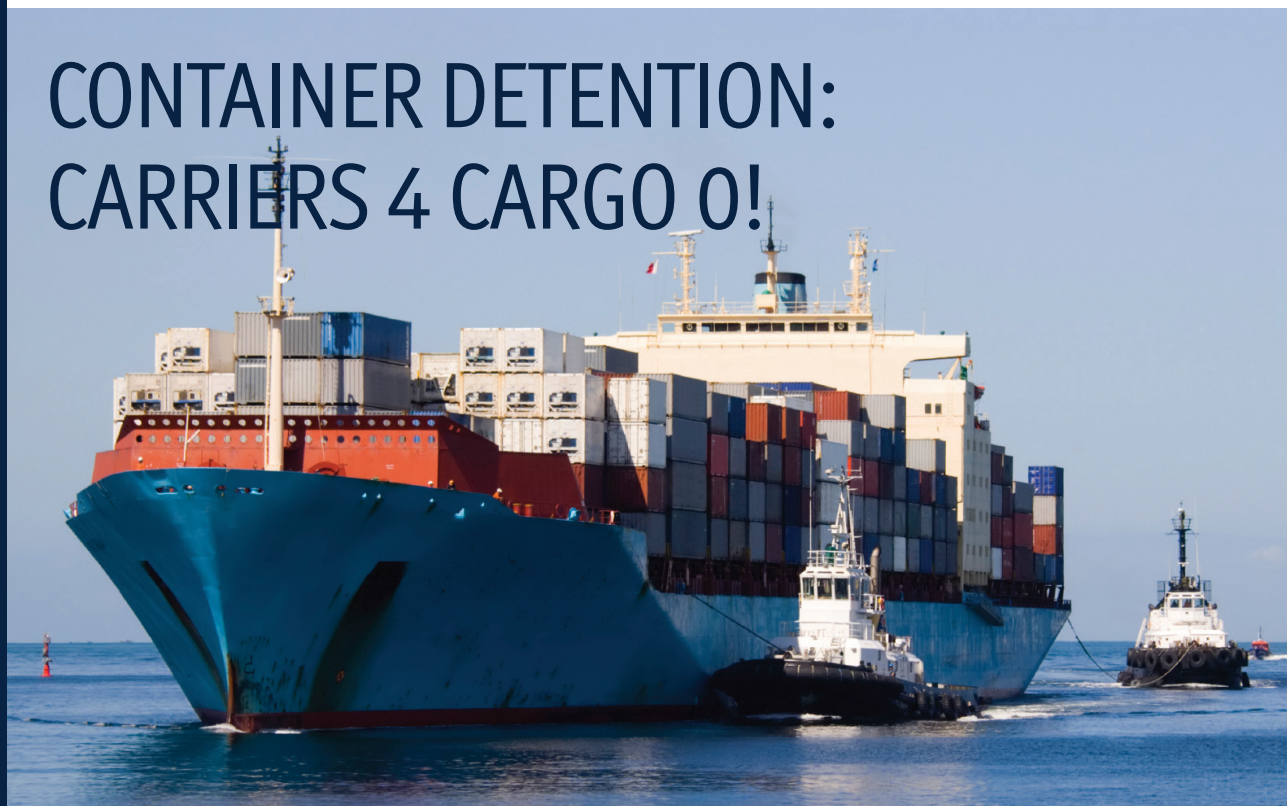
Shipping

May 2012

CONTAINER DETENTION: CARRIERS 4 CARGO 0!



Introduction

Two further decisions involving the issue of container detention have again found in favour of the shipowner or bill of lading carrier. The scoreline now reads: Carriers 4 Cargo 0!

As a result, there is good cause now to believe that the issue is dead and buried.

DV Kelly v China Shipping [2010]

In a previous circular, it was reported that the Consumer, Trader & Tenancy Tribunal ("CTTT") had found the detention fee charged by *China Shipping* to *DV Kelly* to be a penalty on the basis that it was extravagant and unconscionable in comparison to the greatest loss that could conceivably be proved to have flowed from the breach.

On appeal to the Supreme Court of New South Wales, Justice Rein held the decision of the CTTT to be invalid on jurisdictional grounds, namely that the CTTT was not a "court of the State" capable of exercising admiralty jurisdiction. As a result, the challenge by *DV Kelly* failed and *China Shipping* retained the container detention charges.

