

# MEMBER ALERT



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## **SAFE CARRIAGE OF LATERITE NICKEL ORE: JUDGMENT IN CHINESE COURTS**

Members may be interested in the attached Wintell & Co. legal briefing, *Safe Carriage of Laterite Nickel Ore – Latest Judgment of Chinese Court*. The attachment is in both [English](#) and new [Mandarin](#).

In this case, charterers alleged that the vessel's master had made an unjustifiable deviation due to his concerns for the safety of his vessel, based on his belief that the transportable moisture limit (TML) of the cargo had been exceeded. The charterers claimed that the delay in delivery of the cargo led to significant losses in its market price, and sought damages.

The vessel owner defended the decision, and the measures taken by the master. They included delaying the vessel's departure to sun-dry the cargo and, later, while on passage to the discharge port, calling at an alternative port for further sun-drying of the cargo before finally heading safely on to the vessel's final destination for discharge. The owner asserted that these measures were reasonable for the common safety of the vessel, cargo and crew.

The Supreme Court of the People's Republic of China ruled that the IMSBC Code did indeed apply to the carriage of laterite nickel ore, despite the cargo not being listed as a cargo prone to liquefaction as set forth in Appendix 1 of the Code (Group A). The Supreme Court further ruled that:

- (1) the master's actions to sun-dry the cargo and alter course while en route to the destination were reasonable; and
- (2) the appeals court had reasonably concluded that the vessel's diversion to the Philippines was justifiable; and
- (3) the receivers had failed to establish their claims for alleged losses.

## SAFE CARRIAGE OF LATERITE NICKEL ORE

-- Latest Judgment of Chinese Court



### Abstract

*The issue of safe carriage of laterite nickel ore has attracted attention of international society. A latest judgment of Chinese court shows that the IMSBC Code shall be applicable to the safe carriage of the laterite nickel ore. The master shall be cautious and prudent in deciding whether the cargo is suitable for safe carriage. Where heavy moisture of cargo is visible to the naked eyes, the proportion of small particles (<7mm) is large and the moisture content of small particles is above the TML (Transportable Moisture Limit), even if large particles (>7mm) may have a comparatively lower moisture content, the master may, in his professional judgment, deem the cargo unsuitable for safe carriage and is further entitled to make decisions such as to cease the voyage, sun-dry the cargo and to carry out inspection etc. for the common safety of vessel, cargo and the crew, and the carrier shall not be held liable for his breach of obligation under shipping contract.*

### Facts

On 28 January 2011, vessel A arrived at Indonesia for cargo loading, and the loading continued until 11 February. On 12 February 2011, the master issued a full set of original clean bill of lading. After that, the master suspected that the laterite nickel ore was not suitable for safe carriage because of the high moisture content, so vessel A stayed at the anchorage of loading port for sun-drying and testing. On 27 March, vessel A proceeded to Philippines, and arrived and stayed there since 29 March, still for sun-drying and testing. On 16 May, vessel A departed from Philippines and proceeded to Lianyungang Port, and arrived on 23 May eventually.

Before loading, the shipper issued two Cargo Declarations indicating that the cargo was suitable for safe carriage. The weather was very rainy during the loading operation, and even free water was found in two holds. Two reports indicated that the moisture content of the cargo in above-mentioned two holds was in excess of its TML during loading period. After loading, a series of testing were carried out by different



inspection organizations. The relevant reports divided the cargo into small particles (<7mm) and large particles (>7mm). The small particles, the proportion of which is larger, had the moisture content exceeding its TML, while the large particles, taking a smaller proportion, had lower moisture content. However, no reports indicated explicitly whether the moisture content of whole cargo was beyond the limitation.

The Plaintiff (the consignee) claims that, the Defendant made an unjustifiable deviation, and shall thus be liable for compensation for its significant losses in cargo's market price. The Defendant (the ship owner) defends that, it made correct decisions and took reasonable measures for the common safety of the hull, cargo and crew, so the Plaintiff has no right to claim for compensation.



