Logistics

July 2013

Welcome to the July edition of our Logistics Bulletin.

We begin this edition by reviewing two recent logistics cases. The US District Court recently confirmed that the US Carriage of Goods by Sea Act 1936 clearly applied to limit the sub-contracting domestic carrier's liability and we look at how Himalaya Clauses in multimodal bills of lading protect subcontractors for the land leg of the transport. We then turn to a recent decision of the Federal Supreme Court of Germany, which confirmed the view taken by the English Court that, for the purpose of Article 2 CMR, the Hague Rules apply to the sea leg of a multimodal transport, limiting the road haulier's liability for that leg.

The carriage of dangerous goods by air gives rise to both potential civil and criminal exposure for all parties involved in the cargo chain, including shippers, freight forwarders and air carriers. We analyse the types of liability which might arise from carriage of dangerous goods by air and how cargo interests may seek to mitigate against such risks.

Liquidated damages clauses can be commercially useful, but must be carefully drafted in order to avoid falling foul of the English law rule against penalties. In a recent decision, the English High Court applied a more modern approach to analysing contractual wording and we examine the potential impact on liquidated damages clauses in logistics contracts.

Finally, we put the spotlight on competition and look at the latest competition issues in the logistics sector, including mergers, acquisitions and antitrust investigations.

Justin Reynolds, Partner, justin.reynolds@hfw.com
Craig Neame, Partner, craig.neame@hfw.com

holman fenwick willan hfw

Himalaya Clauses in multimodal transport: implications of a US District Court's decision in *Royal & Sun Alliance Insurance plc v Service Transfer Inc*

A recent decision granting partial summary judgment in the US District Court (Southern District of New York) has confirmed that the US Carriage of Goods by Sea Act 1936 (COGSA) can be contractually extended to limit a sub-contracting domestic carrier's liability. The decision provides a useful illustration of the US courts' current approach to interpreting contracts for the multimodal international carriage of goods.

Himalaya Clauses

Because sub-contracting is central to multimodal transport, multimodal transport operators (MTOs) typically contract to protect their subcontractors against claims in tort from shippers. One of the most common ways of doing this is by including in bills of lading a "Himalaya Clause", which permits the subcontractor to rely on the exclusions, limitations and defences in the MTO's bill of lading despite the subcontractor not being a party to the bill.

Royal & Sun Alliance Insurance plc v Service Transfer Inc (4 Dec 2012, US District Court, Southern District of New York)

Here, the shipper, Baxter Healthcare Corporation (Baxter), entered into a multimodal (land, sea, then land) bill of lading with the MTO, American President Lines Ltd (APL), for the shipment of a cargo of human plasma by road and sea from Erlanger, Kentucky to Vienna, Austria. APL then subcontracted with the defendant motor carrier, Service Transfer Inc (STI), for the carriage of goods by road from Erlanger to the port of Norfolk, Virginia. There was an accident during this stage of the journey, which resulted in a total loss of the goods. Baxter's subrogated insurer, Royal & Sun Alliance Insurance (RSA), claimed against STI for the loss, who in turn, applied for partial summary judgment that it was entitled to rely on the limitations in liability conferred by COGSA, and, in particular, on the Himalaya Clause present in the bill of lading, and the Clause Paramount, which expressly extended COGSA's application to the inland proportion of the shipment.

STI argued that, in claiming directly against it, RSA were disregarding the bill of lading and umbrella service contract by pursuing a direct, unlimited liability action against them as subcontractor, which was not permitted under COGSA. RSA argued instead that the Carmack Amendment[1] – and not COGSA – applied in this instance. Carmack imposes liability against certain carriers for damage caused during the carriage of goods by road. RSA argued that Carmack applied to the relationship between STI and Baxter and thus they were liable for the loss.

The Court held strongly that Carmack did not apply in this case, for two reasons:

First, Carmack does not apply to non-receiving carriers transporting goods as part of transhipment between the US and non-adjacent foreign countries. This is because STI did not fulfil the two-part test[2] for liability under Carmack, that:

(a) The carrier must provide transportation or service subject to the jurisdiction of the US Surface Transportation Board (STB); and,

(b) The carrier must "receive" the goods for transportation under the STB's jurisdiction over domestic motor transport.

