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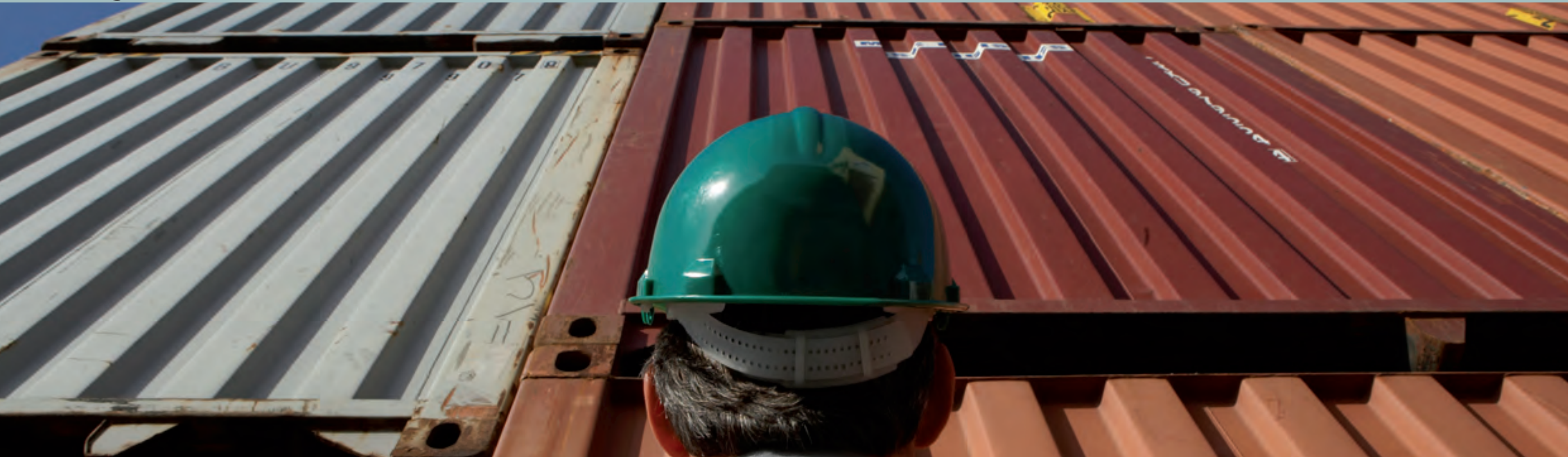
Customs Trade and Transport Update

August 2012



Container detention fees likely to become a bigger pressure point

INTRODUCTION

As many readers would be aware, from 1 August 2012, several container shipping lines have reduced the "free" container time from 10 days to 7 days. The CBFCA and the VTA have already expressed their significant concern regarding the move and the likely associated costs for the entire supply chain. The move by the lines comes after their "winning" outcome in a recent decision ("**Cosco Decision**") by the District Court of NSW in March 2012, whereby it was held that container detention fees charged by Cosco Shipping ("**Cosco**") and its Australian agent, Five Star Shipping and Agency Company ("**Five Star**") were enforceable as against a freight forwarding company. An article regarding the Cosco Decision was recently published in the Shipping Australia Journal for Winter 2012 ("**Journal**"). The editorial in the same edition of the Journal welcomed the Cosco Decision in a way which suggested that the issue of the enforceability of such container detention fees had been conclusively determined and would be welcomed by all parties.

However, to declare that the issue of container detention charges is now fully settled in Australia after this decision may not be entirely accurate. Indeed the substantive article on the Cosco Decision in the Journal acknowledged that the decision depended on the specific facts of the case and that whether certain fees will be enforceable depends on the individual contracts governing the relationship between the parties.

It must also be emphasised that the decision would not necessarily be welcomed by **all** parties in the industry – including those who pay such fees which represent significant and often unexpected additional costs in the supply chain. Such fees also represent a significant risk for freight forwarders and customs brokers who bear the fees in the first instance where the fees arise from the failure by their customers to return the containers in the permitted "free" time and where customers will not or cannot pay the fees. In those cases it is predominantly the freight forwarders and customs brokers (named as consignees on the Ocean Bill of Lading/Sea Waybills) who bear the fees pursuant to their shipping and other agreements with the shipping companies and their Australian agents.

