Logistics

June 2015

Welcome to the June edition of our Logistics Bulletin.

In this edition we begin by considering the regulation of alliances in the container trade as two new major alliances, the "Ocean Three" and "2M", have been launched in 2015.

Following this we consider Himalaya clauses and their importance to logistics companies. As many readers will be aware, in November 2014 BIMCO updated their Himalaya clause and this is briefly reviewed. We also look at a recent US case that emphasises the importance of careful drafting of the clause if the intention is to protect sub-contractors in a multi-modal transportation chain.

Next, we report on an English High Court case which summarised the main legal principles for contempt of court to be found against a company or director. This case has important implications for all directors of companies. If it is found that a director is in contempt, then they could potentially be imprisoned.

As well as BIMCO's revised Himalaya clause, BIMCO have also recently developed the BIMCO SERVICECON as a Standard Service Contract for use by carriers and shippers. The intention is that this contract will provide a basis for volume carriage in container shipping trades. This new BIMCO contract is reviewed.

Should you require any further information or assistance with 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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Alliances in the container trade

On 18 June 2015 the European Commission's DG Competition will host the second Global Maritime Regulatory Summit, where regulators from Europe, the US and China are expected to review the global trend towards increased cooperation and market consolidation in liner shipping, as well as regulatory and policy issues affecting ports. With the launch of two further major alliances in early 2015, we consider the regulation of alliances in the container trade.

Four large scale container alliances, "2M", "Ocean Three", "G6" and "CKYHE" represent 16 of the world's top global carriers. Carriers have increasingly entered into vessel sharing agreements (VSAs) to combat sustained market overcapacity. A clear trend of consolidation has developed through these agreements, and through traditional mergers, such as Hapag-Lloyd's acquisition of Compañía Sud Americana de Vapores (CSAV).

Both "Ocean Three" (the alliance between CMA CGM, CSCL and UASC) and the VSA between Maersk Line and Mediterranean Shipping Co (MSC) (the "2M" alliance) received official confirmation of antitrust approval from the US Federal Maritime Commission (FMC) in October 2014.

The "2M" alliance is a successor to the proposed "P3" alliance between Maersk, MSC and CMA-CGM. In June 2014, after having received regulatory approval from the FMC, and indications of no immediate intervention from the European Commission (the Commission), the "P3" alliance was blocked under China's merger control law by the Chinese Ministry of Commerce (MofCom).

In June 2014 the Commission announced a renewal of the EU Consortia Block Exemption Regulation for an extended period of five years until 25 April 2020. This Regulation provides a "safe harbour" for VSAs whose participants have a market share up to 30%. Where the 30% threshold is exceeded, the alliance may be subject to intervention.

ANTHONY WOOLICH, PARTNER

The "2M" alliance differs from "P3", featuring no joint service centre or independent legal entity. Maersk and MSC are each responsible for their own bunker costs and enter into separate service contracts with customers.

Current regime

VSAs are often considered to have positive market benefits, allowing lines to make better use of slot capacity, improving operating efficiency and reducing costs. Many states, including Australia, China, India, the EU and US, have adopted block exemptions for these types of agreement provided that specified conditions are met.

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Market share

The parties to the "2M" alliance completed a competition self-assessment and had discussions with the Commission. The market share of 2M is thought to be around 30%.

The EU Commissioner for Competition, Margerethe Vestager, has confirmed that "2M" will be closely monitored along with the other major container alliances. Ms Vestager has urged shippers, carriers and other participants to notify the Commission if they suspect any anti-competitive behaviour.

Similarly in China, the authorities may investigate VSAs for anti-competitive practices if they carry more than 30% of the volume carried through Chinese ports on any trade route in

a given year. The "2M" alliance has already been registered in China and so far, has not been subject to formal investigation.

Market participants, including the Global Shipping Forum (GSF), have expressed concerns about 2M's market share, on the grounds that this could exceed 30% on certain trades. Any such complaints could result in the alliance coming under official investigation.

Greater co-operation

The divergence between national regulatory regimes causes significant uncertainty and procedural complexity for container lines. However, representatives of the EU Commission and of the Chinese and US authorities have expressed a willingness to co-operate more closely in future in sharing information and co-coordinating positions. The second Global Maritime Regulatory Summit represents a positive step towards this goal.

While there remain a number of jurisdictional and political barriers for any single international regulation, the move towards this type of international co-operation between regulators should be welcomed where it results in greater consistency in approvals and monitoring.

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Himalaya clause

A Himalaya clause, included in a carrier's terms and conditions, enables a carrier to transfer a benefit (generally the right to rely on defences and limits of liability in the carrier's T&Cs) to a third party who is not party to the contract.

Those engaged in the transportation or storage of goods have a strong interest in ensuring that they are covered by a Himalaya clause if they are acting as a sub-contractor. Recent amendments to standard form clauses and case law from 2014 show that careful drafting is key.

