的损失、损害或延迟等，申请人不能就此向被申请人提出追偿。

在庭审调查中被申请人称，货物之所以未能在卸货港卸下，是因为“A”轮发生货物倾覆事故后船吊损坏，无法继续卸载货物，而卸货港本身又不具备卸载重大件的条件。申请人对此予以认可。申请人在庭审中陈述：“最后一刻就是觉得，在圭亚那那边是没有办法处理这个货物了，就把这个货原路运回来”。

据此，仲裁庭认为，根据《运输合同》第二部分第11条约定，“货物一经装好，运费即被视为取得，不论船舶/或货物是否灭失和是否由于海难或任何其他原因灭失，都不退还。”该约定并无与我国法律、行政法规的强制性规定相悖的情形。与此同时，根据上述互免责任条款，承租人应对任何性质、任何原因对货物造成的一切损失、损坏或延迟负责，而不向船东等追偿。如果申请人认为因货物未能在卸货港卸载而遭受损失，该损失也是因同一《运输合同》项下的货物发生倾覆事故直接造成的损失。根据该免责条款的规定，申请人应自行承担与货物有关的损失。

#### 四、典型意义

我国企业出海承包相关项目的同时，国内航运企业往往会提供配套运输服务，形成协同效应，共同打造中国企业的海外品牌形象。本案中涉及的重大件货物运输，因货物本身的不规则性和操作规程的非标准化，导致货物运输中存在区别于其他货物运输的特殊风险，因此相比于其他海上运输合同，或者一般民商事合同，重大件运输合同中往往设置一些分摊风险的特殊条款，而这些条款往往与一般民商事合同中的原则相悖。故仲裁庭在案件审理和裁决过程中，需对行业实践给予更多的理解和尊重，以保持行业实践的确定性发展。具体到本案，除标题列明的争议焦点，仲裁庭还重点关注了事故发生的原因，但是经过一系列的审理，包括技术专家证人的证人证言、船长的事实陈述等，以期还原事故当时的情况，锁定事故发生的原因。然而仲裁庭很难在本案中根据现有证据将事故原因归结于某一方，尤其在本案中因为卸货和安装过程交织在一起，为仲裁庭的归责增加了很多的难度，但这也是重大件货物运输审理中较为常见的情形。基于这一行业在航运产业的特殊性，因此在设置合同条款时，特别安排了“knock for knock clause (双方互免责任条款)”，并在行业中广泛使用，是行业一致认可的归责原则，甚至是行业发展和生存的基础，关系到船东风险控制、保险安排等一系列环节。仲裁庭在本案审理中，亦面临着来自一般民商事法律原则的抗辩，但是仲裁庭结合案件审理实践，充分尊重了这一条款的效力，确保行业



实践的稳定性,可以说本案的审理在整个行业发挥了引领性的作用,实现了商业效益和社会效益的统一。

## 【多式联运纠纷中, 赔偿责任限额的法律适用?--某外资保险公 司与某外资货运公司多式联运货损纠纷仲裁案】

关键词:【多式联运】【外国法查明】【责任限额】

### 一、裁决要旨

案外人与被申请人签署了《物流服务协议》, 约定被申请人为案外人提供全程物流服务。2016年11月24日, 由被申请人负责运输的一票货物在加拿大公路运输段与一油罐车发生碰撞事故而导致火灾, 货物发生全损。申请人作为货物保险人在向案外人进行赔付后, 取得了代位求偿权。双方就被申请人是否承担货损赔偿责任以及是否有权主张责任限制产生争议。其中还涉及责任限制适用法律的查明问题。本案中, 双方当事人均提交了相应的外国法律, 即加拿大法律。申请人提交了加拿大法院的判例, 认为只有当责任限额条款在运单中明确记载且构成承托双方的合意时, 方才有可能适用, 否则, 承运人无权援引该责任限额的抗辩。被申请人提交了加拿大当地律师意见, 认为其有权享受责任限制。仲裁庭认为, 根据《中华人民共和国海商法》(以下简称“《海商法》”) 第一百零五条的规定, 赔偿责任限制问题应适用加拿大法律。双方均提供了加拿大法律的相关规定, 仲裁庭经审阅双方材料, 认为被申请人提供证据更具有证明力, 采信了被申请人提供的加拿大当地律师的意见, 即赔偿责任依据加拿大《<机动车辆法>的适用规则》(大不列颠哥伦比亚省法规26/58), 被申请人有权主张赔偿责任限制。

## 二、基本案情

案外人YF公司及其子公司与被申请人签署了《物流服务协议》，约定被申请人向YF公司及其子公司提供完整的门对门的物流服务，其中包括“从中国出口至欧洲、美国、日本韩国及其可能市场的空运与海运”和“需求的将来其他项目的物流运输服务”。《物流服务协议》约定的有效期自2015年6月1日起至2017年12月31日止。

2016年10月，YF公司子公司YFJQ公司委托被申请人提供自上海港运输72件汽车用门内饰件货物至加拿大多伦多的运输服务。2016年10月14日被申请人作为承运人D公司的代理签发了提单。提单记载卸货港为温哥华，交货地为多伦多。涉案货物实际由赫伯罗特公司从上海港经海运运输至加拿大温哥华，2016年11月到港卸船后，赫伯罗特公司的代理人（位于不列颠哥伦比亚省）雇佣同样位于不列颠哥伦比亚省的S公司所属的卡车将涉案货物经公路从加拿大不列颠哥伦比亚省温哥华市运输到加拿大安大略省的多伦多市。2016年11月24日，卡车运输途中在安大略省11号公路与一油罐车发生碰撞事故而导致火灾。经检验，涉案货物全损，货损金额为50,019.28美元。根据所提供的提单记载，受损货物总重为3,960千克。

YF公司向申请人投保了货物运输险，被保险人之一是YFJQ公司，承保运输包含从中国出口到全球的海上运输和卡车运输等，保险期间自2016年5月1日00:00时或在此之后起至解除条款解除时止起运/出发的运输。

2019年6月17日, 申请人根据保险合同向YFJQ公司赔付50,019.28美元。申请人依法取得代位求偿权。

2019年11月22日, 申请人及被保险人YFJQ公司委托律师向被申请人发送律师函, 被申请人对该律师函的真实性无异议。

申请人提出的仲裁请求如下:

1. 请求裁决被申请人赔偿申请人经济损失50,019.28美元及其相应的利息(损失合人民币344,832.92元, 按照2019年6月17日中国人民银行公布的汇率中间价1美元对人民币6.8940元计算。利息自2019年6月17日计算至被申请人实际支付之日为止, 暂计至2020年7月10日为人民币15,367.00元, 其中, 2019年6月17日至2019年8月19日期间按照中国人民银行公布的同期贷款利率计算; 2019年8月20日至2020年7月10日期间按照中国人民银行授权全国银行间同业拆借中心发布的利率计算);

2. 请求裁决被申请人承担本案的仲裁费用。

### 三、主要争议焦点及仲裁庭结论

本案主要争议焦点为被申请人是否享有责任限制及其适用的法律。

申请人认为: 根据我国《海商法》第四章的规定, 被申请人作为承运人, 应对全程运输承担责任, 该法第四章强制适用, 且任何减轻该章所规定的承运人责任的约定都属无效的。涉案《物流服务协议》第13条第4款约定“乙方在本合同下的赔偿责任不超过在本合同下收取的服务

费”，明显违反了前述第四章的规定且内容前后矛盾，因此，前述该第4款无效。案涉协议约定适用中国法，被申请人无权援引加拿大法律下的承运人责任限额。即使适用加拿大法律，申请人提交的加拿大法院判例已经证明只有当责任限额条款在运单中明确记载且构成承托双方的合意时，方才有可能适用，否则，承运人无权援引该责任限额的抗辩。

关于被申请人提交的加拿大律师的意见，该意见的出具人是否具有相应的法律资质尚有待被申请人进一步举证；该律师意见并未结合本案事实分析，仅是罗列了关于货物损失赔偿的相关法律规定，对于适用主体、适用范围、丧失限额的情形和构成均未有任何涉及；加拿大为判例法国家，但该意见并未提供任何判例对加拿大法律下的责任限额的适用作出整体性的论述；已有加拿大法院判例判决承运人无权责任限制，同时判决内容提及只有当此种限额明确约定为合同的一部分内容时，方才有机会适用，然而，该意见书对此只字不提，明显缺乏客观性；该意见从本质上来说，仅为一名外国律师的个人意见，且存在上述诸多瑕疵，因此无任何证明力可言。案纠纷应适用中国法律，因此，该意见与本案也没有关联性。

被申请人认为：即使被申请人就涉案货损被认定需要承担一定的赔偿责任，也应根据《物流服务协议》第13条第4点之约定，对于被申请人的赔偿责任，应以涉案货物单次运输的运费人民币24,159.65元为限，这是《物流服务协议》的约定。

即使被申请人对涉案货损须负全责，根据我国多式联运有关的法

律规定, 本案中被申请人作为多式联运经营人的赔偿责任和责任限额应根据损坏发生的运输区段所在地的相关法律确定, 本案中即加拿大道路运输法律, 被申请人已经提供相关法律, 其中规定的责任限额为每公斤4.41加元, 因此, 根据本案货物的重量算出了责任的赔偿上限是17,463.6加元, 被申请人的赔偿责任上限折合成美元是12,936美元。

对于申请人提交的判决书, 没有任何地方支持申请人的观点。相反, 在该案中, 法官论述的焦点是承运人在未依法签发提单的情形下能否享受责任限制的问题, 如该判决书第[36]至[38]段所述, 货物实际交付后, 承运人才向托运人签发运单, 故认定为承运人未按照不列颠哥伦比亚省《机动车法案条例》第37.39条的要求签发运单, 所以承运人无权援引责任限制。但本案货物运输已经签发了相关提单, 且提单中本案也有责任限制条款, 即背面条款第8.3.3条所规定的“在非涉及美国的运输下承运人的赔偿责任限额为2SDR/kg”。根据加拿大不列颠哥伦比亚省的法律, 承运人有权援引双方在运单上约定的责任限制或者当地法律规定的责任限制来确定赔偿责任。

仲裁庭认为: 依据《海商法》第一百零五条的规定, 涉案货损发生于加拿大境内的公路运输区段, 赔偿责任限额适用加拿大法律关于公路运输责任限额的相关法律规定。对此, 申请人及被申请人双方均已提交加拿大的相关法律规定。申请人提交了证据12“CanLII网站简介及在该网站下载的加拿大法院作出的判决书(含部分判决书内容的中译文)”, 被申请人提交了证据2“加拿大当地律师的邮件及相关法律条款和加拿

大当地律师出具的法律意见书(经公证认证并附意见书的中文译本)”, 仲裁庭综合判断后, 确认被申请人的上述证据2的证明力, 即赔偿责任依据加拿大《<机动车辆法>的适用规则》(大不列颠哥伦比亚省法规26/58)。本案没有证据表明托运人(被保险人)在货物托运时申报了货物价值, 被申请人根据大不列颠哥伦比亚省的法律规定可以主张赔偿责任限制。根据《<机动车辆法>的适用规则》(大不列颠哥伦比亚省法规26/58)第37分则第10条的规定, 涉案卡车运输的责任限额为每千克受损货物不超过4.41加元。涉案受损货物提单载明总重量为3,960千克, 因此被申请人的赔偿责任限额为17,463.60加元。已知涉案货物的损失金额是50,019.28美元, 因此, 被申请人的赔偿责任金额应以责任限额为限, 即为17,463.60加元。

#### 四、典型意义

在我国企业出海的过程中, 往往会涉及需要适用外国法的情况, 因此查明及适用外国法是我国企业在出海时需要关注的问题。本案为多式联运合同较为常见的货损代位求偿纠纷, 具有代表性, 尤其是其中的外国法查明及适用问题。涉外案件中, 外国法查明问题并不罕见。根据我国《涉外民事关系法律适用法》第十条规定, 涉外民事关系适用的外国法律, 由人民法院、仲裁机构或者行政机关查明。当事人选择适用外国法律的, 应当提供该国法律。《涉外民事关系法律适用法司法解释(二)》对外国法查明责任、查明途径、查明程序、认定标准等进行了系统性

规范。本案中仲裁庭查明并认定适用加拿大法律的过程具有一定的示范作用。首先,根据我国《海商法》的规定指向适用加拿大法律,后根据双方当事人提供的加拿大法律规定确认了相应的外国法律,并回应了本案焦点问题。随着一带一路战略进入高质量共建阶段,越来越多的中国企业走向海外,在此过程中往往会面临合规及争议解决问题,因此了解当地法律尤为重要。而企业熟悉掌握了解外国法的途径,无疑对保护自身合法利益有所帮助。对于相关法律从业者而言,无论是涉外律师,亦或是人民法院、仲裁机构,都应该注重提高查明及适用外国法的专业能力,保持开放兼容的态度,让我国企业,或是来华投资的外国企业,切实体会到我国司法实践的专业性及国际性,助力国际海事司法中心建设,打造面向全球的亚太仲裁中心。

