Logistics

July 2014

LOGISTICS BULLETIN

Welcome to the July edition of our Logistics Bulletin.

This month we start by analysing the recent blocking of the proposed P3 alliance between the three largest container shipping lines, which has surprised many in the industry. We look at the competition law requirements which must be met by global liner alliances, in light of the 2M vessel sharing agreement which has now been announced.

We then examine two recent cases in relation to bills of lading. A decision of the US Court of Appeals Second Circuit on package limitation under the US Carriage of Goods by Sea Act 1936 will benefit freight forwarders operating in the US and we review how liability can best be limited. In light of a decision by the Hong Kong court, we look again at exclusion clauses generally and the best way to ensure a clause excludes liability for negligence.

Finally, the United Kingdom Warehousing Association (UKWA) has recently published the latest version of its trading conditions for use by its members. We examine the key features of the UKWA Conditions 2014 and set out what members need to know.

Should you require any further information or assistance on any of the issues dealt with here please do not hesitate to contact any of the contributors to this Bulletin, or your usual contact at HFW.

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The fall of P3 and the rise of 2M: competition law and the container shipping industry

Unlike the regulators in the EU or the USA, MofCom required P3 to obtain merger clearance.

ANTHONY WOOLICH, PARTNER

Against industry expectations the proposed alliance between the world's three largest container shipping lines, Maersk, MSC and CMA-CGM, was blocked by the Chinese Ministry of Commerce (MofCom) on 17 June. MofCom's decision means that the P3 alliance will not go ahead and has led to further restructuring in the container shipping market. Maersk and MSC have since entered into an exclusive Vessel Sharing Agreement (VSA) – dubbed the '2M' – on east-west trades, whilst CMA-CGM have been left to assess their options, which include the establishment of a new global VSA with carriers that are not currently a member of a global alliance, such as UASC and CSCL.

Why was P3 rejected?

P3 had already received regulatory approval from the Federal Maritime Commission (the FMC) in the USA. In addition the European Commission (the Commission), which does not have a formal clearance procedure for VSAs which fall short of a full-function joint venture, had indicated that it would not open proceedings against P3 when it started operations. However, both regulators stated that they would closely monitor P3 to ensure that its impact over time did not lead to a restriction of competition, which might be evidenced by higher prices or less choice for consumers.

Unlike the regulators in the EU or the USA, MofCom required P3 to obtain merger clearance. MofCom had not required this clearance for the G6 or CKYHE alliances. In making the decision to reject P3 MofCom drew a distinction between what it termed as 'traditional' VSAs, which it would not treat as a 'merger' and 'non-traditional' VSAs between container lines.

MofCom reasoned that in a 'traditional' VSA individual members retain the ability to have an impact on the decision making of the alliance, as operational decisions are taken by a committee that involves all the members to the agreement. In contrast, P3's day-to-day operational decisions would have been taken by a dedicated arms-length network service centre. In this regard, MofCom was especially concerned that the proposal of P3 to pool costs through the network service centre would have reduced the ability of P3's members to compete effectively on price. It was also concerned that P3's market share, which it said was 47% on the Asia – Europe trades, may have given P3 the power to control prices in a concentrated market with barriers to entry.

MofCom's decision indicates that competition authorities are prepared to place limits on the level of integration VSAs can achieve if those authorities feel that increased integration would have a negative impact on customers such as shippers, freight forwarders and terminal operators.

2M

2M has structured itself as a 'traditional' VSA in response to MofCom's P3 decision. It has said that there will be no joint service centre, and that Maersk and MSC will each be responsible for their own bunker costs and will enter into separate service contracts.

However, 2M may still face difficulties from regulatory authorities. Shippers' forums in a number of jurisdictions, including China, have expressed concerns about 2M's market share, which, although smaller than P3's, could, according to press reports, still be as high as 42% on transatlantic trades and 35% on Asia – Europe trades. These market shares would mean that 2M would be unable to benefit from the EU block exemption for liner consortia permitting co-operation between carriers short of price fixing and market allocation where market shares do not exceed 30%[1]. Instead, like P3, it will have to 'self-assess' its agreement to ensure compliance with EU competition law. Whilst it is unlikely that the Commission will stop 2M from starting operations, it could place its operations under significant scrutiny in the future if freight rates were to rise.

In addition, whilst 2M may not be viewed as a merger by MofCom, the Chinese Ministry of Transport may

investigate a VSA for anti-competitive practices if it carries more than 30% of the volume carried through Chinese ports on any trade route in a particular year. We understand that the Chinese Ministry of Transport may order a VSA to be amended or limited if it finds that the VSA is detrimental to fair competition[2].

Conclusion

MofCom's decision to reject P3 and the regulatory difficulties 2M may face highlights the legal uncertainty that competition law presents for those companies that have operations in a number of different jurisdictions, as different competition authorities have different procedures and may take differing approaches to the same transaction. The establishment of a single global set of competition rules for the container shipping industry might be desirable, but for now the liner companies will have to continue to seek competition law advice in separate jurisdictions when entering into VSAs or mergers.