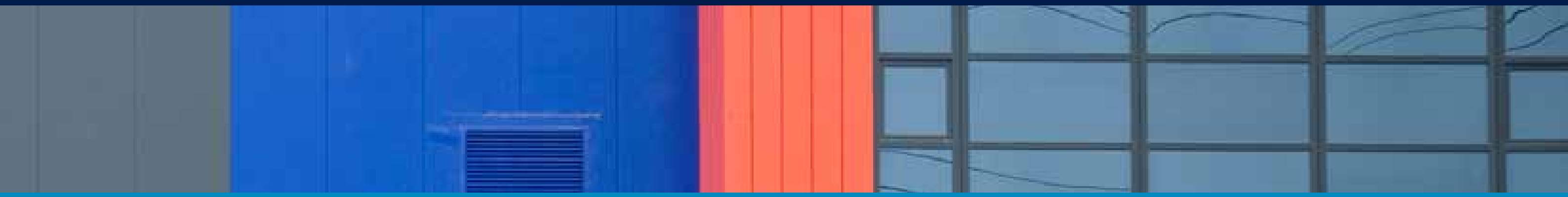
Second, RSA's further argument, that there was a *de facto* domestic bill of lading between STI and Baxter under which STI were liable under Carmack,

The case illustrates how Himalaya Clauses as incorporated into multimodal bills of lading can help to protect subcontractors for the land portion of the transport and the difficulties of holding subcontractors liable under domestic regulations such as Carmack.

CRAIG NEAME

1 46 U.S.C. §14706

2 From the US Supreme Court's decision in Kawasaki Kisen Kaisha Ltd v Regal-Beloit Corporation 130 S Ct 2433, 2439 (2010)



also failed. This was because the bill of lading itself was not domestic, and expressly stated carriage of goods all the way to Vienna. Even if there were to be a second domestic bill, this would be invalid under US law unless additional consideration had been received for it in addition to that which was paid under the main bill of lading. Both parties acknowledged there had not been additional consideration.

RSA's defence therefore failed and STI were granted summary judgment for non-liability. The case illustrates how Himalaya Clauses as incorporated into multimodal bills of lading can help to protect subcontractors for the land portion of the transport and the difficulties of holding subcontractors liable under domestic regulations such as Carmack.

For further information, please contact Craig Neame, Partner, on +44 (0)20 7264 8338 or craig.neame@hfw.com, or Matthew Wilmshurst, Associate, on +44 (0)20 7264 8115 or matthew.wilmshurst@hfw.com, or your usual HFW contact. Research by Otto Rich, Trainee.

CMR v Hague Rules - which applies when and why?

Summary of "UND ADRYATIK" BGH, Judgment of 15 December 2011 - I ZR 12/11 - OLG München

Introduction

Difficulties can arise when trying to determine whether the Convention on the Contract for International Carriage of Goods by Road (CMR) or the Hague/Hague Visby Rules determine the road carriers' liability where goods are lost or damaged during the sea leg of an international multimodal transport.

The Federal Supreme Court of Germany recently decided in the case of *Und Adriyatik* that, when the requirements of Article 2 CMR are fulfilled, it is the Hague/Hague Visby Rules and not CMR that governs the road carriers' liability during the sea leg. The English Court reached a similar decison some time ago in *Thermo Engineers Ltd and others v Ferrymaster Ltd*[3].

Facts of the Und Adryatik

The contract of carriage involved the transportation of goods from Turkey to the UK and Spain.

Initially, using two trucks, the goods were transported to the Turkish port Pendik, where the trucks carrying the goods were stowed on board the "Und Adryatik". A fire broke out on board during the sea passage from Trieste, Italy, which destroyed the vessel and the cargo. The cause of the fire was never established, but serious doubts were raised at the time regarding the effectiveness and operation of the fire fighting system on board.

The Claimant alleged that the applicable liability regime was CMR, despite the damage and loss taking place during the sea leg of the transport. The road carrier sought to rely on the exception found in Art. 2 of CMR, meaning that it was the Hague Rules that applied.

In summary, Art 2 sets out the broad proposition that if the cargo remains on board the road vehicle during carriage by some other mode, e.g. during a Ro-Ro sea crossing, then CMR will generally apply. The exception, also found in Art 2, states that if it is established that the loss or damage was not caused by the road carrier and the loss or damage was attributable to some event which could only have occurred in the course of and by reason of carriage by the other mode, then CMR is ousted in favour of any other *"conditions prescribed by law."* It is important to note that CMR will still apply even if the exception is met, if there are no other *"conditions prescribed by law."*

Federal Supreme Court Judgment

The First Instance and the Appeal Court found in the Claimant's favour, stating that CMR also applied to the sea leg of the voyage and not the Hague Rules. The case was appealed once more, and it was left to the Supreme Court to consider and interpret what amounted to "conditions prescribed by law" for the purposes of Art. 2 CMR.

This question posed numerous difficulties with no straightforward answer. The Supreme Court reviewed the history of Art. 2 CMR and considered how other Member States had tackled the question. It considered the meaning of the French interpretation, the Dutch interpretation in *Hoge Raad der Nederlande and the English approach in Thermo Engineers Ltd and others v Ferrymaster Ltd*, in trying to answer the question.