## 【舱面货物运输约定的效力如何认定, 承运人责任范围如何界定?

### --某韩国物流公司与国内某航运公司航次租船合同纠纷仲裁案】

关键词: 关键词:【舱面货运输】【承运人责任范围】【减损义务】

#### 一、裁决要旨

申请人与被申请人签订航次租船合同, 约定被申请人为申请人装运一批结构侧板等工程配件至土耳其海达尔帕夏港。考虑到货物特性, 申请人与被申请人代理人S公司在签订航次租船合同之前, 通过电子邮件等, 告知S公司其货物应装载在舱内, 但实际出运时, 仍有6件货物被装运在舱面上。后应申请人要求, 被申请人在新加坡将装载于甲板的货物卸下。申请人因此要求被申请人赔偿货物转运产生的各项费用损失。被申请人认为, 申请人与S公司的邮件并不构成有约束力的合同条款, 因此被申请人没有义务将申请人货物装载于舱内。双方就6件货物被装载在舱面上是否违约及承运人相应的赔偿责任范围产生争议。仲裁庭认为, 根据我国《海商法》第五十三条第一款规定, 承运人在舱面上装载货物, 应当同托运人达成协议, 或者符合航运惯例, 或者符合有关法律、行政法规的规定。本案中, 被申请人未与申请人达成舱面货协议而是径自将6件货物置于舱面之上进行运载, 并且其也没能充分举证证明在舱面上装载涉案6件货物符合航运惯例或符合法律法规要求, 违反了我国《海商法》关于装载舱面货的规定。对于责任范围, 我国《海商法》第五十三条第三款规定, 承运人违反规定将货物装载在舱面上, 致使货物遭受灭失或者损坏的, 应当负赔偿责任。虽然本案货物并未遭受损坏, 但并

不能完全免除被申请人对申请人相应损失的赔偿责任。

## 二、基本案情

2018年8月2日,为出运一批结构侧板等工程配件,申请人与被申请人签订航次租船合同(以下简称“本案合同”)。本案合同由S公司代表被申请人签署。根据本案合同,被申请人向申请人出租“C”轮,用以在中国上海港、韩国马山港和越南海防港装运该批工程配件,最终在2018年10月10日前将所有货物运送至土耳其海达尔帕夏港。同时,考虑到该批装运货物的特性,申请人与作为被申请人代理人的S公司约定所有装运货物不得装载在甲板上,只能装于舱内。

“C”轮于2018年9月11日到达越南海防港并于次日靠泊装货,申请人提供的货物同申请人向S公司发送的电子邮件所附货运信息清单中货物相比,包装编号、重量、长宽高数值、体积、数量均有所不同。S公司代表被申请人告知申请人部分货物需要装载在甲板上运输。之后申请人向S公司发送邮件要求被申请人停止装货,但最终被申请人仍然将6箱货物积载在船舶甲板上。9月15日,在197箱货物全部装船后,S公司作为被申请人的代理人签发了已装船提单,装货港为越南海防港,卸货港为土耳其海达尔帕夏港。“C”轮也于同日启程离开海防港。

9月17日,申请人向S公司发送邮件要求将6件装载在“C”轮舱面上的货物在新加坡卸下,邮件中提及申请人认可“C”轮挂靠新加坡港卸货的费用数额75,000美元。

经协商,双方均同意将装载在“C”轮甲板上的6件货物在新加坡卸

下,被申请人一方签发了卸货港为新加坡的提单(6件侧板组件及其他)和卸货港为土耳其海达尔帕夏港的提单(191件侧板组件及其他)。

“C”轮于9月19日靠泊新加坡港,次日完成6件舱面货物的卸载工作。涉案6件货物于9月20日装上申请人另外承租的“B”轮上运往目的地。

2018年10月13日和14日,“B”轮和“C”轮分别完成在土耳其海达尔帕夏港的最终卸货工作。

因本次转运,申请人遭受了778,820.23美元的损失。申请人还不得不向托运人支付了违约金43,569.37美元。申请人共计支付的款项金额为822,389.60美元。

申请人提出的仲裁请求如下:

- 1.被申请人向申请人赔偿损失822,389.60美元,及以该金额对应等额人民币为本金,按照同期全国银行间同业拆借中心公布的贷款市场报价利率计算的、自2018年9月16日起至仲裁裁决生效之日止的利息。
- 2.被申请人承担本案全部仲裁费、律师费(暂计15,000美元)及其他费用。

### 三、主要争议焦点及仲裁庭结论

本案主要争议焦点为被申请人是否有权将涉案部分货物装载在舱面上以及被申请人作为承运人的责任范围应如何界定。

申请人认为:

- (一)被申请人在海防港将6件货物装载在“C”轮船面上的行为,违

反诚信原则,缺乏法律依据且存在明显过失,显然属于违约行为。

在正式起运前,申请人已经通过多种方式告知S公司,货物应装载在舱面。在起运后申请人也向被申请人抗议6件货物被装载在舱面。因此,被申请人自始至终明确知晓所有申请人货物需要装载在“C”轮船舱内的货运要求。所以,被申请人提出其有权将货物装载在船舶舱面的说法,有悖于法律基本的诚实信用原则。

其次,我国《海商法》第五十三条第一款规定,“承运人在舱面上装载货物,应当同托运人达成协议,或者符合航运惯例,或者符合有关法律、行政法规的规定”,本案既不存在授权被申请人可以在舱面上装载货物的协议条款,同时又没有任何有效证据表明被申请人在“C”轮舱面上装载货物符合航运惯例或者相关法律及行政法规的规定。

我国《海商法》第四十八条规定,“承运人应当妥善地、谨慎地装载、搬移、积载、运输、保管、照料和卸载所运货物”,本案被申请人之所以最后不得不在“C”舱面上装载货物,根本原因是其未能妥善谨慎地积载所运货物所导致,被申请人存在明显过失。

(二)被申请人所谓“涉案双方已就该6件货物运输至新加坡,被申请人就这6件货物的合同责任即终止达成一致”“根据我国《海商法》第五十三条第三款的规定,被申请人无需承担赔偿责任”和“因海防港装运货物的尺寸突然变化导致其无法按照原积载计划执行,所以被申请人无需承担舱面货装运的法律责任”的免责抗辩主张,缺乏事实与法律依据,不能采信。

(三) 被申请人提出的申请人索赔的所有转运及相关费用不合理的主张,也不符合事实与法律规定。

为了避免6件舱面货物发生货损且满足该票货物运输的时间要求,在当时市场上有且仅有“B”轮满足申请人承租要求的情况下,申请人紧急承租“B”轮整船进行转运,在当时情况下是无奈但唯一合理的选择。目前被申请人提出,申请人相关费用不合理,本质上是主张申请人的减损费用支出不合理,缺乏事实和法律依据。

被申请人认为:

(一) 双方签署的航次租船合同未约定涉案货物必须舱内运输。S公司2018年8月1日发给申请人的邮件或邮件附件尽管有提到舱内装载,但只是双方就装载计划的沟通内容,而非有约束力的合同条款。因此,被申请人没有合同义务保证将所有货物装载于舱内。

(二) 海防港有6件货物无法舱内装载的原因完全由于申请人突然改变货物清单,实际货物件数不仅仅比原清单多了5%,达到了浮动上限,又有6件新增货物的长度超过了原先清单内的货物最长长度,属于货物的重大变动,非合同允许的正常变化范围。根据我国《海商法》第六十六条和第一百条的规定以及双方签订的航次租船合同,申请人应当保证其在订舱时申报的货物的重量、长宽高、体积、可否堆载等描述是准确的,因申请人的过错,被申请人有权临时调整配载,将6个钢构大件货物进行舱面配载。

涉案货物为大型钢构件,有很多的异形、大尺寸的裸装件。作为运

输惯例, 此类货物通常无需或者无法排斥甲板装载。除非在订舱时双方协商一致, 并在合同中载明进行舱内装载, 否则被申请人并不承担此项义务。

在海防港装货过程中, 申请人提出另外的方案, 即打算在海防港将甲板上的货物卸下并另外租船运输, 但因台风将至, 港口方面不允许卸货, 为了船货共同安全, 船舶只得离港。

(三) 申请人指示被申请人将甲板的6件货物改为在新加坡卸载, 并同意承担额外改港费用。根据《海商法》第七十一条的规定, 提单是海上货物运输合同的凭证。经过和申请人协商一致, 被申请人签发目的港为新加坡的提单, 即双方已对原来的运输合同约定的卸货港口进行了修改。该变更后的运输合同已履行完毕, 后继转运费用和被申请人无关。

(四) 即使承运人违反装货约定, 我国《海商法》规定承运人责任仅限于货物灭失或者损坏。鉴于涉案货物并无任何损失或者损坏, 申请人所谓的安排新加坡转运费用, 显然不属于承运人的赔偿责任范围。

关于“B”轮费用675,075美元, 该金额明显不合理。申请人索赔的租船费用远远高于承运该6件货物的合理的市场运费价格。

(五) 申请人索赔的其他费用并没有事实依据, 向被申请人主张也没有法律依据。

1. 货物检验费用2,500美元, 缺乏事实基础, 没有法律根据。第一, 被申请人已履行完义务。第二, 申请人单方面安排进行不必要的检验, 产生不必要的检验费用, 没有法律依据。

2.重新装卸的费用26,245.23美元,证据缺乏真实性,无法证明实际已发生。

3.违约金54,050美元未实际发生,没有法律和事实依据。

4.新加坡港口使费75,000美元,是申请人同意负担的,又向被申请人提出索赔要求,明显不合理也不合法。

5.律师费,无法律或合同依据。

(六)虽然6件涉案货物改为新加坡卸货,但承运人并无任何义务退还所谓的运费差价。

在改变合同的过程中,申请人并未提出6件货物因运程缩短,要求被申请人退运费差额。申请人在运输结束后一次性支付了原先约定的全部运费,没有要求过扣减运费差额。

提前卸下6件货物意味着船舶增加了停靠,被申请人的费用和成本明显增加,不存在所谓节省运费。

(七)海运阶段并不存在延迟。“B”轮运输的6件货物在海达尔帕夏港卸货完毕的时间为2018年10月13日,被申请人“C”轮运输的申请人其他264件货物至该港卸货完毕时间为2018年10月14日。因此,不存在海运阶段的延迟。即便6件甲板货存在延迟交付的情形,该延迟也是陆运阶段的延迟,与海运无关。因此,申请人主张延迟违约金毫无法律或事实依据。

根据申请人与货主的约定,申请人只要能在2018年10月14日之前重新装船从新加坡开航,就不会违反与货主的运输合约。申请人因自身

原因,未充分利用时间在租船市场上询价,并通过竞价比较审慎地寻找合适的船舶承运这6件货物,未尽到审慎义务,产生的费用不应由被申请人承担。

仲裁庭认为:

本案中,当被申请人发现申请人所提供的货物不符合约定时,被申请人完全可以依据《海商法》第一百条的规定拒绝予以承运,但是被申请人却径自将涉案的6件货物装载于船舶甲板上。

S公司在2018年8月1日发给申请人的邮件尽管提到舱内装载,但其只是双方就装载计划的沟通内容,并不构成有约束力的合同条款。因此,被申请人没有合同义务将申请人的所有货物装载于舱内。

仲裁庭认为,根据我国《海商法》第五十三条第一款规定,承运人在舱面上装载货物,应当同托运人达成协议,或者符合航运惯例,或者符合有关法律、行政法规的规定。然而本案中,被申请人在清楚知晓申请人所提出的全部货物装载于船舱内这一要求的情况下,未主动与申请人达成舱面货协议而是径自将6件货物置于舱面之上进行运载,并且其也没能充分举证证明在舱面上装载涉案6件货物符合航运惯例或符合法律法规要求,显然违反了《海商法》关于装载舱面货的规定。

据此,仲裁庭认为,被申请人将涉案6件货物装载在“C”轮甲板上进行运输的行为,违反了我国《海商法》关于装载舱面货的规定,被申请人未能按照舱内装载这一合法方式运输涉案货物,没有完全地履行将申请人提供的货物按照约定的、合法的方式运送到目的地之合同义务,因

此构成违约,需承担相应法律责任,理应依法赔偿申请人为此遭受的经济损失。

至于在新加坡卸货后是否意味着被申请人运输6件货物的义务已经终止,仲裁庭认为,在新加坡港卸下涉案6件货物实际上是双方当事人针对舱面货问题协商确定的解决方案。被申请人关于双方协商变更了运输合同,已完成合同义务的主张,仲裁庭无法采信。