## Court's Decision

The whole court process of this case lasted for 3 years and 6 months, going through the judgments by the 1st and the 2nd instances, as well as the Court Decision by the Supreme People's Court.

The Supreme People's Court holds that: 1) The *IMSBC Code* was applicable to the carriage of the laterite nickel ore. The two sets of Cargo Declarations issued by the shipper, stating that the moisture content of the cargo was below its TML, were only unilateral statements, which alone could not prove that the cargo was suitable for safe carriage. That the carrier issued a set of original clean bill of lading only reflected that the cargo was in apparent good order. The carrier shall not be deemed to have accepted the cargo as being suitable for safe carriage only because of the issuance of clean bill of lading by the carrier. All the survey reports after cargo loading never state about the TML for particles with a size >7mm, nor about the TML for the whole cargo. In accordance with the *IMSBC Code* and based on the evidence respectively presented by the shipper and the carrier, the Court should determine that it is justifiable for the carrier to judge that the cargo was not suitable for safe carriage at the port of loading. 2) The shipper failed to prove the actual resale of the cargo and the reasonableness of the resale price. Therefore, there was no basis for the alleged economic loss.

## Comment

The issue of safe carriage of laterite nickel ore has attracted heavy attention of international shipping society in recent years. Especially, from October to December 2010, 5 vessels sunk near Bass Strait and its northern water area, because of accidents caused by the carriage of laterite nickel ore. This action arose at the beginning of 2011. The master chose to stop the voyage and take certain measures to ensure the safety, while this act also caused a breach of contract under B/L relationship. The court's attitude towards the master's choice would have major influence on similar cases in the future. We Wintell & Co., acting for the ship owner to defend in the 1<sup>st</sup>, the 2<sup>nd</sup> and the last instance trial, found the following 3 key points merit our attention:-

## 1. Whether the *IMSBC Code* was applicable to the carriage of the laterite nickel ore

China is a contracting party to *SOLAS Convention 1974* as amended. As per the *Convention*, the *IMSBC Code* is mandatory and it has come into effect in China as of 1 January 2011. The cargoes in this case, i.e. the laterite nickel ore in bulk, are crude ore with different sizes. This cargo is not listed as solid bulk cargo in Appendix 1 to the *IMSBC Code*, while the *IMSBC Code* however provides that the current list of typical solid bulk cargo carried by sea is “not exhaustive” and Section 1.7.5 of the *IMSBC Code* also states that “cargoes which may liquefy mean cargoes which contain a certain proportion of fine particles and a certain amount of moisture. They may liquefy if shipped with moisture content in excess of their transportable moisture limit”. The nature of laterite nickel ore is of course in accordance with this definition. In addition, Article 4 of *Safety Management Rules for Waterway Transport of Solid Bulk Cargoes that are Liable to Liquefy* promulgated by Chinese Ministry of Transport on 9 November 2011 explicitly indicates that laterite nickel ore is one kind of solid bulk cargoes that are liable to liquefy. All the three courts of different instances held the same view towards this issue, i.e. the *IMSBC Code* shall be applicable to the carriage of the laterite nickel ore.

## 2. The criteria for masters to judge whether solid bulk cargoes that are liable to liquefy is suitable for safe carriage or not



The first generally accepted method for testing the TML, flow table test, stipulated in Appendix 2 of the *IMSBC Code*, was designed for mineral concentrates and other fine materials with a maximum grain size of 7mm. Therefore, most of the inspection organizations in this case divided the cargo into small particles and large particles accordingly. For small particles, the moisture content and TML could be tested and then be compared; while for large particles, only the moisture content could be tested but not the TML.