3 Thermo Engineers Ltd and others v Ferrymaster Ltd and other [1981] 1 All ER

The Supreme Court noted that "Piggy-back transports", where cargo remains on board the road vehicle which is itself loaded onto another mode of transport, can leave the road carrier unprotected, as the Hague/Hague Visby Rules, applicable to the contract of affreightment between the road haulier and the vessel, provide for different defences and limitations.

The purpose of Art. 2 CMR was therefore, the Supreme Court concluded, to ensure that the recourse action the road carrier has against, for example, the vessel mirrors the liability the road haulier has vis-à-vis its own client.

Looking at the history of CMR the Supreme Court took into consideration that at the time CMR was drafted, other international transport conventions for the transport by air, by train and by sea already existed. It was assumed by the Supreme Court that the Member States recognised the different dangers associated with the different modes of transport and that consequently, under certain circumstances, it made more sense for these other international transport conventions to apply. As such, in the Dutch case, Hoge Raad, the court concluded that "conditions prescribed by law" referred to international transport conventions. A similar conclusion was also reached by the English High Court in Ferrymaster Ltd.

The Supreme Court consequently concluded, that (i) the CMR rules would not apply in cases where the damage/loss was caused by an incident typical for that other mode of transport and, (ii) as long as the road haulier was not responsible by way of action or omission for the incident occurring.

When considering what amounted to a 'typical incident for the carriage by sea', the Supreme Court concluded that the sinking of a ship, vessel collisions, groundings, cargo damage from sea water ingress or the movement of the vessel in rough sea were evidently risks inherent in the carriage of goods by sea. Fire on the other hand was as such not an incident typical for the carriage by sea. Nevertheless, it was concluded that a fire of the magnitude experienced by the "Und Adriyatik" was typical for the carriage by sea. The justification was that the lack of escape and greater difficulty of bringing a fire under control at sea, means the risk fire presents at sea is substantially different to the one it poses on land, making it a risk typical for the carriage by sea.

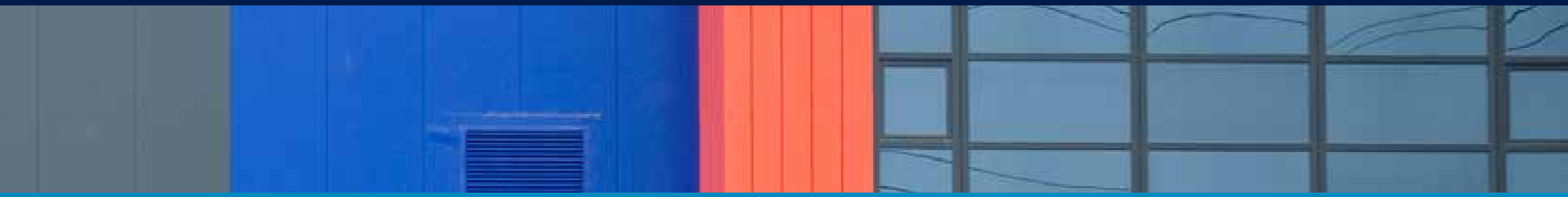
Moreover, the Supreme Court stated that the liability was to be determined based on a fictitious contract that would have existed, had the seller/shipper of the cargo entered directly into a contract with the carrier of the other mode of transport. Implying a fictitious contract meant that for the sea leg of the transport the Hague Rules were to apply, as these would have been the regime mandatorily applicable, i.e. "prescribed by law" to such a contract had it been entered into and accordingly the road carrier's liability fell to be determined by the Hague Rules and not CMR.

Thermo Engineers Ltd and others v Ferrymaster Ltd and others [1981] 1 All ER

The English High Court considered a case where a trailer containing cargo suffered severe damage during loading operations. The stevedores loading the cargo were familiar with the vessel and should therefore have noticed that because the cargo exceeded the trailer height, it could not be stowed on the vessel. The question was thus not whether the defendant, who employed the stevedores, was liable for the said damage, but if the defendant's liability was to be determined by the Hague Rules or CMR. It was held that CMR did not apply and that the liability fell within the exception provided for within Art. 2 CMR. The court's reasoning was that CMR was supposed to be consistent with other international conventions, such as the Hague Rules.

"The rulings in *Und Adriyatik* and *Thermo Engineers Ltd and others v Ferrymaster Ltd* create a certain degree of certainty, but in every case where a loss has a occurred during a multimodal transport operation, to which CMR appears to apply, a careful analysis must be undertaken to establish the position."

JUSTIN REYNOLDS



"For the purpose of Art. 2(1) when a road vehicle was loaded onto a ship [...]the point where carriage by road ceased and carriage by sea commenced was [...]to be determined by the Hague Rules."[4] Consequently and in accordance with the provisions of the Hague Rules, the carriage by sea was under way, as the damage arose during cargo loading operations and thus the applicable cargo regime was by extension the Hague Rules.