基于仲裁庭对系争合同履行与挂靠新加坡港费用承担的分析,仲裁庭认为,虽然《海商法》第五十三条第三款规定,承运人违反规定将货物装载在舱面上,致使货物遭受灭失或者损坏的,应当负赔偿责任,但这一规定并不应成为被申请人免除自身责任的法律依据。根据我国《合同法》第一百零七条的规定,当事人一方不履行合同义务或者履行合同义务不符合约定的,应当承担继续履行、采取补救措施或者赔偿损失等违约责任。因被申请人违约将涉案6件货物装载在舱面上,未完全履行合同义务,理应承担相应的法律责任。参照《最高人民法院关于适用〈中华人民共和国民事诉讼法〉时间效力的若干规定》,民法典施行前的法律事实引起的民事纠纷案件,当时的法律、司法解释没有规定而民法典有规定的,可以适用民法典的规定。《民法典》第五百八十一条规定,当事人一方不履行债务或者履行债务不符合约定,根据债务的性质不得强制履行的,对方可以请求其负担由第三人替代履行的费用。由于第五百八十一条属于《民法典》新增设的规定,因此可以适用于本案。据此,仲裁庭认为,申请人有权基于被申请人将涉案货物装载于舱面的违约行为,

请求被申请人负担由第三人替代履行即另行租船的费用。仲裁庭对于被申请人所提出的“只要货物未遭受灭失或损害,承运人则无须承担赔偿责任”的主张不予支持。

不过,申请人没有提供证据证明其曾就另行租船转运事宜与被申请人进行过协商或征求过被申请人的意见,其也未及时向被申请人披露另行承租“B”轮的《订舱确认书》、运费等信息。而且,申请人未能提供另行租船时市场询价过程,从而证明租用整船运输涉案6件货物的必要性与合理性。关于金额问题,申请人向B公司支付的租船费用为675,075美元,但被申请人认为该金额远远超出合理的市场价格,并提交了向B公司询价的证据加以证明。申请人没能提出任何证据对此予以反驳,其仅指出,只要采取减损措施费用(即转运等费用)低于涉案6件货物全损金额,就应当视作该笔减损措施费用合理。仲裁庭对于这一主张不予支持,我国《合同法》第一百一十九条也明确规定,当事人一方违约后,对方应当采取适当措施防止损失的扩大,没有采取适当措施致使损失扩大的,不得就扩大的损失要求赔偿。违约方所承担的应是当事人因防止损失扩大而支出的合理费用,仲裁庭认为,申请人租用整船运输6件货物的必要性和合理性并未得到证明,申请人全部货物到达海达尔帕夏港后的路上运输时间并不能说明租用整船的急迫性,因此仲裁庭无法采信申请人的此项主张。

综上,鉴于被申请人违反《海商法》规定和合同约定将涉案货物装载于舱面运输,故被申请人应承担一部分申请人另行租船的费用。而申

请人也存在未就另行租船转运事宜与被申请人进行协商、无法证明租用整船运输涉案6件货物的必要性与合理性、另行租船金额超出合理市场价格等问题,关于此项费用的支出,双方都负有一定的责任。依据《合同法》第五条当事人应当遵循公平原则确定各方的权利和义务、第六条当事人行使权利、履行义务应当遵循诚实信用原则的规定,仲裁庭裁定,另行租船费用675,075美元由申请人承担472,552.50美元;被申请人承担202,522.50美元。

#### 四、典型意义

本案争议是我国企业出海交易中比较典型的一种争议类型。根据知名管理咨询公司麦肯锡的分析报告,2024年之后中国企业出海的产业类型主要为基建与科技、新能源及先进制造业,全球90%以上的贸易往来均需要通过海运实现。因此海运业在企业出海参与全球基础设施建设、资源勘探开发等领域,发挥着至关重要的纽带作用。本案中,因中国企业在土耳其当地承包建设一个厂房设施,因此需要从国内运输钢结构至目的港,因装载方式引起了本案纠纷。在海上货物运输领域,舱面货的装载通常是特殊的。因为舱面货物与舱内货物面对的风险是明显不同的,是显著增加的,因此需要托运人与承运人在合同中特别约定,方可将货物装载在舱面上。至于承运人的赔偿责任范围,我国《海商法》作为特别法,虽然规定承运人责任范围为货损,但是该条法律并未排斥承运人承担除货损外的责任,如因此豁免承运人在无货损产生情

况下的其他责任,则会导致虽有违约行为和损失,却无需承担任何后果。因此仲裁庭亦援引了我国《民法典》的相关规定作出裁决。在海事海商类案件的审理过程中,我们也观察到了一般民商事法律的适用频率逐步增加。本案仲裁庭既适用了《海商法》,又在《海商法》没有规定的情况下,适用了《民法典》,实现了纠纷的妥善解决。

## **[How to determine that whether the General Manager has the actual authority to enter into the Guarantee and Indemnity Agreement on behalf of the Company under the Peruvian Law?--In the Matter of An Arbitration Regarding the Guarantee and Indemnity Agreement Between Claimant and Respondent]**

Key Words: Guarantee and Indemnity Agreement, Application of the English Law and Peruvian Law, Authority of General Manager

### **I. Summary of the Final Award (裁决要旨)**

1. On 1 December 2011, M as the Seller entered into the MOA with W for the sale of the Vessel at the price of USD 14,000,000. Due to W's failure to pay for the purchase of the Vessel, the Claimant alleged that Mr. E, as the general manager and Class A Attorney of the Respondent, and Mr. S, as the legal representative of M, reached the oral agreements that the Respondent guaranteed the payment of the purchase price for the vessel by W on a first demand basis to M (hereinafter referred to as the "2011 Guarantee"). In 2017, Mr. E also promised that the Respondent would pay M interest at an annual compound rate of 10% (hereinafter referred to as the "2017 Indemnity", together with 2011 Guarantee hereinafter referred to as "Alleged Arrangements"). On 12 October 2018, M and other non-parties to this case have entered into an accession agreement with the Claimant, through which the Claimant succeeded to all the

rights, title, interest, and obligations of M.

2. On 15 March 2021, Mr. S, also as the legal representative of the Claimant sent the 15 March Letter to Mr. E setting out the terms of the alleged arrangements above together with a CMAC Shanghai Sub-Commission arbitration agreement and asking Mr. E to confirm them. On the same day, Mr. E responded to Mr. S by email confirming the Alleged Arrangements on behalf of the Respondent. The Claimant submitted that both corporate resolutions and Peruvian law empowered Mr. E to make the Alleged Arrangements on behalf of the Respondent. The Respondent should pay the unpaid Purchase Price under the MOA as well as the compound interest.

3. The Respondent challenged the Tribunal's jurisdiction over the present case. They simply submitted that the Alleged Arbitration Agreement did not exist and was never concluded. The Respondent again submitted that the Alleged Arrangements did not exist and even if they did exist, Mr. E had not been authorized to make such arrangements on behalf of the Respondent.

4. On balance of probabilities, the majority of the Tribunal decided to accept that, as submitted by the Claimant who has firstly produced prima facie evidence to prove the existence of the Alleged Arrangements, and in absence of persuasive contrary evidence, the Tribunal (by a majority) finds and decides that the Alleged Arrangements existed. Mr. E has the actual authority to enter into the 2011 Guarantee and the Arbitration Agreement, but he has no

authority to agree on the 2017 Indemnity (or any indemnity which is not convenient or necessary) on behalf of the Respondent. However, since the London arbitrators have awarded compounded interest on the principal amount of Purchase Price, it follows that the claim for Purchase Price under the 2011 Guarantee will include the claim for such interest awarded under the MOA, and it will not prejudice the Claimant's right as such.

## **II. Summary of the Factual Background (基本案情)**

5.The Respondent, was incorporated under the laws of Peru and adopted its Bylaws on 16 March 2006. On 20 June 2006, the Respondent adopted a Shareholders' Resolution, in which the shareholders approved the creation of a new classification of "attorneys-in-fact" and a new structure of powers. Mr. E was appointed as a "Class A Attorney-in-fact", by virtue of which he enjoyed the power to exercise the contractual power provided in the 2006 Resolution on behalf of the Respondent.

6.The background of the dispute comes from the selling of a fishing vessel named "R", with M as the seller and W as the buyer. The parties executed an MOA dated 1 December 2011, in which it is stipulated that W shall make full payment to Seller within 1 year of the execution date of the MOA. On 7 December 2011, M duly delivered the Vessel to W in accordance with Article 5 Section b of the MOA. Further, the parties executed the Addendum No.1 to MOA dated 8

December 2011, in which the parties confirmed that W would pay M a Purchase Price of US\$14,000,000.

7.As previously mentioned, the following oral agreements were allegedly made between Mr. E on behalf of the Respondent and Mr. S on behalf of the Claimant from 2011 to 2017, which have been asserted by the Claimant but denied by the Respondent.

(1)In or around December 2011, an agreement whereby the Respondent “fully guaranteed” W’s obligation to pay the price of USD14 million for the purchase of the Vessel under the MOA. That price was due to be paid by 1 December 2012.

(2)In 2012, and pursuant to a request from the Respondent, an agreement whereby the due date for payment was extended from 1 December 2012. In return for M’s agreement to extend the due date for payment, it was agreed that late payment interest of 10% would be paid.

(3)In 2017, in view of continued non-payment by the Respondent and/or W and the Ng Family facing financial difficulties, an agreement whereby the Respondent agreed to (a) indemnify M, its successors and assigns, on first written demand, against all losses caused partly or wholly by Wiludi failing, refusing or being unable to pay the MOA USD 14,000,000 Purchase Price, (b) pay M annual compound interest of 10% on the USD 14,000,000 from the original due date in 2012 until payment in full, and (c) execute a formal fully enforceable deed of guarantee, upon first demand.

(4) Between 2012 and 2017, an arbitration agreement was also agreed orally to the effect that should any dispute arise between M and the Respondent in respect of the Alleged Arrangements, such dispute would be resolved by arbitration in Shanghai.

8. In 2016, the E family faced with financial challenges such that on 30 June 2016, certain entities within the P Group, including the Respondent's direct parent company, C Peru, filed for voluntary relief under Chapter 11 of Title 11 of the US Bankruptcy Code before the United States Bankruptcy Court for the Southern District of New York. However, the Respondent is not a debtor in these Chapter 11 Proceedings.

9. In April 2017, the Vessel was arrested in Namibia.

10. On 12 October 2018, M and other non-parties to this case entered into the Accession Agreement with the Claimant, through which the Claimant succeeded to the rights and obligations of M on the basis of universal succession following the reorganization.

11. On 30 December 2018, M commenced arbitration proceedings in London against Wiludi for the payment of the Purchase Price under the MOA. The arbitration award was rendered on 6 July 2022 and a Correction to this award was made on 12 September 2022.

12. On 2 June 2020, the Respondent transferred ownership of W, which became a subsidiary of S Limited, to another company in the Respondent's corporate group, as a result of an internal reorganization.

13. On 2 March 2021, the creditors of C Peru entered into a Restructuring Support Agreement, which provided that once concluded, the Respondent's creditors would take new debt and equity in the Respondent.

14. On 15 March 2021, the Claimant's Representative Mr. S, assisted by his lawyers, sent a letter (15 March Letter) to Mr. E, which described and reiterated the background of the purchase of the Vessel under the MOA, the breaches of MOA by W, and the 2011 Guarantee and 2017 Indemnity between Seller and Respondent. This letter also asked Mr. E to confirm that disputes arising out of the Guarantee and Indemnity Arrangements described therein shall be submitted to CMAC for arbitration by stating "Shanghai arbitration for dispute resolution...therefore that any disputes between M and the Respondent arising out of or in relation to the matters described in this letter, including the guarantees and indemnities given by the Respondent, would be resolved through the China Maritime Arbitration Commission, (sic) Sub-Commission (Arbitration Center) for arbitration in accordance with the CMAC's arbitration rules effective at the time of applying for arbitration; and that the respective award would be final and binding".

15. On the same day, Mr. E responded to Mr. S's letter via email, just three hours afterwards, confirming the guarantee agreement in 2011, the indemnity agreements in 2017, and the arbitration agreement between the Seller and the Respondent.

16. On 29 March 2021, the Claimant issued a formal letter to the Respondent, demanding payment of the USD 14,000,000 Purchase Price together with USD 16,965,498.15 interest accrued and due under the 2011 Guarantee and/or 2017 indemnity in relation to the MOA.

17. On 15 April 2021, the Claimant sent to the Respondent a final notice to pay the amounts due under the 2011 Guarantee and/or 2017 indemnity, otherwise a lawsuit would be brought against the Respondent.

18. On 2 June 2021, F Limited, C Peru and their affiliates, including the Respondent as well as certain creditors of Respondent entered into a Global Settlement Agreement, under which Mr. E was listed as one of the “Directors/General Managers” of the Respondent pursuant to Exhibit III of this agreement.

19. On 29 June 2021, Mr. E resigned from the position of general manager of the Respondent.

20. On 30 June 2021, Mr. P, another General Manager of the Respondent replied to the Claimant, denying liability to the Claimant.