The 1st instance court held that, Article 7.2.1 under Article 7.2 “Conditions for hazards” of the provisions of Section 7 “Cargo that may liquefy” under the *IMSBC Code* provides that: “Group A cargoes contain a certain proportion of small particles and a certain amount of moisture. Group A cargoes may liquefy during a voyage even when they are cohesive and trimmed level.” Therefore, it could be seen that, the fine grains are crucial elements that may easily cause liquefy. Under the circumstances where the proportion of the small particles was larger, it is reasonable for the Defendant to apply the *IMSBC Code* in this case and to compare the moisture content of the small particles with its TML, and eventually to judge that the cargo was not suitable for safe carriage.

The 2nd instance court held that, the moisture content of large particles is obviously lower than that of small particles. There was no sufficient evidence for the master to make the judgment that the whole cargo was not suitable for safe carriage, only by comparing the data of small particles.

The Supreme Court held that, in consideration of the whole situation during loading period, it is not inappropriate for the carrier to reasonably initially suspect that the cargo was not suitable for safe carriage. On the basis that the proportion of small particles was larger and the moisture content of small particles was above the TML, it is reasonable for the carrier to conclude that the cargo was not suitable for safe carriage.

### 3. Master's discretion when safety of life at sea is threatened

Article 34-1 "Master's discretion" of the SOLAS Convention 1974 as amended provides that: "The owner, the charterer, the company operating the ship as defined in regulation IX/1, or any other person shall not prevent or restrict the master of the ship from taking or executing any decision which, in the master's professional judgment, is necessary for safety of life at sea and protection of the marine environment." As China is a contracting party to the Convention, this article also has legal binding force within mainland China. Another thing to note is that, the discretion of a master should also be exercised within a reasonable and necessary scope. As in this case, the master decided to stop at Philippines, which was not in the normal route from Indonesia to Lianyungang, so the carrier has the burden of proving the reasonableness and necessity of this act. Finally, the Supreme Court held that, Philippines is very close to the normal route from the loading port to the destination port, thus it could be concluded that, it was for common safety of the ship, the crew and the cargo on board when the vessel sailed to Philippines, which shall be deemed as "or any justifiable deviation" as provided for in the Maritime Code of China. The essence of master's discretion is the respect for life. The judgment of 1st instance cited the Convention directly, while the Supreme Court's decision did not apply this article directly but followed its spirit thoroughly.

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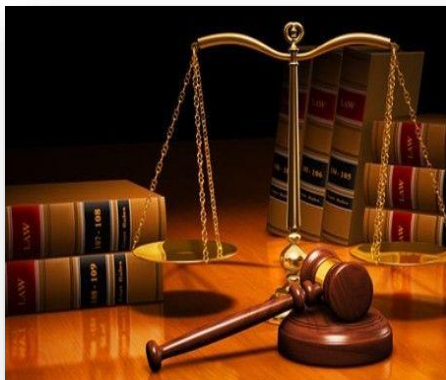


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## CHAMBERS ASIA 2015

**Chambers Asia 2015** Gives High Rankings to Wintell Lawyers both in Shipping Area and in Insurance Area for Excellence in Their Respective Practice Areas.

The shipping team remains Band 1. *"Top-tier firm with a wide network of offices across the PRC and a strong bench of distinguished practitioners. Best known for its prominence in wet claims, although it has a fast-growing shipping finance practice, particularly in Shanghai. Clients further benefit from a well-established, standalone insurance offering."*

The insurance team remains Band 2. *"The lawyers are very practical and client-focused."*

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# 红土镍矿的安全运输问题

——中国法院的最新判例

法律资讯

2016年3月



## 摘要

红土镍矿的安全运输问题近年来引起国际关注。中国法院的最新判例表明,《国际海运固体散货(IMSBC)规则》应当适用于红土镍矿的安全运输。船长对于红土镍矿是否适运应持谨慎的判断标准,在肉眼可见货物潮湿情况严重,规格小于7毫米的小颗粒货物占比较高且含水量超过适运水分极限的情况下,即使大颗粒货物的含水量较低,船长亦可基于其专业判断,为确保船、货和人员的共同安全,有权作出停航、晒货、检验等决定,承运人无需为此承担运输合同项下的违约责任。