When considering if the damage was caused by an *"event which could only have occurred in the course of and by the other means of transport"*[5] the court concluded that the correct question one should ask is not *"whether the damage could only have occurred in the course of the other means of transport, but whether the event causing the damage could only have occurred in the course of the other means of transport."*[6] The court therefore found that the Hague Rules must apply, as that particular stowage damage could have only occurred in the course of and by reason of the transport by sea.

Furthermore, the court ruled that the liability for the damage caused by the stevedores was to be determined as if the claimant had entered into a separate contract with the carrier for the carriage by sea. Consequently, the CMR rules would not apply to such a contract, but the Hague Rules would and the court thus concluded that any liability caused during the sea leg of the transport was to be determined by the Hague Rules. This begs the question, from an English law perspective, as to what would have happened had a bill of lading (or similar document of title) not been issued, which is of course a pre-requisite for the Hague/Hague Visby Rules to come into play. If a bill of lading had not been issued (which for most short sea crossings is the norm), it is likely that CMR would then apply as there could be no other *"conditions prescribed by law."*

4 Thermo Engineers Ltd and others v Ferrymaster Ltd and others [1981] 1 All ER, 1143, b

5 Thermo Engineers Ltd and others v Ferrymaster Ltd and others [1981] 1 All ER, 1143, d/e

6 Thermo Engineers Ltd and others v Ferrymaster Ltd and others [1981] 1 All ER, 1143, d/e

Conclusion

The rulings in *Und Adriyatik* and *Thermo Engineers Ltd and others v Ferrymaster Ltd* create a certain degree of certainty, but in every case where a loss has a occurred during a multimodal transport operation, to which CMR appears to apply, a careful analysis must be undertaken to establish the position. Art 2 CMR is an awkwardly worded provision and in many cases it is not an easy analysis to make.

For further information, please contact Justin Reynolds, Partner, on +44 (0)20 7264 8470 or justin.reynolds@hfw.com, or your usual HFW contact. Research by Meike Ziegler, Trainee.

Carriage of dangerous goods by air: liability issues for cargo interests

The carriage of dangerous goods by air gives rise to potentially significant exposures, both civil and criminal, for all parties involved in the cargo chain, including shippers, freight forwarders and air carriers. Such exposures have increased in recent years as the boom in e-commerce has resulted in ever-increasing numbers of people buying and selling (and shipping) goods internationally.

We discuss below the regulation of the carriage of dangerous goods, the types of liability which might arise from the carriage of such goods and how cargo interests may seek to mitigate against such risks.

Regulation

International regulation of the carriage of dangerous goods by air largely stems from rules laid down by the International Civil Aviation Organisation (ICAO), a UN agency, set out in Annex 18 to the Chicago Convention 1944. The rules cover, at a high level, matters such as permitted/forbidden dangerous goods, packing requirements, labels and markings, and the responsibilities of shippers and aircraft operators. They also require compliance with separate and detailed ICAO technical instructions on the carriage of dangerous goods.

The Annex, of itself, does not create binding obligations on cargo interests. Instead, contracting states to the 1944 Convention (which includes virtually all of the world's countries) are required to implement, within their own domestic legislation, laws which give effect to the requirements of the Annex and which ensure compliance with the technical instructions.

However, whilst this might suggest that a standardised level of regulation should be present at an international level, the reality is that, owing to the manner of implementation of Annex 18 being largely left to individual states, levels of regulation, sanctions and enforcement can vary between different jurisdictions. As such, cargo interests must be aware of, and comply with, all such regulations which might apply to their activities.

By way of example, in the UK, the carriage of dangerous goods is subject to strict regulation. The UK's Civil Aviation Authority carries out regular inspections (e.g. at freight sheds/warehouses, on ramp or at the terminal) to check for compliance with the requirements of the ICAO technical instructions. Audit style inspections are also performed on operators and their handling agents to assess the adequacy of their procedures and training. Statistics on such audits in 2012 found, for example, that 63 operators and 23 handling agents had training related issues, whilst 15 operators and 13 handling agents were using out-of-date instructions/guidance. A system of approvals is also in place for UK and foreign-registered operators carrying dangerous goods within the UK.

Aside from Annex 18, the International Air Transport Association (IATA), the principal trade association of the airline industry, also publishes its own Dangerous Goods Regulations. These contain all of the requirements of the ICAO Technical Instructions and, in some instances, impose more restrictive requirements arising from operational considerations. The IATA regulations are applicable to all IATA member airlines, as well as shippers and agents that offer consignments of dangerous goods to such airlines.