21. On 16 August 2021, the Claimant commenced the present CMAC arbitration proceedings against the Respondent.

22. On 6 July 2022, the learned London arbitrators concluded that the MOA was not a sham agreement, and ordered W to pay the sum of USD 14,000,000 to the Claimant forthwith, together an interest of 4.5% per annum, compounded at three-monthly interval.

23. In the Claimant's Request for Arbitration dated 16 August 2021, its Clarification of its Requests for Relief dated 18 August 2021, and in its Application to Amend the Request for Relief dated 21 October 2022, the Claimant sought the following relief:

- (1) an order that the Respondent pay the sale price of the m.v. R to the Claimant in the amount of USD 14,000,000, alternatively damages;
- (2) an order that the Respondent pay the agreed late payment interest compounded at an annual 10% rate of the sale price of the Vessel to the Claimant from 1 December 2012 until actual payment in full;
- (3) an order that the Respondent pay the Claimant's costs of the London Arbitration and bear the Claimant's legal costs and the arbitration fees, including the fees of CMAC, arbitrators' fees, experts' fees (if any), direct costs and all other costs, fees and expenses of any kind as well as the interest on the costs afore specified at such rate and for such period as the arbitral tribunal may determine in the arbitral award.

### **III. The Issues in Dispute and Legal Analysis by the Majority of the Tribunal (主要争议焦点及仲裁庭结论)**

24. Based on the summary of the case above, the Tribunal notes that the parties mainly dispute on the following issues:

- (1) Whether the Alleged Arrangements existed? Or whether the Claimant failed to prove its existence?
- (2) Whether Mr. E has the actual authority to enter into the Alleged

Arrangements on behalf of the Respondent? Whether the Alleged Arrangements are invalid under English law?

(3) Whether CMAC has the jurisdiction?

A. Whether the Alleged Arrangements existed? Or whether the Claimant failed to prove its existence?

25. The Tribunal notes that, before proceeding with any analysis of the evidence in the present case, it is also necessary to address the allocation of burden of proof and standard of proof. On the first point, it is not disputed that, pursuant to Article 45 of the CMAC Arbitration Rules, the Claimant bears the burden of proving the existence of the Alleged Arrangements between Mr. E and Mr. S. On the second point, the CMAC Arbitration Rules are silent on the standard of proof to be applied. According to common practice in international commercial arbitration and the submission of both Parties, it is the Tribunal's view that the required standard of proof is that of the balance of probabilities, i.e., what is more likely than not.

26. It was common ground that there was no external contemporaneous evidence of the alleged telecons between Mr. S and Mr. E during which the agreements were concluded. It was necessary to determine whether the evidence adduced by the Claimant was sufficient to establish a prima facie case so the burden of proof shifted to the Respondent who denied the existence of the Alleged Arrangements.

27. The Respondent relies on the fact that Mr. S admitted in the

hearing that the terms of the 15 March Letter were drafted and “made up” with the assistance of the lawyers, so that these terms were never originally agreed during the alleged telephone conversations between Mr. S and Mr. E in 2011 or 2017. The Claimant argued that it had never suggested that the Alleged Arrangements were agreed between Mr. S and Mr. E in the precise terms set out in the 15 March Letter.

28. The Tribunal notes that Mr. S has confirmed in the hearing that the oral agreement made between Mr. E and him can be summarized as follows: “I can define this document in five bullet points. The nature of agreement was, one, in 2011, I received a guarantee. In 2012, I have extended agreement in return of agreeing to receiving further 10 per cent. And then in 2017, we agreed on 10 per cent compound interest. We also agreed on indemnity arrangements and we agreed on location of arbitration”. Based on the submissions of the Parties, it involves the issue of whether the 15 March Letter “made up” matters that had never been agreed.

29. On this issue, firstly, there was no dispute that the letter was later prepared by the lawyers, and the Tribunal did note that Mr. S, during cross examination, confirmed that the legal terms used in the 15 March Letter were “made up” by his lawyer. The Tribunal however thinks it reasonable for two businessmen with no professional legal background to seek assistance of a lawyer using legal terms to reflect what had been discussed and agreed orally. It is one thing that if a

“recapitulation message” generally reflects contents of earlier oral agreements, and it is another thing if it becomes a completely new agreement.

30. The Tribunal is of the views that while some legal terms (which may seldomly be used in telephone conversation) were “added” when one party seeks to recap the oral agreement, it does not necessarily mean it differs materially with the oral agreement itself. It assists an oral agreement to be converted into a more explicit/concise legal document. Such recapitulation message though slightly different from the oral conversion word for word, it may be evidence of the agreement instead of the agreement itself, unless sufficient evidence proves otherwise. The Tribunal notes the words of “on first demand” in the Claimant’s Request for Arbitration and in Mr. S’s witness statement, but, at the hearing Mr. S just said that he “received a guarantee”, while the 15 March Letter described it as “on first demand” guarantee. It is possible that Mr. S simply did not understand the differences between the two, and/or he did, but at the hearing, he meant “on first demand” guarantee when he said “guarantee” only. However, since Respondent is neither a bank nor an insurance company, it seems unlikely that the words “on first demand” was actually agreed between Mr. E and Mr. S even though the 15 March Letter was confirmed by Mr. E. It was also mentioned in the 15 March Letter that Mr. E only proposed Shanghai arbitration for dispute resolution which he agreed orally, but apparently with help of

his lawyer, he said to Mr. E that “Shanghai arbitration” was understood as CMAC arbitration, which was then confirmed by Mr. E.

31. The Claimant has produced a prima facie case in support of existence of the Alleged Arrangements, and in any event, the 15 March Letter shows that only two persons privy to it all confirmed the contents of their oral agreements to be accurate. Unless there is evidence to suggest otherwise, or the Tribunal would nevertheless find it implausible, the Respondent is then under the onus of proving that it did not exist, or it was indeed “made up” by Mr. E and Mr. S. However, on hearing evidence of the Respondent, the Tribunal has not seen any convincing evidence from the Respondent to the contrary. Nor has the Tribunal found material dishonesty of them.

32. It is odd or unusual for two parties in shipping industry to negotiate and conclude orally a contract involving over USD 14 million by telecon without any contemporaneous correspondences. However, the Tribunal appreciates that this case is quite different from any deal in ordinary course of business.

33. In the London Arbitration Award, it was further found by the learned arbitrators that “collaborating partners”, Messrs. E and S, “made an agreement which they intended to be a valid agreement even if they anticipated that, in good time, the debt created by it would be ‘sorted out’ rather than paid in cash”. The Tribunal finds it equally possible for Mr. E to have agreed with Mr. S on the Alleged Arrangements orally first, particularly because such agreements

would not be triggered at all when the debt under MOA was “sorted out”. While it is also possible that the move was simply an act for Mr. E to help Mr. S to extract funds from the Respondent before he was expelled, the Respondent has the onus of proof but failed to provide sufficient evidence to support its argument. Consequently, on balance of probability, the Tribunal by a majority, after considering all the evidence given by Mr. S at the hearing, is inclined to accept the Claimant’s submission in that the 15 March Letter echoes the “5 bullet points” raised by Mr. S, and with detailed analysis above, the Tribunal does not find material inconsistencies in the 15 March Letter and Mr. S’s evidence, the conclusion by the Respondent that the agreement did not exist is rejected.

34. The Respondent submits that the Claimant fails to reliably and sufficiently proving the existence of the Alleged Arrangements, which has been further elaborated by the Respondent into the following points and carefully considered by the Tribunal.

34.1 Firstly, the Respondent argues that there is no contemporaneous evidence to substantiate the Alleged Arrangements, as no records of such agreements appear in the financial statements of either M or the Respondent, nor is there any suggestion that other employees within the Respondent were made aware of the transactions in question.

34.2 However, the Tribunal is reluctant to jump to a conclusion merely due to lack of contemporaneous evidence for reasons as set out above. Therefore, the Tribunal decided to look at all evidence from

the Claimant before it makes any conclusion.

34.3 Secondly, it is also argued whether oral agreement is sufficient or whether it must be in writing? The factual background that the Tribunal must consider is that, as explained by the Claimant, there is no mandatory requirement for written agreements in the course of their business dealings with Mr. E. Their practice of conducting business orally has spanned over 15 years since 1996 when they first met. Moreover, on hearing from both sides, the Tribunal is inclined to agree that under English law, it is not a mandatory requirement for a guarantee or indemnity to be reached in writing, and in any event, if an oral agreement is later confirmed or evidenced by email exchange between the parties, that should satisfy the “in writing” requirement. As regards the arbitration agreement, since the arbitration agreement is governed by Chinese law, it is clear that an arbitration agreement should be in writing, however, it suffices where it is originally agreed orally, but later confirmed by way of email or any other form of electronic transmission which can be reproduced in writing, the requirement is satisfied.

34.4 In addition, as to the absence of the 2011 Guarantee and the 2017 Indemnity in the financial statements, the Tribunal notes that, Mr. B has confirmed during his cross-examination that “if in the consolidated accounts you’ve identified an account payable, you don’t need to identify a guarantee of that account payable as well” Therefore, considering that as a matter of accounting that where the

M accounts have identified an “account receivable” in respect of a debt, it is not necessary to further identify a guarantee in respect of the same account receivable.

34.5 Furthermore, regarding the fact that no one other than Mr. E himself within the Respondent is aware of the Alleged Arrangements, the Tribunal observes that Mr. E serves as the legal representative and Class A Attorney of the Respondent. As will be discussed below, this position confers upon Mr. E the authority to conclude agreements on behalf of the Respondent in the present case, without the necessity of consulting with any other officers within the Respondent.

34.6 Secondly, the Respondent also raises the issue of rational/reasonableness when the Claimant’s account of the circumstances and terms of the 2017 Indemnity are wholly implausible. On this issue, the Tribunal also finds it weird that in allowing W to delay payment under MOA indefinitely, yet Mr. E agreed to bind the Respondent to indemnify the Claimant against any losses for failure to pay the debt already due and to pay compound interest rate of 10% per annum.

34.7 Thirdly the Respondent submits that the Alleged Arrangements are implausible because the debt under the MOA was never expected or intended to be paid. However, although the London Arbitration Award does not bind upon this Tribunal or the Respondent, the Tribunal will respect the findings of the London Arbitration Tribunal unless there is convincing evidence to the contrary or otherwise

persuading the Tribunal not to follow. While the London Arbitration recognized that “in good time”, the debt would be sorted out by way of intra-group settlement or assignment instead of cash payment, it denied that the MOA was a sham and still concluded that the MOA debt was a real debt where both Parties did intend to create legal relations, which were also treated in the accounting records and financial statements as a debt owed to a ‘third party’. The Tribunal hereby confirms that the Respondent’s “sham” arguments must fail.

34.8 Fourthly, the Respondent submits that the Chapter 11 Proceedings provide important context for the invention of the Alleged Arrangements. However, the Respondent fails to provide any substantial evidence to support its argument that Mr. E and Mr. S acted in bad faith at the material time. The majority of the Tribunal is not convinced, on balance of probabilities, that the Alleged Arrangements never existed.

34.9 Fifthly, the Respondent questioned Mr. E's confirmation of the length, detail, and clarity of the terms in the 15 March Letter within a relatively short period. The Respondent suggests that the brevity of time could only indicate that the exchange of emails are fabrications of arrangements which were not in fact concluded. Mr. S had explained in the cross-examination that he personally called Mr. E two or three days before sending the email and told Mr. E that he would expect this email from Mr. E.

35. In conclusion, on balance of probabilities, it is the Tribunal’s

decision to accept that, as submitted by the Claimant who has firstly produced prima facie evidence to prove the existence of the Alleged Arrangements, and in absence of persuasive contrary evidence, the Tribunal (by a majority) finds and decides that the Alleged Arrangements existed.

B. Whether Mr. E has the actual authority to enter into the Alleged Arrangements on behalf of the Respondent?

36. It is essential to note that both Parties have consented to the application of Peruvian law on the issue of Mr. E's authority, which is in conformity with the Law of the People's Republic of China on the Choice of Law for Foreign-related Civil Relationships.

37. There is no dispute that the Respondent was incorporated in Peru on 16 March 2006, by means of a Certificate of Incorporation (COI) which contained the Respondent's Bylaws and was registered in the Peruvian public registry. Within this publicly available Bylaws and COI, it shows that Mr. E was appointed as the Respondent's general manager as such, he had the powers set out in Article 30 of the Bylaws, as well as those detailed in the Additional Clause of the COI. On or about 20 June 2006, by way of the 2006 Resolution under which Mr. E was appointed as a Class A Attorney-in-Fact, capable of exercising the powers in the new framework of POAs, which replaced the powers above in the Additional Clause.