## 案情

2011年1月28日,A轮驶抵印度尼西亚开始受载货物直至2月11日结束。2月12日,船长签发全套正本清洁提单。此后,船长认为货物含水较多可能影响航行安全,故A轮停靠装货港锚地,进行晒货、检验等操作。3月27日,A轮驶往菲律宾并于3月29日抵达,继续进行晒货、检验等操作。5月16日,A轮驶往目的港连云港并最终于5月23日抵达。

在A轮受载前,托运人曾出具两份货物申报单表明货物适运。A轮装载期间雨水较多,其中有两个货舱能看见水,在装货过程中委托检验,结果表明货物含水量超标。A轮受载结束后又委托多



家机构进行货物水分检验，该系列检验报告将货物分为大小两种颗粒，其中小颗粒货物所占比重较高，含水量亦较高，且明显超出适运水分极限，而大颗粒货物所占比重较低，含水量亦较低，但检验报告均未对货物整体含水量是否超标作出明确判断。

原告（收货人）诉称，被告进行不合理绕航，应赔偿原告货物市场价格下跌的价差损失。被告（船东）辩称，被告系为确保船、货安全采取合理措施，原告无权要求赔偿。



## 裁判

该案审判过程历时3年零6个月，经历了一审判决、二审判决，以及最高人民法院关于是否受理再审的审查程序。

最高人民法院在其终审裁定中认为：（一）《散货规则》适用于涉案红土镍矿运输。托运人出具的货物申报单系单方声明，不能作为判断货物是否适运的证据。承运人签发清洁提单表明货物外表状况良好，仅涉及货物品质问题，不能以承运人签发清洁提单认定其初步认可货物适运。货物装运后形成的各份检验报告均没有载明大颗粒货物的适运水分极限和整批货物的适运水分极限，故依据《散货规则》的规定，在承运人已有初步合理理由怀疑货物不适运的基础上，根据后续检验报告中指出的占比较高的小颗粒货物水分超标的结论，应认定承运人在装货港判断货物不适合安全运输的理据相对充分。（二）收货人既未能证明其已将货物转卖的真实性，亦未能证明其转卖价格的合理性，故其主张存在损失没有事实基础。

## 评析

红土镍矿的安全运输问题是近年来国际航运界所共同关心的热点话题。尤其是2010年10月底至12月初，巴士海峡附近及以北水域连续发生5起船舶沉没恶性事故。本案纠纷发生于2011年初，涉案船舶的船长为确保运输安全而选择停航晒货进而导致运输合同违约，该行为究竟会得到怎样的司法评价，有可能直接影响此后类似情形下船长的判断。瀛泰律所作为本案船方的代理，纵观三级法院的裁判，有以下三点内容值得引起我们关注：

## 一、《散货规则》是否适用于红土镍矿运输

我国作为《经修正的 1974 年国际海上人命安全公约》的缔约国，《散货规则》依据该公约成为强制性规则，并于 2011 年 1 月 1 日对我国生效。涉案货物为散装红土镍矿，系大小颗粒混杂的原矿，虽未列入《散货规则》附录 1 的固体散装货物，但《散货规则》同时规定其对目前典型海运固体散装货物的明细表“并非详尽无疑”。而该规则第 1.7.5 条款规定：“易流态化货物系指至少含有部分细颗粒和一定量水分的货物。在运输中，如果这些货物的水分含量超过其适运水分极限，会流态化。”红土镍矿的特性无疑是符合这一定义的。此外，中国交通运输部于 2011 年 11 月 9 日颁布《水路运输易流态化固体散装货物安全管理规定》，其中第四条明确指出红土镍矿属于易流态化固体散装货物。三级法院对此问题均持一致观点，即《散货规则》应当适用于红土镍矿的安全运输。