MofCom's decision certainly does not signal the end of the global VSA system, but it does indicate the wide variety of factors at play and the need for due diligence when structuring transactions and VSAs to comply with competition law.

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1 Commission Regulation (EC) 906/2009 OJ L256/31, 28 September 2009.

2 Regulations of the People's Republic of China on International Maritime Transportation – Articles 35 – 41.

Package limitation: *OOO Garant-S v Empire United Lines Co Inc*

A recent decision of the United States Court of Appeals Second Circuit on package limitation under the Carriage of Goods by Sea Act 1936 (US COGSA), *OOO Garant-S v Empire United Lines Co Inc*, is helpful for freight forwarders operating in the USA.

Garant-S contracted over a number of years with Empire, a freight-forwarder, to ship cars from Elizabeth, New Jersey, where they were held at Empire's warehouse before being loaded on board a vessel. In 2013, two cars were stolen from the Elizabeth warehouse and Garant-S sued Empire.

Empire did not deny that they were liable, but argued that they were entitled to rely on the package limitation provisions of US COGSA. The first instance court gave summary judgment to Empire, meaning that they were only liable for $500 per package (i.e. per car), far less than they were actually worth. Garant-S appealed, raising a number of arguments for package limitation not applying.

Garant-S first argued that US COGSA did not apply at all. US COGSA only applies mandatorily once goods have been loaded on board a ship, but the parties can agree by contract to it applying earlier. This was the effect of Empire's house bill of lading, which stated that US COGSA would apply from when the goods were received at Empire's warehouse. However, at the time that the cars were stolen, no bills of lading had been issued. Empire argued that, because they had done business previously with Garant-S using the same house bill of lading, those terms should apply to the contract even before the bill was issued. The court accepted this argument, holding that although the bills had not been issued, the parties' previous dealings meant that as *"there is no indication that the house bill of lading with which Garant-S had extensive experience would not have been issued, US COGSA applies by contract"*.

Garant-S's fallback argument was that even if US COGSA did apply, the package limitation provisions did not. US COGSA requires that shippers be given a "fair opportunity" to declare that their cargo is worth more than the $500 package limit, and the courts have held that *"the carrier bears the initial burden of providing fair opportunity"*.

Garant-S argued that it had not had a fair chance to declare the value of the cars. Empire were again able to defeat this argument using the wording on their house bill of lading, which, the court found, *"unambiguously notifies the shipper both that US COGSA applies to limit liability and that a higher value may be declared".*

Therefore, because Garant-S were held to be aware of the wording of the house bill, it had been given a fair opportunity to declare a higher value and the $500 limit applied.

This case is a good example of the ability to limit liability that US COGSA gives to carriers and freight-forwarders and how the scope of those limits of liability can be increased by the use of a carefully worded house bill of lading.

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Exclusion clauses: the *contra proferentem* rule continued

In our previous Logistics Bulletin, we looked at exclusion clauses and specifically the *contra proferentem* rule[1]. The *contra proferentem* rule was invoked in a decision by a Hong Kong court[2] in relation to a point we touched on in our previous Bulletin, namely that the best way to ensure the clause excludes liability for negligence is by expressly using the word *"negligence"* in the clause, or a word which is synonymous with *"negligence"*.

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CATHERINE EMSELLEM-ROPE, SENIOR ASSOCIATE

The case

This case related to a consignment of Sony goods, which were carried by combined transport from Shanghai to Tilburg via the port of Rotterdam. A Blue Anchor Line express cargo bill of lading was issued in respect of the consignment, with the terms of the contract of carriage set out on the reverse[3] (ECB). Following a series of events, one of the containers forming part of the consignment was delivered to a fraudster who disappeared with the goods. The court had to consider a number of issues, one of which was whether the US$2 per kilo limitation of liability contained in clause 18.3 of the ECB applied to limit the defendants' liability for the loss suffered as a result of the theft of the goods.

The claimant, relying on the *contra proferentem* rule, contended that the absence in clause 18.3 of express reference to negligence or similar wording, meant that the clause could not to be taken to extend to liability for negligence.

There was also mention of clause 23.2 of the ECB, which disentitles the carrier from relying on the limit under clause 18.3 where there was (i) an intent on the part of the carrier to cause damage or (ii) recklessness with knowledge that damage would probably result on the part of the carrier. The question was whether the wording of clause 23.2 could be extended to cover the defendants' negligence, in which case the limitation in clause 18.3 would not apply.

The outcome

The court agreed that clause 18.3 of the ECB indeed needed to be read together with clause 23.2 of the ECB. However, the court did not agree that clause 23.2 could have the effect of avoiding or annulling the limitation of liability contained in clause 18.3 in the event of negligent conduct. The judge stated that to extend the meaning of clause 23.2 to include negligence would be *"to read into it words which are not there"*.