2006 Resolution

38. First of all, after hearing from both sides, the general views of the

Tribunal towards the 2006 Resolution (or Bylaws) are that these were required by Peruvian law for any incorporated company to publicize the powers of attorneys. The general requirements of such POAs should be specific and express, and no evidence was given as to whether the 2006 Resolution itself was unlawful in respect of the POAs. With those in mind, the Tribunal is of the views that proper construction of the 2006 Resolution (or the like) must be that it is publicized according to Peruvian law in an aim to tell the potential counterparty at large what authorities a general manager (including particularly different class of managers) has rather than what he does not (because the manager would be unauthorized if it is not specific and expressly in the POAs). The logic behind it is that a publicized bylaws of BOD resolution is to encourage parties to be sure, rather than suspicious of the authorities that a manager may have, and hence in an aim to promote economic and trade rather than the other way around. Where a counterparty is not sure, it could seek clarification, but if it chooses to rely on the bylaws or BOD resolutions publicized, the Company who wish to challenge the authorities as listed in the bylaws or BOD resolutions shall have a heavier burden to prove why the authority does not cover the act of the manager. The company bylaws or articles of association will usually list the scope of business where it is subject to agreement among the BOD or shareholder's meeting. The whole purpose of this list of POAs is to facilitate the business transactions and to reduce the cost thereof.

Where the general manager is empowered, there is no need of agreement.

39. Secondly, where a contract or agreement is governed by a foreign law, it is sufficient to find what authorities that a manager has under Peruvian law, but it is irrelevant if there is any other requirement of a contract or agreement under Peruvian law.

40. The Claimant relied on Articles 6, 11, 19 and 27 of the 2006 Resolution and submits that Mr. E was vested with the authority to enter into the Alleged Arrangements:

In Article 11 of the 2006 Resolution, the power vested in Mr. E to conclude or amend or renew or terminate the agreements which will include “11. Simple surety agreements and joint and several surety agreements”

In Article 19 of the 2006 Resolution, it includes “19. Grant personal guarantee backing the obligation of the Corporation”.

In Article 27 of the 2006 Resolution, it includes “27. Any other typical or atypical contract or agreement, whether nominate or innominate, which, in his sole discretion, is necessary or convenient for the purpose of the Corporation”.

In Article 6 of the 2006 Resolution, it includes “6. Arbitration Agreement for any contract to which the corporation is, or will be, a party”.

The Respondent contends that none of the provisions in the 2006 Resolution granted any power to Mr. E to conclude the Alleged

Arrangements. Based on the parties' submissions, the dispute therefore is whether the POAs under the 2006 Resolution are express and specific.

41. The Tribunal is of the view that the relevant provisions of POAs under the 2006 Resolution are express and specific enough. To the mind of the Tribunal, the requirement of "express and specific" refers to the type of such contract/agreement and no more "express and specific" are needed which cannot be decided based on the wording of the POA itself.

42. In further discussion of the 2006 Resolution, the Respondent contended that Article 11 does not apply to the 2017 Indemnity, nor does it apply to any "on demand guarantee". There was also a dispute between the Parties over the terms of guarantee, surety or fianza in Spanish.

43. The Claimant submits that the Alleged Arrangements are forms of surety agreement and therefore fall within the scope of this power. The term "fianza" is simply Spanish for the concept of suretyship. It is irrelevant as to whether the Peruvian law requires suretyships to be in writing. The Peruvian law is only relevant to determine what Article 11 authorizes Mr. E.

44. The Tribunal is not convinced that "fianzas" will be limited to those under the Peruvian law. On the contrary, Article 1868ff of the Civil Code of Peru clearly defines the meaning of "fianzas" and it does not distinguish the characteristics of "fianzas" with that of the surety under

the English law, and it does not exclude its application to it. Therefore, it is sufficient for the Tribunal to determine whether Article 11 shall apply to any guarantee and surety which may be subject to a foreign law. It is irrelevant whether the Peruvian law may or may not have different requirements on the forms or requirements before a valid fianza can be concluded under the Peruvian law. Given the analysis above, the Tribunal thinks the Article 11 does empower Mr. E to conclude the 2011 Guarantee. As regards the 2017 Indemnity, it will be discussed later.

45.As for the authority to enter into the Arbitration Agreement, the Claimant submits that Article 6 of the Section II of the 2006 Resolution empowered Mr. E to execute “[a]rbitration Agreement for any contract to which the corporation is, or will be, a party”. The Tribunal finds that the text of Article 6 is clear, and it empowered Mr. E to enter into the Arbitration Agreement on behalf of the Respondent.

46.The Tribunal has noted that Article 27 firstly deals with the power in respect of typical or atypical (or nominate or innominate) contract or agreement and it appears that both Parties have no issues over whether the 2017 Indemnity falls within this category of contract or agreement. The only dispute is whether it empowers a general manager with the power that he, at his sole discretion, deems necessary or convenient. The Peruvian law emphasize that powers of attorney must be confined to a certain scope. In satisfying such requirement, there have been a list of specific types of contracts or agreements that a manager is empowered to

enter into with a counterparty. Article 27 should be understood as a catch-all provision. So, any contract or agreement, “typical or atypical, nominate or innominate” which does not fall into the previously provided category, may fall into this category, provided that the manager at his sole discretion deems it necessary or convenient. The Tribunal accepts the Respondent’s submission that the power under this article is not an unfettered or limitless power. However, the test for “necessary or convenient” should be applied objectively (not subjectively) in the eyes of the counter party who may rely on the 2006 Resolution. The objective test includes the consideration of object of the company, nature of the contract/agreement, ordinary course of company’s business as well as customs of the manager.

47. The Tribunal will now turn to discuss whether Article 27 of the 2006 Resolution would authorize Mr. E to enter into the 2017 Indemnity, which includes two parts, i.e. (a) the alleged agreement to indemnify any losses that Claimant may suffer; and (b) the alleged agreement to pay interest compounded at an annual rate of 10%. The Tribunal firstly concludes that the alleged agreement to indemnify the Claimant against any losses in this matter mean indemnify for any cost of Claimant in pursuing the claim against W under MOA, and the alleged compound interest means the interest to be accrued on the Purchase Price of the Vessel under MOA due and payable about 6 years ago. The Tribunal finds it difficult to understand why such agreement is necessary and convenient, and is done for the interest of the company when the principal debt was already overdue for

about 6 years. Nor was the Tribunal persuaded that in absence of the 2017 Indemnity, the Respondent's short-term financial stability would not be properly preserved. In particular, 10% compound interest per annum is extremely high among two entities in ordinary course of business, let alone the Parties which were closely associated. So, on the contrary, it would be unnecessary for Mr. E to rely on Article 27 of the 2006 Resolution to agree on 10% compound interest per annum. Similarly, when two closely associated companies were prepared to wait for the Purchase Price to be "sorted out" one way or another for 6 years, there must have been reasons why, all of a sudden, Mr. S and Mr. E agreed in 2017 that the Respondent would indemnify M against any cost in pursuing claim for Purchase Price, and unless evidence is produced, the Tribunal finds it hard to accept the 2017 Indemnity meets the "necessity and convenience" test. Consequently, the Tribunal decides that Mr. E was not authorized to agree with Mr. S on 2017 Indemnity.

48. In the second place, except the 2006 Resolution, the Claimant also submits that the Peruvian law authorized Mr. E to undertake the 2011 Guarantee and 2017 Indemnity, including Article 14 of the General Law of Companies (hereinafter referred to as the "GLC") and Article 188 of the GLC.

49. As for Article 14 of the GLC, it is not disputed that by the way of the Legislative Decree 1332, which entered into force on 7 January 2017, fifth and sixth paragraphs were added to Article 14 which provided that "Likewise, by sole virtue of their appointment and unless otherwise stated,

the general manager possesses all the powers of representation before natural persons and/or private legal persons ...Likewise, they have powers to dispose of and create liens on the company's assets and rights, as well as to enter into any type of civil, banking, commercial and/or corporate agreement provided for in the applicable laws", and it is also not disputed that by the way of the Supreme Court Decree 6, it is provided that the fifth and sixth paragraphs of Article 14 only apply to companies which were incorporated, or which modified their bylaws in relation to the management of the company, after the Legislative Decree 1332 entered into force on 7 January 2017.

50.Indeed, as the Claimant suggested, if the Legislative Decree 1332 is applicable in the present case, it would empower Mr. E to act on behalf of the Respondent to enter into any type of agreement. The question is whether the Supreme Court Decree 6 that sets limitation to the application of the Legislative Decree 1332 is valid or not. The Tribunal accepts the Respondent's submission that the Supreme Court Decree 6 is valid, and the Legislative Decree 1332 shall apply only to companies which were incorporated, or which modified their bylaws in relation to the management of the company, after 7 January 2017. Consequently, the Tribunal concludes that Article 14 of the GLC does not apply to any acts in respect of guarantee or indemnity.

51.As for Article 188 of the GLC, the Tribunal notes that this article has set a very clear pre-condition for its application by stating that "The powers of attorney of the manager shall be set forth in the bylaws, when appointed

or in a subsequent act. Except when otherwise provided in the bylaws or in an express agreement of the shareholders or the board of directors, the general manager is presumed to have the following powers of attorney". Therefore, it is the Tribunal's view that the article will apply only if there are no different provisions in the bylaws or in the agreement of shareholders or the board of directors in respect of the power of the attorney. In the present case, it is not disputed that the Respondent has made a clear power of attorney by the Bylaws of the Respondent and the 2006 Resolution. Therefore, this article is not applicable in the present case.

52.The Respondent finally argues on the issue whether Mr. E abused his power and hence the Alleged Arrangements are invalid and unenforceable even if it was found that Mr. E was acting within the limits of his powers.

53.The Claimant argues that the allegation of abuse of power is premised on his apparently "knowingly and fraudulently purporting to recognize false agreement, including a substantial and uncommercial provision for compound interest ... so as to benefit Mr. S and himself (to the substantial detriment of the Respondent) under the Peruvian law." However, the Peruvian law position is irrelevant as to whether the Respondent is bound by the Alleged Arrangements. This is a matter of English law.

54.The Tribunal accepts that whether Mr. E has abused his power is indeed a matter of English law, and therefore, the Peruvian law is irrelevant.

C.Whether the Alleged Arrangements are invalid under English law?

55.The only legal issue between the Parties is whether the Alleged

Arrangements are nevertheless invalid for want of certainty or fall foul of s. 4 of the English Statute of Fraud.

56.The Respondent argues that in the present case, where the Alleged Arrangements were later said to be a “guarantee” or “full guarantee”, and for unspecified “indemnity arrangements”, they are plainly too uncertain to be valid as a matter of English Law.

57.The Claimant concluded that all that a guarantee needs to provide for in order to be certain is simply that the guarantor agrees to guarantee the principal’s obligation to creditor under an agreement that has been entered into or is envisaged.

58.The Tribunal accepts the Claimant’s argument that it is sufficient for a guarantee to undertake to pay the debt, which is either fixed, or is expressly envisaged (i.e., which can be determined later). Indeed, where an letter of undertaking(hereafter referred as “LOU”) is provided for the shipowner to avoid the arrest of a vessel, it is quite often that the guarantor agrees to pay in the LOU whatever amount that is later adjudicated by the court (or by arbitration) or by agreement between the principal and the creditor (though more often than not, there will be a cap for the maximum liability under the LOU).

59.Both Parties also argued in their opening submissions on the issue of English Statute of Fraud. The Respondent suggested that the Claimant’s case cannot be that the 2011 Guarantee was agreed in 2011 in materially different terms than the terms contained in the 15 March Letter because in those circumstances, the 2011 Guarantee would fall foul of s. 4 of the

English Statute of Frauds.

60. The Claimant concludes that the English Statute of Fraud does not form part of the English substantive law of obligations that governs the parties' contractual relationship. As the current arbitration procedure is governed by Chinese law, the English Statute of Fraud has no scope of application in the present case. The Tribunal accepts Claimant's submission and decides that the English Statute of Fraud is irrelevant in the present case.

D. Whether CMAC has the jurisdiction?

61. Regarding the Tribunal's jurisdiction over the present case, the Tribunal has issued the Decision on Jurisdiction on 10 June 2022 and held that the Tribunal has prima facie jurisdiction over the present case in line with Article 4, Article 16, Article 18 and Article 19 of the PRC Arbitration Law, Article 5.4, Article 6.1 and Article 6.3 of the CMAC Arbitration Rules.