Types of Liability

The main types of liability arising from the carriage by air of dangerous goods are as follows:

i) Criminal Liability

In many jurisdictions, breaches of dangerous goods regulations can give rise to criminal liability. In the UK, for example, it is an offence if a person delivers, causes to be delivered, takes onboard or causes to be taken onboard an aircraft any goods which he knows or ought to have known or suspected of posing a risk to health, safety, property or the environment when carried by air, unless that person has complied with applicable technical instructions and the packaging is suitable for carriage by air. Penalties will typically be in the form of (potentially unlimited) fines, but custodial sentences are also possible for individuals. Experience in the UK is that fines can be significant – running into many thousands of pounds – even for defendants who are not at the forefront of the cargo supply chain.

Other criminal exposures may also exist. For example, failures in the handling of dangerous goods which result in passenger deaths could potentially give rise to exposures to corporate or individual manslaughter/homicide type charges.

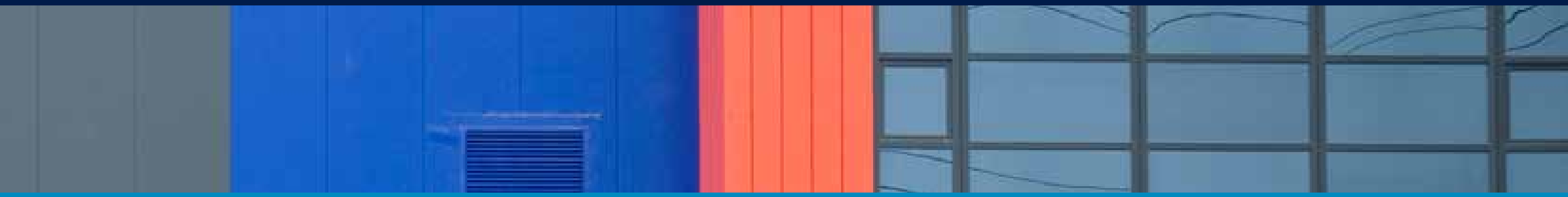
ii) Civil Liabilities

The carriage of dangerous goods by air can result in various types of damage, all of which could potentially lead to significant civil exposures for aircraft operators, freight forwarders and/or shippers. Such damage might include, for example:

- Damage to the aircraft.
- Damage to the offending cargo or to other cargo.
- Injury to/death of persons on the aircraft.
- Injury to/death of persons on the ground.
- Damage to property on the ground.
- Consequential/business type losses (e.g. losses arising from an aircraft being grounded).

"...it is an offence if a person delivers, causes to be delivered, takes onboard or causes to be taken onboard an aircraft any goods which he knows or ought to have known or suspected of posing a risk to health, safety, property or the environment when carried by air..."

MARK WATERS



The scale of damage can be extreme. Examples exist of mis-packaged/mis-declared dangerous goods causing catastrophic accidents. In 1996, for example, a Valujet DC9 crashed in the Florida Everglades as a result of a fire caused by loosely packaged chemical oxygen generators, killing all 105 passengers and 5 crew on board. More recently, lithium batteries have grabbed the headlines, being implicated in a number of accidents (including the loss of a Boeing 747 in 2010), leading to revised regulations on their safe transport.

Of course, where liability for such losses ultimately falls is very heavily dependent on a number of factors, including the established cause(s) of the loss, the applicable liability regime(s), the actions/omissions of the various involved parties and any arrangements (e.g. contracts) between the parties which might affect the apportionment of liability. Cargo interests should, however, be aware of the exposures they potentially face, which might arise if they are found to have played a part in mis-declared or mis-packaged dangerous goods finding their way onto an aircraft, for example, through failures in their internal procedures or checks.

Mitigation

In view of the potential exposures identified above, cargo interests should take steps, as far as possible, to avoid contraventions of dangerous goods regulations and protect themselves against the consequences of such breaches. Whilst it is of course very difficult to screen every item of cargo sent by air (particularly given that we live in an age where anyone can effectively be a "shipper"), there are a number of steps that cargo interests should be taking, including:

- Ensuring/maintaining awareness of, and compliance with, all applicable dangerous goods regulations (including the Annex 18 requirements as implemented in all relevant contracting states and any applicable IATA regulations).
- Provision of comprehensive training on the handling, packaging, inspection etc of dangerous goods to all individuals involved in such activities, and repeating and updating such training as necessary (e.g. to reflect changes to applicable rules).
- Implementation and operation of suitable quality systems and record keeping to monitor compliance with dangerous goods procedures (to include incident reporting and response).
- Consideration of the terms and conditions of contracts in place with other parties in the freight chain, and how such provisions might be used to apportion or transfer liability between such parties.
- Consideration of whether liability insurance carried is adequate (both in terms of scope and level of cover) to protect against potential civil liabilities which might arise from the handling of dangerous goods.

For further information, please contact Mark Waters, Associate, on +44 (0)20 7264 8275 or mark.waters@hfw.com, or your usual HFW contact.