It needs also to be remembered that the prevailing practices and levels of the detention fees have yet to be subject to a specific independent review. Such a review of the practices and the fees would be intriguing. Australia's biggest exports are empty containers being returned overseas and empty container parks are notoriously full – which suggests that there are readily available replacements for any that are returned "late". At the same time, the availability and size of empty container parks, their ownership and relationship to their lines would also be relevant to any such inquiry. All of those factors feed into consideration whether the quantum of fees and their collection are reasonable (even if enforceable)

Whilst the Costco Decision was referred to in an earlier Update as well as discussed during recent CBFCA State Conventions, given the subsequent commentary and the recent development of the issue, it may be worth revisiting the Cosco Decision.

BACKGROUND

The background to the Cosco Decision is one which will be fairly common to those in industry. The freight forwarder had at some time earlier entered into an agreement (known as the "ImportNet Agreement") with Cosco and Five Star governing the loan and use of Cosco's containers. The ImportNet Agreement incorporated the terms and conditions of Cosco's standard Bill of Lading/Sea Waybill Agreement as well as its Equipment Handover Agreement. Pursuant to the ImportNet Agreement, Cosco agreed to loan containers to the freight forwarder on terms which included the payment of container detention charges by the freight forwarder.

FACTS OF THE COSCO DECISION

The specific facts behind the Cosco Decision arose in 2009. The freight forwarder was named as consignee in various Cosco Sea Waybills for a number of containers which were shipped from China to various Australian ports. The goods in the containers were destined for a customer of the freight forwarder who passed the electronic delivery orders for the goods to its customer which arranged for collection and unloading of the containers. The containers were not returned during the prescribed "free period" and attracted fees for their late return.

Cosco/Five Star sought to recover the fees against the freight forwarder which would normally have recovered the fees against its customer. However the customer could not pay the fees and eventually went into liquidation. Accordingly, the freight forwarder remained primarily liable to Cosco/Five Star for the detention fees which moved to recover the fees from the freight forwarder pursuant to the ImportNet Agreement and the associated incorporated Agreements.

THE DECISION

Facing the action by Cosco and Five Star, the freight forwarder defended by claiming that the detention fees were, in fact, payable for a breach of the contract with Cosco and Five Star and were a penalty and unenforceable given their quantum. Cosco and Five Star maintained that the fees were not payable as damages for a breach of contract but were payable for the loan of the containers for a period beyond the agreed free time and in accordance with the ImportNet Agreement and the associated other agreements implied by that ImportNet Agreement.

Ultimately, based on the terms of the ImportNet Agreement and the incorporated agreements, the Judge held that the container detention fees were not payable due to a breach of contract. The Judge held that although there was an obligation to return the containers in 10 "free" days, the parties had also agreed that in exchange for loaning the containers, the freight forwarder would hire them until return at agreed rates. The Judge characterised that this was a separate obligation not contingent upon any breach by the freight forwarder. As a result the amount payable was not a penalty and the Judge did not need to consider whether the fee charged was a reasonable pre – estimate of the loss that was likely to be suffered by Cosco and Five Star.

This decision left the significant amount of detention fees charged by Cosco unexamined and unchallenged. However, this "non-intervening" approach appears to reflect the view of the Judge that, as an ordinary rule, the courts in Australia would generally enforce commercial agreements, unless to do so is against public policy.

END OF THE DEBATE?

Although the facts of the case are similar to those faced by many freight forwarders and customs brokers, the validity of a particular container detention charge must be ascertained on a case by case basis, and be determined in accordance with the specific contractual agreements between the freight forwarders and customs brokers on the one hand, and the shipping lines and their respective agents in Australia on the other hand.

Whilst standard industry terms are usually incorporated in the contractual arrangements for ocean carriage, each carrier does tend to adopt different wordings for the specific contracts between it and its customers. It is precisely the specific terms of the contracts that must be examined to conclude whether the obligation to pay contention detention charges beyond the "free time" is based upon a breach of contract, consequently giving rise to the issue of penalty. For example, if the terms of the relevant contract are drafted in such a way, indicating that the act of late returning containers is in itself an act of contractual breach and the detention fees charged are compensation for such breach, these charges are likely to be characterized as penalty. In the example given, there may well be an arguable case that the fees payable are not a separate obligation. Rather, the fees are compensation that is contingent upon the breach of the contract, namely the conduct of not returning the containers within the stipulated time.