62. During the proceedings of the present case, as illustrated above, in absence of evidence to the contrary, the Tribunal recognizes the existence of the arbitration agreement, and Mr. E's authority to conclude the Alleged Arrangements except the 2017 Indemnity. Second, the Tribunal notes that the Respondent has alleged that even if the arbitration agreement existed, it is not valid because it does not meet the requirement of written form. The Tribunal notes that 15 March Letter also indicated that "Shanghai arbitration for dispute resolution" was originally "requested" by Mr. E and agreed to by Mr. S during the alleged oral telecon in 2011, but Mr. S then clearly expressed his understanding of such agreement which actually

refers to arbitration before China Maritime Arbitration Commission, Sub-Commission (Arbitration Centre). This was then expressly confirmed by Mr. E on behalf of Respondent. It can only be understood as arbitration before CMAC Shanghai Sub-commission though there are other arbitration institutes in Shanghai. The Tribunal notes that the Chinese law does not prohibit an oral agreement (concluded as such) from being rectified, supplemented or otherwise evidenced later in written form, by which a specific arbitration commission is specified. The Tribunal is satisfied that, in any event, Mr. E and Mr. S reached a supplementary arbitration agreement in writing which designated CMAC as the arbitration commission. Therefore, the Tribunal (by a majority) holds that CMAC has jurisdiction over the present case.

#### 四、典型意义

本案是中国海仲上海总部受理一起典型涉及企业出海的国际仲裁案件。本案仲裁条款约定为提交中国海仲上海总部仲裁，案件审理过程中的仲裁程序几乎与国际仲裁程序保持一致，国际律师团队广泛参与，使用了翻译及英文速记等国际仲裁辅助服务、设置交叉盘问环节、适用多国法律解决实体和程序争议、仲裁员来自不同国家、涉及众多国际支付环节、使用英文作为仲裁语言、开庭持续一周等，充分说明了中国海仲《仲裁规则》的基本理念和价值取向是充分尊重当事人意愿，机构对于案件程序的管理已经由“重管理”过渡到“轻管理”，且机构具备管理

国际仲裁案件的专业能力和经验,进一步验证了我国海事仲裁的地位正在逐步提升,中国海事仲裁正积极参与国际竞争。本案中,双方围绕着涉案船舶担保合同是否成立、被申请人总经理是否有权以公司名义对外提供担保等争议发表意见。虽然双方约定本案争议适用英国法,但是涉及被申请人总经理权限等问题,仲裁庭经过慎重考量,认为适用秘鲁法来审理这一议题更为适合,凸显了本案仲裁庭在法律适用方面的国际性和专业能力。此外,需要特别指出的是,本案涉及的仲裁费用问题,亦体现了中国海仲《仲裁规则》与国际全面接轨。中国海仲《仲裁规则》设置了两种收费模式,即按争议标的收费和按小时费率收费,后者在国际海事仲裁领域更加通行。正是这样的规则设置保证了本案收费的公开透明,赢得了当事人的信任。本案证明了中国海仲《仲裁规则》的包容性、灵活性,也有力地体现了中国海仲一直以来秉持的“轻管理”理念非纸上谈兵,中国海仲有充分的勇气和能力将这一理念贯彻到仲裁案件的管理过程中,充分尊重当事人的意见自治,同时提供当事人需要的仲裁管理服务,引领我国海事仲裁高质量发展,为提升我国海事仲裁业的国际影响力持续做出贡献。

## 【包运合同中,货物体积测量标准以及违约责任的确定?--某外方公司与某货运代理公司包运合同纠纷仲裁案】

关键词:【包运合同】【运费争议】【货物体积测量】【延误损失】

### 一、裁决要旨

在承运人将货物交付收货人之前,托运人可以要求变更海上货物运输合同。承运人主张货物运输责任期间变更的,应提供证据证明其与托运人已就变更达成合意。本案争议焦点,在合同未明确约定货物体积测量标准及程序的情况下,应以提单和装箱单等运输单证上记载的体积作为确定运费的基础。关于违约问题,申请人在第一航次存在延误交付的违约行为;在第二航次存在未妥善积载全部配件存在违约行为。对于第二航次因配件遗漏导致被申请人产生的合理损失(向案外人支付的赔偿款),申请人是否应承担赔偿责任。申请人为第三、四航次提供的船舶既不符合合同约定的“指定公司控制”要求,也无法在约定时间内抵达装货港,是否构成违约。

### 二、基本案情

#### (一) 申请人的仲裁请求及主

2020年2月18日,申请人与被申请人签订期限为2020年4月至12月(共八个月)大连港至纽卡斯尔港(中澳航线)多航次海运包运合同(CONTRACT OF AFFREIGHTMENT)。合同主要约定由申请人分航次(共计九个航次)完成被申请人所提供货物(主要为136列列车车厢及其

配件)的海运运输任务,同时被申请人需支付约定的运费价款。

2020年6月5日,第一批次货物实际起运,于2020年7月4日抵达卸货港,航行时间共计29日。

2020年7月17日,第二批次货物实际起运,于2020年8月6日抵达卸货港,航行时间共计20日。

2020年8月11日,被申请人单方解除包运合同。

在合同实际履行过程中,申请人认为被申请人违反了上述合同项下所约定其应承担的义务:第一、第二航次均未按时足额缴纳运费;第一航次履行过程中,被申请人临时变更第一批货物备货时间和数量导致申请人运输成本不当增加,造成额外损失;完成上述二航次的运输任务后,被申请人单方解除剩余航次的履行,提前终止包运合同。故申请人仲裁请求如下:

1. 被申请人向申请人支付第一和第二航次欠付运费370,678.85美元及逾期付款利息人民币115,837.98元。

2. 被申请人赔偿申请人因被申请人违反《包运合同》及擅自解除《包运合同》造成的损失共计人民币2,299,177.58元,包括:(1)因被申请人在第一航次中的违约造成的损失49,417.92美元以及(2)因被申请人未履行第三航次及后续航次造成的损失279,689.50美元。

3. 本案开庭审理产生的律师费人民币259,325元由被申请人承担。

4. 本案产生所有仲裁费用由被申请人承担。

(二)被申请人的反请求及主张

2020年2月18日,双方签署《包运合同》,由申请人安排船舶,为被申请人自大连港运输136列车厢及配件至澳大利亚纽卡斯尔港。《包运合同》第2条约定,“每个航次可能有大约100-200运费吨的配件”,“申请人最迟应在20天受载期首日提前45天通知被申请人船期”,“第一批次货物在船舶驶离装货港后需在18天内在卸货港交付”;之后,由于申请人在运输第一批次货物时未按照合同约定使用指定提单且发生严重延误,双方签署《补充协议》,进一步明确“使用指定提单,并请在规定时间内报适用船舶”。

就第一批次货物,起运时间为2020年6月5日,抵达卸货港的时间为2020年7月4日,超过上述合同约定的时间11天。由于货物晚到,被申请人不能按时交付货物,导致上游委托人扣留了应当支付给被申请人的最后一批次货物目的港内陆运费62,752.45澳元,回运配件海运费12,919.13美元以及操作费5,214澳元,以此作为货物晚到的赔偿金。按照2021年8月19日人民币兑澳元汇率中间价4.6916、兑美元汇率中间价6.4853。上述金额折算人民币共计402,655.83元。

就第二批次货物,申请人遗漏被申请人托运的配件,导致配件未能装入船舱。因配件必须与车厢一同出运,被申请人不得不采取对外购买集装箱,将配件装入集装箱后再装载在船舶甲板上的方式将配件运出。由此被申请人产生了额外购买集装箱的费用人民币64,000元。此外,因上述重新安排延误了船期,导致被申请人于2020年9月22日赔偿了案外人延误损失13,000美元,按照当日人民币兑美元汇率中间价6.7872,

折算为人民币88,233.60元。上述金额共计人民币152,233.60元。

被申请人所遭受的上述损失系申请人违约导致,申请人需承担全部赔偿责任。另外,被申请人多次催促申请人报告第三、第四航次的船期,但申请人均未如约提供,故申请人已构成预期违约。之后被申请人不得不解除合同。对于申请人预期违约所导致的损失,被申请人保留进一步索赔的权利。故被申请人提出如下反请求:

1. 申请人赔偿被申请人第一航次延误损失人民币402,655.83元,及以人民币402,655.83元为基数,按照同期全国银行间同业拆借中心公布的贷款市场报价利率自2021年8月20日起至被申请人实际赔付之日止的利息;

2. 申请人赔偿被申请人第二航次额外费用及损失人民币152,233.60元,及以人民币152,233.60元为基数,按照同期全国银行间同业拆借中心公布的贷款市场报价利率自2020年9月22日起至被申请人实际赔付之日止的利息;

3. 申请人承担被申请人为本案支出的律师费人民币160,000元;

4. 请求依法裁决申请人承担本案所有仲裁费用。

### 三、主要争议焦点及仲裁庭结论

#### (一) 关于双方就运费的争议

1. 关于双方就运费的争议,主要涉及到货物体积测量问题

就第一航次、第二航次货物实际体积(作为计费依据)的测量,仲裁

庭根据双方提供的证据,包括提单、装箱单及双方的邮件记录,在判定其具有真实性、合法性、关联性的基础上,查明如下事实:

(1) 实际承运人签发提单所记载的货物体积与被申请人提供的装箱单所记载的货物体积保持一致,而与申请人提交第三方测量机构所获取的货物体积测量结果不同。

(2) 申请人在向被申请人发送的邮件中对于货物体积测量曾表示:因为实际承运人质疑货物体积而需对货物进行重新测量。(2020年8月5日申请人发给被申请人的邮件)

(3) 对于货物的体积测量,由申请人单方请求第三方鉴定机构作出判定,被申请人未参与或监督,包运合同中仅规定承运人可对货物体积进行测量,但未提及具体测量要求及测量结果的效力:包括货物的最大尺度是什么标准;是否需要通知被申请人在旁监督测量过程(监尺);所得测量结果是否可以直接作为货物的计费依据。

仲裁庭认为,首先,因为申请人所得测量结果与本案其他具有证明力的证据相冲突,上述证据包括提单、装箱单中关于货物体积的记录以及邮件记录所记载的事实。其次,在包运合同第十五条对于货物体积规定不明确的情况下,按照《合同法》第六十条的规定,此时装箱单记录的货物体积可以确认为货物的实际体积。故仲裁庭认为申请人所提交的第三方测量机构得出的货物体积不应作为其向被申请人请求相应运费的依据,货物实际体积应以装箱单与提单上记载的体积为准。综上所述,本仲裁庭对于申请人的相关仲裁主张(对于因测量体积不同导致的

第一航次、第二航次索赔运费请求) 不予支持。

根据《海商法》第六十九条规定：“托运人应当按照约定向承运人支付运费。”，托运人具有依约付费的义务。在本案中，虽然申请人存在违约情形，主要包括第一航次延迟抵达目的港、第二航次未将相应配件安排积载于船上，但亦履行了运输合同项下的主要义务，故被申请人应当给付第二航次运费中扣除已支付给实际承运人后的差额部分。其中被申请人支付给实际承运人的运费单价为57美元/计费吨；申请人与其下家签订的包运合同约定的运费单价为60美元/计费吨。前者小于后者，故仲裁庭认为被申请人并未向实际承运人超额支付运费，即被申请人并未以60美元/计费吨以上的价格向实际承运人支付运费。因此，被申请人并未将申请人所应得的利润部分支付给实际承运人，故被申请人无需另行支付给申请人此部分利润。此外，对于申请人上述违约行为给被申请人带来的损失将在反请求部分加以阐述，此处不再赘述。因此申请人应获得对应第二航次的运费报酬：申请人应收取的运费(304,718.30美元)，减去被申请人已实际支付给实际承运人的运费(264,776.40美元)，即39,941.90美元。

## 2. 被申请人是否与第三方公司产生不应有的联系

申请人曾提出被申请人与第三方公司产生不应有的联系，违反包运合同规定，仲裁庭对此有如下意见：

根据包运合同的规定，托运人不应与承运人之外的第三人产生不必要的联系，但在本案中，首先，申请人作为承运人并未给出托运人与

实际承运人(第三人)之间不当联系的直接证据。其次,就双方提供的电子邮件记录来看,被申请人在第二航次配件无法装上船的情况下,与实际承运人进行沟通协调,从而购置集装箱将货物装于甲板之上,完成其合同项下的目的,并非属于上述合同中规定的“不必要联系”的范畴。再次,根据《海商法》第九十五条的规定:“对按照航次租船合同运输的货物签发的提单,提单持有人不是承租人的,承运人与该提单持有人之间的权利、义务关系适用提单的约定”,按照航次租船合同运输的货物签发的提单可在提单持有人(非承租人前提下)与承运人之间发生效力,根据提单的约定调整双方的权利义务关系,故本案被申请人作为提单持有人而非航次租船合同项下的直接承租人有权就货物运输的相关问题在必要情况下按照提单要求进行协商解决,与包运合同的规定亦不矛盾。最后,在申请人违约的情况下,被申请人为防止损失进一步扩大而与实际承运人进行联系并形成解决方案可以视为采取的适当减损措施,符合《合同法》第一百一十九条的规定:“当事人一方违约后,对方应当采取适当措施防止损失的扩大;没有采取适当措施致使损失扩大的,不得就扩大的损失要求赔偿。当事人因防止损失扩大而支出的合理费用,由违约方承担。”