Liquidated damages in logistics agreements – an overview

"Normal" damages

When a tort, breach of contract or breach of a statutory duty is committed, damages are awarded to compensate the claimant for the loss or damage suffered as a result of such tort or breach. The purpose of damages is to return the claimant, so far as money can, to the position he occupied/would have occupied had the tort or the breach not been committed. The prime example of damages which may become payable in the context of logistics services are damages payable for loss or damage to cargo.

Liquidated damages

Liquidated damages are different from "normal" damages. They are specific amounts which the parties to a contract have agreed will be payable in the event of non-performance of certain contractual obligations. The trigger point for payment of liquidated damages is often delay in delivery or delay in completion. Liquidated damages are widely used in construction agreements, but they are not so common in contract logistics where key performance indicators and service credits are more prevalent, although we have seen an increase in the use of liquidated damages in recent years. They are however found in the logistics and liner shipping industry, but under different name tags. Demurrage, i.e. the daily rate payable for delay to a vessel beyond the agreed laytime, is an example of liquidated damages. Demurrage may also be payable for storage of (full) containers on quay beyond the agreed free time. Detention is often payable on (empty) containers which are returned late to the carrier.

Enforceability of liquidated damages clauses

In order for a liquidated damages clause to be enforceable under English law, the sum specified as payable needs to be a genuine pre-estimate of the loss which would probably arise from a breach of the contract. If the sum is totally out of proportion with the losses likely to be suffered, then the liquidated damages will constitute a penalty and not be recoverable. The onus of proving that the sum payable is a penalty is on the party liable for such sum.

In a recent case, *Cavendish Square Holdings BV and another v El Makdessi* (2012), the High Court applied the more modern approach to penalties, which no longer involves just looking at whether the sum payable is a genuine pre-estimate of loss, but looking at the commercial justification for the clause. Burton J. listed what he considered are the relevant questions when determining whether or not a liquidated damages clause is penal. These questions are:

i) *Was there a commercial justification?*

ii) *Was the provision extravagant or oppressive?*

iii) *Was the predominant purpose of the provision to deter breach?*

iv) *If relevant, was the provision negotiated on a level playing field?*

The above are all relevant factors when deciding whether or not a liquidated damages clause will be deemed a penalty and should therefore be borne in mind when drafting such provisions.

Liquidated damages clauses and international conventions

When using liquidated damages in the context of agreements to which any of the international transport conventions apply compulsorily, careful drafting should be used to ensure the liquidated damages clause does not contravene any of the convention provisions which are mandatory and prevent contracting out. If the liquidated damages clause imposes greater or additional liability and it does so in a manner that is not allowed under the applicable convention, then such clause may be open to legal challenge even if the liquidated damages are a genuine pre-estimate of the loss.

Sole remedy?

If the liquidated damages clause is enforceable, the sum stipulated will be payable without requiring proof of the actual damage and regardless of the actual damage suffered. This will be the case even if the stipulated sum is greater than the actual damage. Where the sum payable under the liquidated damages clause is less than the actual damage, the position is the same, and the sum payable will be limited to the amount stipulated in the liquidated damages clause.

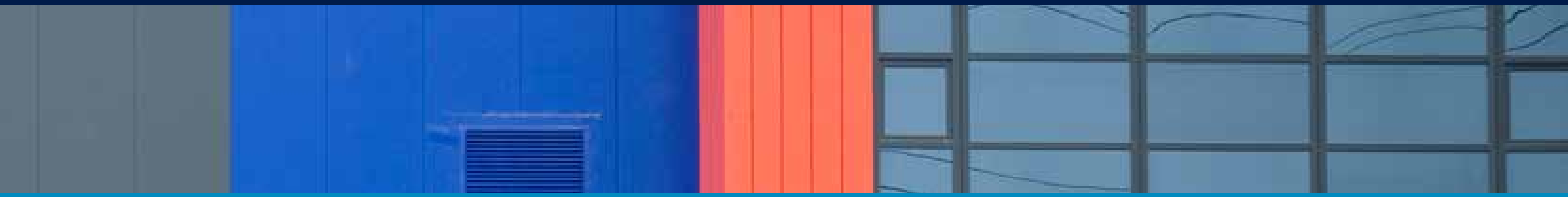
If the liquidated damages clause is deemed a penalty, then the clause will be set aside, and the claimant will be entitled to recover "normal" damages in the ordinary way (and subject to any limitation and exclusion clause which may be contained in the agreement).

Unfair Contract Terms Act 1977 (UCTA)

As we saw in the previous edition of this Bulletin (Jan 2013): Limitation clauses: a quick reminder of how they work, UCTA provides that where a party seeks to rely on a clause that limits or excludes its liability for negligence, it can only do so provided the clause is "reasonable" (Section 2(2) of UCTA). UCTA will apply to a clause which limits the amount recoverable in the event of negligence, but there seems to be some debate over whether UCTA applies to liquidated damages clauses (in non-consumer contracts).