Ichiban Imports v China Shipping [2011]

In the *DV Kelly* case, due to the jurisdictional findings, it was not necessary to consider the question of whether the detention fee gave rise to a penalty or liquidated damages or whether the detention clause was in fact capable of breach. These issues, however, did fall for consideration in the case of *Ichiban Imports* on 18 April 2011. In that case, *Ichiban Imports* sought to avoid the jurisdictional issue on the ground that the relevant contract was an import delivery order which had been entered into after the goods had been landed. Hence, it was not a contract for the carriage of goods by sea and, therefore, the jurisdictional objections were inapplicable.

On this occasion, the CTTT determined that container detention charges of $80 per day

were not a penalty for any breach of the import delivery order, but rather an amount agreed to be paid if *Ichiban Imports* retained the containers beyond the free time.

The basis of the decision, therefore, was as follows:

1. A penalty is a fixed amount required to be paid for a breach of contract which is not a genuine estimate of the actual losses arising from the breach and/or is extravagant or unconscionable.

2. If the fixed sum is not imposed in respect of a breach, but is merely an agreed sum payable in certain circumstances, then the doctrine of penalties has no application and cannot be called upon to strike down any such charge.

This decision is important as it reinforces the point made earlier that container detention charges are simply amounts agreed to be payable upon the happening of certain events, namely the retention of the container beyond the "free time". It also accords with common sense in that if consignees or their agents do not wish to incur container detention charges, they can simply ensure that the containers are returned within the "free time".

Cosco Container Lines v Unity International Cargo [2012]

The decision in *Ichiban Imports* has now been reinforced by the decision of Judge Rolfe in the District Court of New South Wales. In the *Cosco* case, *Unity*, a freight forwarder, had executed an Agreement under which *Cosco* agreed to deliver and loan *Unity* containers on terms which included:

1. The payment of container detention charges by *Unity*.

2. The issuance of electronic delivery orders by *Cosco*.

When *Cosco* sought to claim container detention charges totalling approximately A$80,000 from *Unity*, *Unity* contended that such payments were payments for breach of contract. However, in a decision handed down on 29 March 2012, Judge Rolfe ruled that container detention charges did not constitute a penalty. As there was no amount immediately payable by *Unity* to *Cosco* if *Unity* failed to return the containers on time, Rolfe J indicated that the proper interpretation of the relevant contractual provisions was that the parties had agreed that *Unity* would hire the containers at the agreed contractual rate until their return.

Thus, in accordance with the earlier *China Shipping* decisions involving *DV Kelly* and *Ichiban Imports*, Rolfe J held that the contract gave rise to:

"… a separate obligation which was not contingent on any breach. Looking at it this way, therefore, the provision relied on by [Cosco] does not operate as a penalty."

Cargo Coordinators International NZ Ltd v Cubic Transport Ltd [2012]

In yet a further decision, this time in New Zealand, the High Court declined an application by *Cargo Coordinators* to set aside a statutory demand arising out of charges rendered in respect of the delayed return of containers. The delay concerned 14 containers and was for approximately 75 days.

The initial detention rate was $40 per day and then it rose to $80 per day. *Cargo Coordinators* contended that it would be unconscionable for the claimant to pursue the demand as it failed to allow *Cargo Coordinators* an opportunity to seek a reduction of the charges from the shipping companies.

This argument was rejected by the Court. If the detention charges had been imposed as penalties rather than as a pre-estimate of the loss suffered by the shipping companies due to their inability to use the containers for their business, the Court may have decided to consider the enforceability of the charges.

However, on the evidence, the Court found that the charges levied by the shipping companies were within the range routinely levied by the shipping industry. The Court also had regard to the decision in *Ichiban Imports* which had held that the rate of $80 per day was merely a daily charge for the use of the container rather than a penalty.

"The delay concerned 14 containers and was for approximately 75 days."

Conclusion

The decisions in the *Cosco* and *Cargo Coordinators* cases add weight to the earlier decisions of Justice Rein and the CTTT in *DV Kelly* and *Ichiban Imports* respectively. As a result, it is now most unlikely that cargo interests will again seek to resist or avoid paying container detention in the future.

Significantly also, the earlier threat of a potential class action to recover any container detention charges paid over the last six years is now non-existent and, as a result, all container carriers can now breathe a collective sigh of relief!

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