综上所述,本案中双方并非出于运输本批次货物外的目的进行接触,不应被认定为被申请人与第三方公司产生不应有的联系。

### 3. 申请人第三、四航次所报船舶能否按时到港

从被申请人提供的航行轨迹来看,第三、四航次申请人所报船舶能

否按照双方事先约定的时间到港存疑：

(1) 第三航次申请人所报船舶A轮到港日期为七月十五日至二十五日，而A轮七月十五日尚处南印度洋海域，近非洲，不符合上述到港日期的要求。

此外，根据申请人与被申请人所签署的补充协议中第一条的内容，申请人在第二航次之后必须安排指定公司控制的船舶来承运后续货物，而A轮于2020年3月就解除了与指定公司之间订立的期租合同，因此，在申请人提名该船舶时，即2020年6月17日（见申请人向被申请人发送的6月17日的邮件），A轮已不在指定公司的管控之下，故此船舶本身亦不符合上述补充协议的要求。

(2) 第四航次申请人所报船舶B轮于八月中旬尚处大西洋海域，近南非，亦无法满足申请人的装货时间的要求：八月十五日备货完成，需于九月二十五日前到港。此外，申请人亦未给出相应的证据证明其已联系上对应的实际承运人或给出对应的承诺，故仲裁庭不认可上述船舶能按照双方约定在规定时间内到港。

并且，虽然邮件（6月17日的邮件）中有“sub”（“替代船”）字样，意图表明申请人有联系与安排其他替代船舶的可能性，但直至第三、第四航次预计装货时间开始后，申请人并未提供替代船舶的任何信息，因此仲裁庭不认为申请人已实际安排其他替代船舶以供航行。

除上述争议外，仲裁庭另查明：

(1) 申请人在第一航次运输过程中确实存在延误的情况，违反了包

运合同第二条的规定：“第一个航次应当在船舶离开装货港后18天内抵达卸货港”，申请人未按照被申请人要求将航行时间控制在十八日内。

(2) 申请人在第二航次运输中也存在违约情形，违反包运合同第二条关于货物条款的规定：“每个航次可能有100~200运费吨的配件”，即申请人未将车厢配件一并积载于船舶上。

(3) 被申请人备货时间亦存在一定程度上的延误，调整后的货物到港时间与前期合同中约定的预估时间相差较大，一定程度上给申请人按时提供船舶造成障碍。

仲裁庭经查明，根据申请人与被申请人所提供的证据（主要为双方邮件沟通记录与被申请人提供的船舶航行轨迹，仲裁庭认可邮件记录与航行轨迹的真实性），申请人就第三、四航次均向被申请人提供了可供航行的船舶名称，但所提供的船舶不符合被申请人的要求。不符之处在于第三、四航次被申请人所报船舶“Y”和“G”能否按照双方事先约定的时间到港存疑，两艘船舶均离始发港较远（见事实认定部分）。另外，申请人亦未给出相应的证据证明其已联系上对应的实际承运人或给出对应的承诺。同时，申请人也未在被申请人拒绝申请人提供的上述第三航次、第四航次船舶后另行提供其他符合标准的船舶，故申请人存在一定的过失。因此，根据《海商法》第九十六条：“出租人应当提供约定的船舶；经承租人同意，可以更换船舶。但是，提供的船舶或者更换的船舶不符合合同约定的，承租人有权拒绝或者解除合同。”的规定，若提供船舶不符合约定，出租人将视为违约，承租人可解除包运合同框架协议中申

请人尚未履行三、四航次的航次租船任务。

对于被申请人第一航次有关延误损失的仲裁反请求,仲裁庭查明,虽然申请人确实未满足单航次运输时间的要求,但备货数量与之前合同约定发生较大变化,货物数量较包运合同的最初约定增加了一倍,由8节车厢变为16节车厢,因此,在备货数量方面被申请人违反了合同所约定的要求。而根据《海商法》第一百条:“承租人应当提供约定的货物;经出租人同意,可以更换货物。但是,更换的货物对出租人不利的,出租人有权拒绝或者解除合同。因未提供约定的货物致使出租人遭受损失的,承租人应当负赔偿责任。”的规定,承租人违约提供货物给出租人带来损失,承租人应承担相应的赔偿责任,故被申请人应就违约提供货物(即货物数量不符合合同约定)承担责任。同时根据《合同法》第六十七条:“当事人互负债务,有先后履行顺序,先履行一方未履行的,后履行一方有权拒绝其履行要求。先履行一方履行债务不符合约定的,后履行一方有权拒绝其相应的履行要求。”,申请人作为后履行一方有权对先履行方被申请人违约行为进行抗辩,拒绝其相应的履行要求:即要求第一批货物于18日内由大连港运至布里斯托港。

此外,本案中被申请人所提供的证据材料并不足以证明其所受实际损失及其合理性,故根据《仲裁规则》第四十五条的规定:“(一)当事人应对其申请、答辩和反请求所依据的事实提供证据加以证明,对其主张、辩论及抗辩要点提供依据。……(三)当事人未能在规定的期限内提交证据或虽提交证据但不足以证明其主张的,负有举证责任的当事人

承担因此产生的后果。”，负有举证责任的被申请人也应当承担举证不力所导致的后果。综上，本仲裁庭对此请求不予支持。

对于被申请人第二航次遗漏配件相关费用及延误损失的反请求，仲裁庭根据申请人与被申请人提供的货物测量报告、装箱单等证据认为：根据包运合同第二条的规定，每批次货物可能有一百到两百运费吨的配件，意味着即使在后续运输过程中货物运量根据实际情况有所调整，申请人至少需保证船舶能积载上述每批次可能附带配件的体积下限，即100运费吨的配件，但在第二航次中申请人仅装运了不到50计费吨的配件于船上便停止装载。同时第二航次所运输的货物体积，虽然在货物数量（件数）上较第一航次有所增加，增加了二十五件配件，但在货物体积上第二航次的货物较第一航次的货物反而有所减少，且两个航次申请人均邀请第三方机构对货物进行检测，理应对货物体积有更清晰的认识。此外，在后续实际装载环节中，通过被申请人与实际承运人的协调，货物成功积载于船舶甲板之上，这表明该船舶并非无法继续装载剩余配件。综上，申请人确实违反了合同的相关约定，而根据《合同法》第一百一十九条：“当事人一方违约后，对方应当采取适当措施防止损失的扩大；没有采取适当措施致使损失扩大的，不得就扩大的损失要求赔偿。当事人因防止损失扩大而支出的合理费用，由违约方承担。”，在申请人违约的情况下，被申请人为防止损失进一步扩大而与实际承运人进行联系并形成解决方案可以视为采取适当措施，其直接与实际承运人的联系并无不当，因此由申请人违约产生的相关费用应由违约

方申请人承担。此外,根据《合同法》第一百二十一条规定,“当事人一方因第三人的原因造成违约的,应当向对方承担违约责任。当事人一方和第三人之间的纠纷,依照法律规定或者按照约定解决”,即使可能存在第三人过错的因素,申请人作为直接违约方也应当承担责任。包运合同作为约束申请人与被申请人主要依据,当申请人因第三人违反包运合同约定,不影响被申请人就包运合同的约定要求申请人承担责任,就被申请人所遭受的损失,即赔偿给案外人延误损失13,000美元,申请人应当承担赔偿责任。但对于被申请人提出的申请人应赔付其购买集装箱费用的反请求部分,被申请人未提供相应票据或购买凭证证明当时其购买集装箱时所付出的对价,亦未有其他证据证明三个二手集装箱的来源以及最终处理结果,包括该箱子是否仍继续使用或具有残余价值,即被申请人未能有力举证该笔费用的发生与数额。因此,根据《仲裁规则》第四十五条的规定,负有举证责任但举证不力的被申请人应当承担由此产生的后果,即该笔费用不得计入被申请人的损失范围,故对此请求不予支持。

#### 四、典型意义

《包运合同》一般适用于铁矿石、煤炭等大宗货物的长期运输,主要服务于货主的大批量可分期运输需求。包运合同争议也是企业出海中较为常见的一种争议类型。包运合同的每一个航次并非孤立存在,前一航次的履约瑕疵(如延误、配载问题)会直接影响双方信任,并成为后续

航次争议的背景和诱因,当事人需以合作的姿态履行整个合同周期内的义务。海运作为全球贸易中最主要的运输方式之一,其准时交付货物对于供应链的顺畅运作至关重要。关于货物体积的确定,主要有以下几个原则,合同约定优先原则、行业惯例与标准单据原则、公平与合理原则。本案中,仲裁庭认为,申请人所提交的第三方测量机构得出的货物体积不应作为其向被申请人请求相应运费的依据,货物实际体积应以装箱单与提单上记载的体积为准。体积计费法是适用于需要根据物品的体积来计算运费的情况。在运输标准版中,一般会规定一个基准体积,超过该体积的部分按照额外的费率计算运费。关于延误问题,由于各种原因,货物在海运过程中可能发生延误,进而引发超期费和损失赔偿的问题,延滞损失的产生一般来自当事人不能预见的过失或承租人其他的违约/过错(如迟延告知具体的装卸港口等),导致船东可以向承租人提出的索赔。实践中物流运输行业的受多重因素影响,延误属于常见情况,需要个案进行分析。

## 【仲裁程序中，破产清算程序的适用--某轮船有限公司与重金属公司远洋运输协议违约纠纷仲裁案】

关键词：【FIXTURE NOTE】【破产清算】【冲突法】

### 一、裁决要旨

本案中，申请人与被申请人签订的六份远洋运输协议明确规定了被申请人应支付的海运费及支付期限，申请人已按约完成每一条船的装货任务，并按约履行运输义务，经申请人多次催款，被申请人逾期未支付海运费，双方据此产生争议。在仲裁程序进行中，被申请人被澳大利亚当地法院裁定破产清算，并指定了清算人。本案的核心法律问题在于，当一方当事人在仲裁程序进行中被外国法院宣告破产清算时，仲裁程序应如何进行，以及清算人是否有权代表该当事人继续参与仲裁。仲裁庭通过适用仲裁地（中国）的冲突规范，即《中华人民共和国涉外民事法律关系适用法》第十四条，指引至被申请人登记地法律，即《澳大利亚公司法2001》来具体确定涉外民商事法律关系的当事人的权利义务。仲裁庭根据准据法，认定尽管被申请人已进入破产清算程序，但被申请人尚未被注销，仍具备法人资格，仍具备民事权利能力与行为能力，能够继续履行协议项下的义务。澳大利亚当地法院已经裁定被申请人进入破产清算程序并已指定清算人，根据《澳大利亚公司法2001》，清算人有权以公司名义参与诉讼或仲裁程序。因此，仲裁庭认定清算人可代表被申请人继续参与本案仲裁，破产清算程序不构成仲裁程序中止的法定事由，仲裁庭对案件有继续审理的管辖权。本案明确了涉外仲裁中当

事人主体资格争议应通过冲突法规范确定准据法,为企业出海可能遭遇的跨境破产争议提供了程序协调的范例。

## 二、基本案情

仲裁庭经审理查明:2024年2月5日,张某,即代表被申请人与申请人的对接人,邓某,即被申请人股东和董事,任某,即申请人副总经理,三人微信群聊天,张某将湖北铁鑫通签署的国际多式联运协议彩色扫描件发给任某。2024年3月4日-3月13日,张某与任某微信聊天中确认其邮箱地址,并与申请人沟通澳矿租船合同、运费、货物集港装船库存、首船铁矿石运抵中国等事宜。此后,申请人与被申请人于2024年2月27日、3月4日、4月8日、4月19日及5月7日前后共签订了六份远洋运输协议(即“FIXTURE NOTE”),明确约定了双方在运输服务中的责任、义务及海运费的支付条款。

2024年3月27日,张某通过微信将被申请人签署的P轮、D轮远洋运输协议发给申请人。2024年5月8日,张某通过邮件将被申请人签署的N轮、H轮、B轮、C轮远洋运输协议发给申请人,邮件同时抄送给被申请人的股东和董事邓某。2024年2月-5月,案外人澳大利亚船代M公司通过电子邮件陆续给申请人发送六船装卸准备就绪通知书、装卸事实记录、提单,申请人已按时履行了相关运输义务,并提供了海运服务,但被申请人未履行海运费支付义务。

2024年7月15日,申请人与被申请人以及案外人湖北某公司、香港

某公司(申请人香港公司)签署了四方协议,约定由湖北某公司将其向被申请人购买第六船C轮澳矿的货款美元3,650,998.49元直接支付给香港某公司(申请人香港公司)。同日,申请人与被申请人另签署《补充协议》,双方确认六份远洋运输协议下海运费总额为美元6,855,244.72元,并约定四方协议下湖北某公司支付给香港某公司(申请人香港公司)的货款美元3,650,998.49元抵销被申请人欠付申请人的相应海运费,并按照海运费应付日期的先后顺序进行抵销。抵销后,被申请人欠付申请人海运费余额为美元3,204,246.23元。经申请人多次催促,被申请人仍未支付,申请人于2024年6月20日向仲裁委员会提交仲裁申请,要求被申请人支付逾期海运费及利息。被申请人于2024年9月10日进入破产清算程序,澳大利亚法院指定了清算人。