"When using liquidated damages in the context of agreements to which any of the international transport conventions apply compulsorily, careful drafting should be used to ensure the liquidated damages clause does not contravene any of the convention provisions which are mandatory and prevent contracting out."

CATHERINE EMSELLEM-ROPE



The general view is that if the liquidated damages clause is enforceable, then it probably will not be subject to UCTA.

Key performance indicators – bonus malus/service debit schemes

Service Level Agreements (SLA) are often used in logistics agreements; they are formal negotiated agreements between the shipper and its logistics provider that sit underneath the logistics contract. The SLA specifies in measurable terms – Key Performance Indicators (KPIs) – the standards to be attained in the execution of the services and the consequences that occur in the event the standards are not met.

One such consequence may be the payment by the logistics provider of a "malus" or "service debit"; these are sums which become payable when the service standard falls below what the parties have agreed is an acceptable level of performance for the service in question. If the sum payable goes beyond what would be a reasonable pre-estimate of the loss, it will be deemed a penalty and therefore not enforceable. Conversely, if the sum is set at a level which is obviously much lower than the likely losses, the parties should consider what the nature of such a payment is and whether it is intended to operate as a liquidated damages clause.

Conclusion

There are different ways of dealing with damages when drafting a contract. Liquidated damages can be a useful tool as they can avoid protracted and commercially damaging disputes about the damages payable in the event of a breach. They also bring certainty and act as a cap on liability, so from the point of view of those insuring the risk, they can be an attractive proposition. However, the parties to the contract should always be mindful of the English law rule against penalties, as falling foul of such a rule could result in the liquidated damages clause being set aside.

For further information, please contact Catherine Emsellem-Rope, Senior Associate, on +44 (0)20 7264 8279 or catherine.emsellem-rope@hfw.com, or your usual HFW contact. Research by Matthieu Moss, Trainee.

Spotlight on competition – mergers, acquisitions and antitrust

European Minibulk/Container Feeder Investigation

After an investigation lasting just over a year, on 31 January 2013 the EU Commission closed an antitrust investigation into the cooperation schemes of two large European shipowners. European Minibulk and Container Feeder, both established in Germany, had planned to jointly coordinate certain operations of their container feeder vessels, including the joint purchasing of fuel. Feeder vessels are usually used to collect containers from large terminals to smaller regional ports, often operating on a fixed route. One particular element of the proposed coordination, namely a system whereby owners would be compensated for laid-up vessels, would encourage the withdrawal of capacity from the market and thereby push up charter rates for the types of vessels concerned. The Commission investigated whether this system was compatible with EU antitrust law, and in particular Article 101 of the Treaty on the Functioning of the EU (TFEU), which prohibits anti-competitive agreements. A similar scheme known as the Baltic Max Feeder scheme had been proposed in 2010 by the German tax advisor Anchor Steuerberatungsgesellschaft, but was later abandoned following a Commission investigation. Similarly, following the results of this investigation into the European Minibulk/Container Feeder scheme, and discussions between the companies and the Commission, the cooperatives agreed to abandon this proposal as well as an information exchange scheme which, according to the Commission *"could have enabled the coordination of rates between competitors"*. This latter scheme was designed to provide recommendations of charter rates to shipowners based on data collected about the owners' own rates. Such a scheme and the potential of rate-coordination could have led to increases in charter rates. No formal proceedings were initiated since the Commission felt that market competition had been maintained.

Unifeeder/Feederlink Merger cleared by OFT

On 27 November 2012, the OFT cleared the acquisition of Feederlink Shipping and Trading by Unifeeder. Unifeeder, headquartered in Aarhus, is one of the leading feeder-operators in Northern Europe with a fleet of around 40 chartered vessels, and transport containers from large European container terminals to numerous regional ports. It also operates in the shortsea sector, combining sea, rail and road logistics to transport containers. Feederlink, headquartered in Rotterdam, operates on a smaller scale with four vessels, transporting containers from Felixstowe and Rotterdam to a handful of UK ports. The merger promises to achieve "operational synergies" between the two companies, resulting in more efficient operations in the feeder and shortsea market.

In the Competitive Analysis in their report and following their guidelines to assess whether there is a "substantial lessening of competition", the OFT considered whether the reduction in competing feeder operators in the relevant market was anti-competitive. The existence of BG Freight, a third operator in the market, and the fact that it is seen by third parties as a viable alternative to Feederlink and Unifeeder, meant that a significant constraint on the merged entity would exist. In other words, the OFT took the view that although the two parties do *"represent a competitive constraint on one another"* (one of the factors in determining whether an anti-competitive merger exists), the fact that there were other constraints on them (including road and rail services), as well as the fact that there is a low barrier to entry to the feeder market, meant that customers will not be harmed as a result of the merger. As such, the OFT found that there was no realistic prospect of a substantial lessening of competition in any market in the UK as a result of the merger.