In reaching this decision, the court also looked at clause 18.4 of the ECB which allows for a higher value of the goods to be declared (with the consent of the carrier and subject to payment of higher freight rates), in which case higher compensation may be claimed. The judge considered that clause 18.4 was "in effect a freight plus insurance option" and that extending the meaning of clause 23.2 to include negligence would render clause 18.4 redundant, as why would consignors pay higher freight rates if they could rely on clause 23.2 to claim a higher compensation.

Conclusion

Whilst this case is subject to the law of Hong Kong, it is a useful reminder of the importance of clear drafting and also a helpful illustration of how the *contra proferentem* rule is applied by the courts. The key point here was that the wording of clause 23.2 was in the court's view very clear, in that it only referred to the two mental states mentioned above (intent and recklessness with knowledge). It is unclear from the judgement why clause 23.1 of the ECB[4] was not mentioned in relation to this point, but if it had been, the outcome would have been the same.

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1 http://www.hfw.com/Logistics-Bulletin-February-2014

2 *Maintek Computer (Suzhou) Co Ltd and Others v Blue Anchor Line and Others* [2013] HKCFI 506; HCAJ106/2008 (2 April 2013)

3 The terms and conditions which appeared on the reverse of the express cargo bill of lading were an older version of the Blue Anchor Line terms and conditions.

4 This clause states that the defences and limits of liability contained in the ECB shall apply to actions whether founded in contract or tort.

UKWA T&Cs 2014 edition

The United Kingdom Warehousing Association (UKWA) has published the latest incarnation of its trading conditions for use by its members (the 2014 edition). The purpose of this article is not to set out, in detail, the content, but rather to highlight some important legal principles, to identify two key changes to the 2006 edition of the UKWA conditions (although there are other changes) and to remind the reader of certain important clauses that remain untouched.

Background legal principles

The UKWA conditions, like any other, do not have mandatory legal effect under English law. For a UKWA member to be able to rely upon the conditions (or for any commercial party to do likewise in respect of its own conditions) it has the burden of ensuring that the conditions are "incorporated" into the contract *before* the contract has been formed.

Even if incorporated, a customer might be able to challenge the validity of the UKWA conditions (or indeed any other) in one of two ways. First, if the language of any particular provision is ambiguous, it will be read against the UKWA member and second, if any particular clause is found to offend the requirement of "reasonableness" under the Unfair Contract Terms Act 1977 (UCTA), it will be struck out. It is not the purpose of this article to consider such questions in relation to the UKWA conditions, but it is useful to remind oneself of the potential hurdles that face any commercial party seeking to rely upon standard trading conditions.

The conditions are robust and as long as the member takes care to ensure they are incorporated into their contracts then, as a starting point, the conditions will remain a shield (and in some cases a sword) for use by its members.

JUSTIN REYNOLDS, PARTNER

Key changes

The first important change appears in clause 3.1. Readers may recall the 2006 edition of the UKWA conditions included a provision requiring the customer to procure its own cargo insurance and to ensure that the relevant cargo policy contained a waiver of subrogation in favour of the UKWA member. The purpose was to prevent subrogated cargo claims against the UKWA member. The requirement to procure cargo insurance or self insure has been preserved, but the waiver of subrogation requirement has been removed. Accordingly, subrogated cargo insurers will have the opportunity to bring recovery claims (although in accordance with the terms set out in the conditions, subject always to what we have said above regarding incorporation, potentially ambiguous language and the "reasonableness" test under UCTA).

The second important change is at clause 6.5. This seeks to clarify and extend the rights of lien to situations where monies are owed to the UKWA member (whether strictly due or not) and where they may only be payable on the happening of some future event. In addition, the right to exercise a lien is now expressed to continue even if ownership in the goods is transferred.

Status quo

UKWA has not changed the time limit to commence and serve legal proceedings (including any counterclaim), which remains at nine months from the date of the event giving rise to the claim per clause 7.7.2.

The limitation of liability figure, at £100 sterling per tonne, also remains per clause 3.5.2, as does the ability of the customer to specify a higher limit per clause 3.5.1 (which is intended to demonstrate "reasonableness" on any analysis under UCTA).

Conclusion

The conditions are robust and as long as the member takes care to ensure they are incorporated into their contracts then, as a starting point, the conditions will remain a shield (and in some cases a sword) for use by its members. In cases of conflict, customers will doubtless seek to attack the conditions and where this is on the question of "reasonableness" under UCTA, the outcome of such an assault will depend always on the individual circumstances of the case.

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Conferences and events

Multimodal Seminar – Masterclass
HFW London
9 September 2014
Presenting: Justin Reynolds

Introduction to Logistics Seminar
HFW London
1 October 2014, 22 October 2014 and
20 November 2014
Presenting: Will Gidman and
Ewelina Andrzejewska

The First Saudi Maritime Congress
Saudi
25–26 November 2014
Presenting: Yaman Al Hawamdeh

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