申请人提出仲裁请求如下:

1. 裁决被申请人支付申请人海运费总计美元3,204,246.23元。
2. 裁决被申请人支付申请人逾期未付海运费的利息美元99,547元。
3. 裁决被申请人支付仲裁费人民币301,944元,律师费人民币75,000元。

### 三、主要争议焦点及仲裁庭结论

本案主要争议焦点为仲裁程序中破产清算程序的适用。

在协议履行过程中,申请人按照约定提供了运输服务,而被申请人

未按时支付相关海运费用,导致争议产生。在本案仲裁程序进行过程中,被申请人被澳大利亚当地法院裁定破产清算,并指定了清算人。申请人认为,其债权尚未获得正式确认,要求继续本次仲裁程序。被申请人清算人认为,申请人已在破产清算程序中提交请求,因此清算人认为双方可以在破产清算程序中解决相关争议,而不是在仲裁程序中解决。

仲裁庭认为:进入破产清算后,当事人协议选择的英国法律并没有解决本案被申请人民事权利和行为能力问题的相关规定。在此情况下,申请人认为应适用仲裁地冲突法,即《中华人民共和国涉外民事法律关系适用法》(以下简称“《法律关系适用法》”)相关规定。被申请人未提交相关意见。仲裁庭认可申请人意见,应适用仲裁地的冲突法,即《法律关系适用法》相关规定解决涉案当事人民事权利能力及民事行为能力的法律适用问题。根据《法律关系适用法》第十四条的规定,“法人及其分支机构的民事权利能力、民事行为能力、组织机构、股东权利义务等事项,适用登记地法律”,另查明,被申请人为登记在西澳大利亚州(Western Australia)的澳大利亚公司,故就其民事权利能力及民事行为能力的判断应当适用澳大利亚法律。申请人提供了《澳大利亚公司法2001》,被申请人对此未发表任何意见。仲裁庭认可申请人提供的相关法律,并认为根据《澳大利亚公司法2001》第477条,“清算人权利 (2) 根据本章规定,清算人可以:(a) 以公司名义或代表公司提起任何法律诉讼或参与答辩;和(b) 委托律师协助清算人履行职责”及第488条,“清算人完成工作及公司注销登记 当清算人(a)已变现公司所有财产……清算人可

以向法院提出申请：(d) 申请法院裁定由澳大利亚证券和投资委员会注销公司登记”的规定，被申请人尚未被注销，仍具备法人资格，仍具备民事权利能力与行为能力，能够继续履行协议项下的义务，澳大利亚当地法院已经裁定被申请人进入破产清算程序并已指定清算人。根据上述澳大利亚法律，被申请人清算人J公司、T公司有权代表被申请人参与本案仲裁程序。因此，仲裁庭认为，破产清算程序并未影响本案仲裁程序，清算人已实际参与本案仲裁程序，因此本案仲裁程序应继续进行，仲裁庭应继续审理本案。

综上所述，仲裁庭认为本案涉及的协议具有完全的法律效力，双方应依照协议条款履行各自的义务，仲裁程序将依据该协议继续审理。

#### 四、典型意义

本案在跨境争议解决与破产法交叉领域具有很强的实务价值，破产程序主要用于解决债务人的债务清偿问题，由法院主导；仲裁程序则用于解决当事人之间的争议，由仲裁机构主导。两者在法律性质、启动条件和程序特点上存在显著差异，但在实践中可能存在交叉和协调，当债务人在某个国家或地区进入破产程序，而债权人依据仲裁条款在另一法域提起仲裁时，便产生了破产程序与仲裁程序并行的局面。二者之间的程序冲突来自于不同的价值考量：仲裁程序旨在维护签订仲裁协议的当事人之间的意思自治与契约自由，而破产程序则致力于保障所有债权人集体的共同利益。具体到本案，双方当事人协议选择的英国法

律并没有解决本案被申请人在进入破产程序后的民事权力和行为能力认定的相关规定,被申请人的破产清算人希望在破产清算程序中解决争议,而申请人则希望继续本案仲裁。仲裁庭通过适用仲裁地冲突规范,准确援引外国法(澳大利亚公司法)以确定当事人的民事能力与清算人权限,并明确了企业进入破产清算并不自然导致仲裁程序中止,只要其法人资格存续,清算人即有权代表公司参与仲裁。这一认定既有助于防止债务人滥用破产程序拖延债务清偿,保障债权人的合法权益,也保证了仲裁程序的效率与连续性。

企业出海过程中,企业自身或者合同相对方难免因为经营不善进入破产程序,而本案裁决在对涉外仲裁程序遭遇破产程序时,仲裁机构如何应对提供了一定的参考价值,仲裁庭通过准确适用冲突法规范确定准据法,解决事人主体资格争议,不仅提高了争议解决的效率,保障债权人和债务人的合法权益,进而维护了法律程序的一致性,使得纠纷得以圆满解决。

## 【再保险合同的责任承担?--某外资保险公司与某外资保险公司再保险合同纠纷仲裁案】

关键词:【框架式保险合同】【再保险合同】【定期申报】

### 一、裁决要旨

本案中,申请人与被保险人签订了不定期框架式保险合同,后申请人为降低风险,与被申请人签订了再保合同,并全额支付保费。合同履行开始,被保险人发生保险事故,申请人全额进行了理赔赔付,后申请人据此向被申请人请求索赔,被申请人以再保险性质为财产险并非运输险、涉案货损地点不在再报范围之内、申请人未履行定期申报的义务、申请人的损失已从其他再保险人处获得索赔等理由拒保。本案涉及再保险合同履行中常见的几个争议焦点:再保险合同成立时间、保险标的的范围、申报义务履行、以及损失补偿原则的适用等,本案仲裁庭仲裁庭未对实体争议作出裁断,在仔细阅读双方意见并经三次开庭审理后,在仲裁庭组织下,促成双方当事人达成《和解协议》,并依双方共同申请,根据《仲裁法》及仲裁规则,按和解内容作出裁决书。本案体现了仲裁在复杂再保险纠纷中灵活、高效的争议解决优势,尤其展示了仲裁庭在协助当事人实现和解、并将和解协议转化为具有强制执行力的仲裁裁决方面的独特价值。

### 二、基本案情

2009年5月,申请人与被保险人S汽车销售(中国)有限公司就进口

到中国的轿车的内陆运输签订了不定期的框架式保险合同,对这些车辆的内陆运输及相关存储风险进行了承保。

为降低风险,申请人与被申请人就该保险业务的再保事宜进行了交流沟通。经过多次商谈且申请人向被申请人提交了“A道B号的风险评估报告”后,双方于2014年7月就此再保业务达成一致,签订了“再保合同”。一年期满后,双方又就下一年期内的相关再保险事宜签订了“再保险合同”。申请人全额支付了应缴的保费。

在合同履行期间内,2015年8月12日,停放在A道B号的轿车在爆炸事故中毁损。

申请人按约对被保险人S汽车销售(中国)有限公司进行了理赔及赔付。其后,申请人依据上述“再保险合同”向被申请人索赔,但遭拒。

经过协商、交涉无果后,申请人根据双方的约定,提起仲裁申请,提出并经变更的仲裁请求如下:

1. 裁决被申请人支持理赔款人民币46,237,840元及利息(以人民币46,237,840元为本金,按照中国人民银行贷款利率,从2015年8月21日暂计至2019年8月19日,自2019年8月20日起按中国人民银行公布的LPR计算到实际支付日止)。

2. 裁决仲裁费由被申请人承担。

### 三、主要争议焦点及仲裁庭结论

本案主要争议焦点为申请人是否有权依据再保险合同向被申请人要求索赔。

申请人认为:涉案再保险合同是在2014年再保险合同期满后的续签,虽然再保险合同日期为2015年8月13日,但合同内容在2015年5月已确定并已录入被申请人业务系统,再保险合同已于2015年5月成立,被申请人应承担合同义务。涉案再保险险种是货运险而非财产险,申请人与被保险人之间的险种是货运险,且依据申请人和被申请人之间的邮件往来,无任何证据表明双方对此有实质性的变更。被申请人提交的“环球滚装码头”报告从另一个角度反映了A道B号就在港口环球滚装码头内,申请人发给被申请人的风险评估报告地点也是A道B号。被申请人当时并未提出异议。双方再保险合同没有明确约定申请人向被申请人申报,被申请人在再保险期间也没有要求申请人申报。申请人已按照保监会的要求对案外人进行了赔付,申请人所提供的公估报告通过航拍被封事故现场等相互对比、印证、核实等诸多环节最终得出了涉案车辆全损的结果,申请人的理赔并非没有依据,合法合理。申请人与其他再保险人之间的法律关系、是否赔付与被申请人无关,并不减免被申请人的保险责任。

被申请人认为:涉案再保险合同在2015年4、5月份双方邮件沟通时尚未成立,再保险合同最早也只能于2015年8月13日之后的2-3天后才成立,被申请人依法依规不对爆炸事故造成的涉案损失承担再保责任。本案再保险是对三个仓库地址的再保险,该再保险属于指明地址仓储财产的财产险,并不涉及其他仓库及任何运输。涉案货损地点不在再保

范围内,港口环球滚装码头与A道B号堆场是两个不同的仓储地点,两地点无任何隶属及关联关系,A道B号不在被申请人的再保险范围内。定期申报是申请人的义务,也是申请人就特定保险标的获得再保险的前提条件,本案中申请人未向被申请人履行申报义务,因此无论申请人是否有损失,被申请人都不应当承担再保险责任。申请人未能证明其应当承担涉案货物的保险赔偿责任,未能证明与被保险人S汽车销售(中国)有限公司之间存在合法有效的保险合同,未能证明涉案货物由申请人承保,因此其赔付与否都不能纳入到再保险范围。申请人主张的赔付金额没有依据,申请人未能举证证明A道B号仓库内车辆的损失数量、损失程度及损失金额,以销售价格计算损失而对被保险人S汽车销售(中国)有限公司赔付没有依据。申请人的损失已经从其他再保险人处获得赔偿,因此本案请求的损失已经不存在,其仲裁请求违反了保险法的损失补偿原则。

本案经征询双方当事人同意,仲裁庭组织双方进行调解,并经三次开庭审理,最终双方当事人在仲裁庭主持下达成和解,签署了《和解协议》,并共同向仲裁庭申请,请求按照《和解协议》内容制作裁决书。

仲裁庭认为:双方当事人于2021年4月9日签订的《和解协议》是申请人与被申请人在平等自愿的基础上达成并签署的,是双方真实的意思表示,且内容不违反我国现行法律、行政法规的强制性规定,亦不违背公序良俗。因此,本案双方当事人签订的《和解协议》合法有效,对双方当事人具有约束力。《和解协议》第5条中明确约定,双方共同请求仲

裁庭按照该和解协议出具裁决书。因此,仲裁庭认为,根据《仲裁法》第五十一条、《仲裁规则》第五十二条第(五)款的规定和《和解协议》上述条款的约定,仲裁庭有权按照申请人和被申请人签署的《和解协议》的内容作出裁决书。

#### 四、典型意义

本案作为一起再保险合同纠纷,典型意义不仅在于再保险领域的实体法律问题,更凸显了仲裁机制在化解专业金融保险争议中的重要作用,基于当事人的意愿,仲裁庭通过组织双方当事人调解,以仲裁和调解相结合的方式,成功解决了本案纠纷,真正达到了“案结事了”的效果。仲裁、调解和诉讼,构成纠纷解决的三驾马车,是多元解纷机制的核心力量。而“仲裁与调解相结合”的东方经验被视为中国仲裁对世界的重要贡献。根据中国海仲《仲裁规则》第五十六条的规定,当事人既可以在仲裁程序经仲裁庭调解达成和解,也可以自行达成和解,更可以在仲裁程序开始之前自行达成和解协议,依据海仲的仲裁协议及和解协议,请求机构组成仲裁庭,按照和解协议的内容作出裁决。该款规定充分体现了机构尊重当事人的意思自治及主动解决争议的主观能动性。企业在出海过程中,发生纠纷难以避免,如何高效快速,又不伤和气地解决双方争议,仲裁与调解相结合提供了最优解决方案,正如本案的争议解决。

除仲裁与调解相结合外,自2011年开始,中国海仲上海总部与上海

海事法院开始共同实践海事案件委托调解机制,这是全国海事审判领域多元纠纷化解的最早实践,一大批案情复杂、涉外性、专业性较强的海事海商纠纷经法院委托至上海总部得到及时、妥善解决,受到当事人高度认可。也为当事人的纠纷解决提供了新的思路和途径。



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