UPS abandons acquisition of TNT Express which was subsequently prohibited by EU Commission

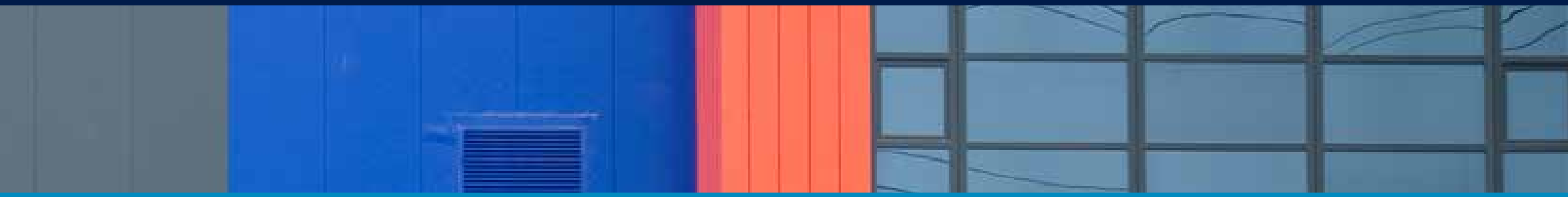
In anticipation of an EU Commission decision to prohibit the deal, UPS abandoned its proposed acquisition of TNT Express. In its press releases issued on the adoption of the decision, the Commission stated that they found that the markets for the express delivery services provided by the four main integrators in Europe, namely UPS, TNT Express, DHL and FedEx, are national in scope, and that these integrators only faced limited competition from local and national delivery companies due to their lack of established air networks. In addition, the Commission found that in several EU countries, FedEx is not a significant competitor, which means that in these countries there are only three main integrators from which the consumer can choose. Therefore, the acquisition of one of these by another (e.g. TNT Express by UPS) would limit this choice further, down to only two options.

In general terms, any "concentration", as defined in the EU Merger Regulation (No. 139/2004), which has an "EU dimension", must be notified to the Commission for approval before its implementation. During this approval process, it is decided in an initial investigation whether the acquisition should be cleared or whether an in-depth investigation (known as Phase II) should be opened. The concentration will subsequently either be cleared or prohibited depending on the Commission's assessment of whether it is compatible with the internal market. Under the EU Merger Regulation, such an assessment must take into account, inter alia, the need to maintain and develop effective competition within the common market and the market position of the undertakings concerned and their economic and financial power. In essence, and as laid out in the Merger Regulation, a concentration which would significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.

Analysing the direct impact to the consumer of a UPS-TNT Express merger in a Phase II investigation, the Commission found that prices for the relevant delivery services would likely increase across much of the EU, and that any benefits of the merger claimed by UPS would be outweighed by the negative impact the consumer.

"In its press releases issued on the adoption of the decision, the Commission stated that they found that the markets for the express delivery services provided by the four main integrators in Europe, namely UPS, TNT Express, DHL and FedEx, are national in scope, and that these integrators only faced limited competition from local and national delivery companies due to their lack of established air networks."

ELIZA PETRITSI



Although UPS had proposed some alterations to the acquisition, including the divesting of TNT Express's subsidiaries in the 15 countries identified by the Commission to be most affected by the proposed merger, the Commission did not see these as suitable remedies to their competition concerns.

As part of the Offer Conditions, UPS had agreed to pay TNT Express a €200m termination fee if EU Commission competition clearance was not acquired.

This case can be treated as especially significant since it adds to a small group of notified mergers which have not been cleared. Only very rarely are mergers found to pose competition issues significant enough to be prohibited. In the period between 21 September 1990 and 7 March 2013, over 5000 merger notifications were made to the Commission, with only 24 of these being prohibited. Since 2008 there have only been 4 such prohibitions, including Ryanair's proposed takeover of Aer Lingus.

For further information, please contact Eliza Petritsi, Partner, on +44 (0)20 7264 8772 or eliza.petritsi@hfw.com, or your usual HFW contact. Research by Andrew Spyrou, Trainee.

Conferences & Events

Multimodal Part 2 Seminar
HFW London
(24 September 2013)
Presenting: Craig Neame, Daniel Martin, Justin Reynolds, Catherine Emsellem-Rope, Matthew Wilmshurst

Lawyers for international commerce

HOLMAN FENWICK WILLAN LLP
Friary Court, 65 Crutched Friars
London EC3N 2AE
T: +44 (0)20 7264 8000
F: +44 (0)20 7264 8888

hfw.com