## 二、船长对易流态化货物是否适运的判断标准



《散货规则》中所列明的测试适运水分极限的实验方法只适用于最大粒度为 7 毫米的物质，因此本案中多个检验机构在检验时均将货物筛分为大小两种颗粒，对于小颗粒能够对比其水分含量与适运水分极限，而对于大颗粒则只能测量其水分含量。一审法院认为，《散货规则》对于“危险性条件”的规定，是货物含有一定比例的小颗粒和

一定水分，在航行中易流态化，进而导致货物移动，故引发危险的决定性因素是小颗粒货物。因此，在小颗粒货物占较大比例的情况下，船长根据检验中小颗粒货物的含水量超过适运水分极限的结果判断货物不适运具有合理性。而二审法院则认为，大颗粒的水分含量明显低于小颗粒的水分含量，船方仅选取小颗粒货物进行数据对比，从而认定货物整体上不适运，依据尚不充分。最高法院的态度同一审较为接近，综合考虑了装货时的天气情况、小颗粒物质所占比例以及对比双方相关证据与理由，最终认定承运人判断货物不适运的理据相对充分。从最终裁判结果上看，最高法院的立场无疑具有指导意义，即在无法通过检测得到明确结论时，船长对于货物是否适运应综合考虑多方因素，并采取谨慎的标准进行判断。

## 三、船长在可能危及海上人命安全时的决定权

《经修正的 1974 年国际海上人命安全公约》在其 34-1 条中对“船长的决定权”有明确规定，即船舶所有人、承租人以及



经营该船舶的公司或任何其他人员，均不得阻止或限制船舶的船长做出或执行根据船长的专业判断认为对于海上人命安全来说所必要的任何决定。中国是该公约的缔约国，公约条款在中国具有法律效力。船长只要基于其专业判断，认为有可能危及海上人命的，就有权在必要的限度内行使其决定权，而不受任何其他人员的干扰。当然，还需注意的是，船长决定权的行使并非没有限度，而是应当在必要合理的范围内。本案中，船舶后续开往菲律宾继续晒货、检验，其合理性与必要性容易遭到怀疑。最高法院最终认定，该菲律宾港口离原本的习惯航线距离较近，船舶航行至此系为了船舶、船员和货物的共同安全考虑，故属于《海商法》下规定的“其他合理绕航”。关于船长决定权的规定，其实质是人命安全至上的人道主义价值取向，一审判决明确引用公约规定，终审裁定虽未适用，但其精神贯穿始终，应当说是充分尊重了船长在可能危及人命安全时的决定权。

如您需要咨询关于本案的更多信息，敬请联系：

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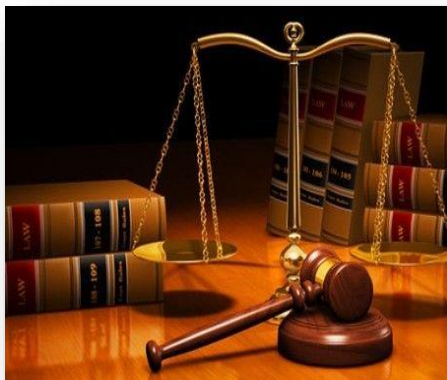


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## 钱伯斯排行 2015 亚太榜单

钱伯斯 2015 亚太榜单对瀛泰律师事务所在航运及保险领域的杰出工作给予了很高评价。

航运业务团队仍居一等：

“瀛泰是一家顶级律师事务所，拥有遍布全国的办公网络，以及一支卓越的业务团队。瀛泰在海事诉讼领域表现格外出色，与此同时尤其是上海瀛泰在航运金融领域成长迅速。客户在同时也可以享受到完善的保险业务服务。”

保险业务团队位列二等：

“瀛泰律师事务所非常专业，以客户利益为中心开展工作。”

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