It must be emphasised that the specific contract(s) that govern the relationship between the parties are the key to the question of penalty.

RISKS FOR FREIGHT FORWARDERS AND CUSTOMS BROKERS

As illustrated in this case, by being a party to the relevant contractual arrangements with the shipping lines, for instance the ImportNet Agreement and the Sea Waybill, freight forwarders and customs brokers are legally bound by the contractual obligations as stipulated under these agreements. For carriers, it matters nothing whether the freight forwarders or the customs brokers are using or even in physical possession of the containers. From a purely legal perspective, shipping lines are enforcing the common law principle of "privity of contract", which in simple terms means that only parties to the contracts are bound by the contractual obligations.

Commercially, this has led to a situation for freight forwarders and customs brokers often being caught as "the meat in the sandwich", since they are responsible for the ramification of any late return of containers, over which they however do not have any direct and practical control. Also, even with the best intention and practice, a timely return of containers may be unrealistic due to certain factors that are beyond the control of freight forwarders, customs brokers and their customers. For example, it is a common occurrence that container terminals or parks are either closed or unsupervised when customers endeavour to return containers, resulting in further unnecessary delays that will be later translated into detention charges. Considering the reduced free container time from 1 August 2012 onwards, returning containers without incurring any container detention charges may become a "mission impossible".

STEPS TO BE TAKEN – CUSTOMER

Against this more limited container "free time", freight forwarders and customs brokers must take a more proactive approach to minimise any commercial risks associated with container detention charges. As a starting point, a contractual term obligating a timely return of containers should be incorporated either in the service agreements or the house bills of lading between freight forwarders and customs brokers and their customers. Customers must be made fully aware of such obligations and also of the considerable amount of container detention charges payable by them for failing to meet the obligations. Also, placing sole reliance on customers for returning containers may prove expensive for freight forwarders and customs brokers at a later date. Thus, freight forwarders and customs brokers should take reasonable actions to monitor the use of containers by keeping necessary records for the duration of container-possession by their customers, and send out prompt reminders to customers for the return of containers. The additional time and administrative costs for completing such tasks could be valuable in comparison with the significant detention charges.

Further, freight forwarders and customs brokers must ensure that they are able to recoup all payments of container detention charges from their customers in a timely fashion. It is without saying that container detention charges are expensive, and it is even so when such charges are for multiple containers and are accrued over a period of time. As evidenced in the recent Cosco Decision, it was however all too late for the freight forwarder as its customer went into liquidation. To reduce financial loss, freight forwarders and customs brokers may consider changing the manner in which they normally recover the paid detention charges from their customers. Rather than seeking a lump – sum repayment from customers, freight forwarders and customs brokers may consider seeking recovery on a periodic basis to minimise loss, for example invoicing customers monthly at the rate published by the relevant shipping lines. Freight forwarders and customs brokers may also consider requesting customers to pre-pay a sum to meet a reasonable estimation of container detention charges, if it is anticipated that there will be a late return of containers by their customers. The pre-payment method may be useful in achieving security, especially when multiple containers are involved.

STEPS TO BE TAKEN – SHIPPING LINES

In addition, freight forwarders and customs brokers should seek to negotiate with shipping lines to secure a longer period of free container time and a lower daily rate after the prescribed free time. However, to achieve a more desirable outcome, for freight forwarders and customs brokers with relatively smaller operation, it may be ideal to act collectively and form a stakeholder group when conducting negotiation. Clearly the more cargo volumes are promised to be carried by a particular shipping line, the longer free time and/or the lower daily rate is likely to be offered by it.

CONCLUSION

As outlined above, we maintain that the recent decision by the District Court of NSW does not represent a "one-size-fits-all" solution to the enforceability issue of container detention charges in Australia. The particular contractual agreements governing the relationship of the parties must be carefully examined to determine whether the potential charges are enforceable or not.

Nevertheless, in order to best protect commercial interests, freight forwarders and customs brokers are strongly recommended to take a more proactive approach to container-related issues.

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