BIMCO standard form

In 2010, BIMCO reviewed the standard Himalaya clause for use in bills of lading and other contracts, and published a recommended revised wording.

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MATTHEW WILMSHURST, ASSOCIATE

Since 2010, there have been questions as to whether the wording was sufficient to cover all forms of sub-contractors and managers. As a result, in November 2014 BIMCO updated their Himalaya clause for inclusion in bills and other contracts, with the objective of extending the protection under the clause to ship managers.

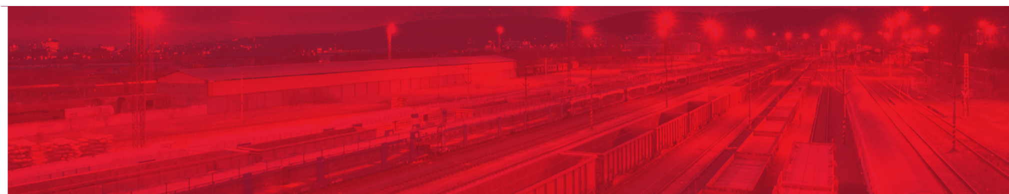
Recent case law

In a recent US case, *Sompo Japan Insurance of America and Another v Norfolk Southern Railway Co*[1] the question arose as to whether, in the context of a multi-modal transportation chain, a railroad operator was entitled to rely on the Himalaya clause in a maritime bill of lading.

In this case, a number of cargoes were shipped from Asia to Georgia, US, with the last leg of transportation being by rail.

In respect of one of the shipments, the shippers engaged Yang Ming Marine Transport Corporation (YM) who in turn sub-contracted the final leg of the journey by rail to Norfolk Southern Railway Co. (NSR). Unfortunately, the train carrying the cargoes derailed, damaging the goods.

1 (2014) 907 LMLN 3



Subrogated insurers commenced proceedings against NSR seeking recovery of the losses. However, NSR contested that they could rely on the Himalaya clause in the YM bill of lading.

The exoneration clause in the bill provided that liability extended to *"other than the Carrier, no Person, firm or corporation or other legal entity whatsoever (including… Underlying Carriers, Sub-Contractors and/or any other independent contractors whatsoever utilized in the carriage"*.

The bill's definition of an *"Underlying Carrier"* as *"the party on whose behalf this Bill is issued, as well as the Vessel and/or her Owner, demise charterer… the time charterer and an[y] substituted or Underlying Carrier whether any of them is acting as a Carrier or bailee"*. The bill's definition of an *"Underlying Carrier"* included *"rail... or other carrier utilised by the Carrier for any parts of the transportation [of] the shipment covered by the Bill"*.

NSR argued that they were not the carrier under the bill and therefore could rely on the Himalaya clause to avoid liability, the liability remaining with YM as carrier.

The subrogated insurers, however, argued that NSR was an *"Underlying carrier"* and therefore, based on the definition in the bill, was the carrier for liability purposes.

In the first instance decision, the Court agreed with NSR and held that subrogated insurers could only pursue YM as carrier under the bills. The subrogated insurers appealed and argued that the clause was ambiguous, due to the wide definition of "carrier", and should be construed against the party seeking the benefit (i.e. NSR).

The US Court of Appeals (Second Circuit) rejected this argument and held that the only reasonable interpretation of the exoneration clause, pursuant to the Himalaya clause, was that YM, the carrier who issued the bill of lading, should alone be liable to the cargo owners and subrogated insurers. The subrogated insurers' proposed interpretation was rejected.

The arguments in this US case reinforce the importance for transport operators of ensuring that Himalaya clauses, which they may seek to obtain benefit from, are clearly drafted.

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hfw Contempt by director punishable by imprisonment

Contempt of court in civil proceedings is a serious offence, punishable by imprisonment. There are limited reported cases, which is why the High Court's recent decision in *IPartner Shipping Pte Limited & Ors v Panacore Resources DMCC & Ors*[1] provides some useful clarification. However, it also underlines the court's general reluctance to find a defendant in contempt.

Background

The claimants had originally been granted a worldwide freezing order (the WFO) against the defendant companies, which was subsequently continued by further orders. The terms of the orders included the requirement for the defendants to disclose specified financial information and documents.

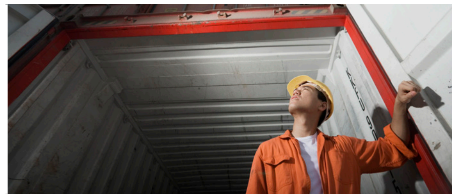
The claimants subsequently applied to the Court for an order that the directors of two of the defendant companies be imprisoned for civil contempt for their respective companies' breach of the orders, the defendants having provided inadequate disclosure.

Legal principles

The Court summarised the main legal principles relating to contempt of court, which include:

- Contempt must be proven to the criminal standard of proof (i.e. beyond reasonable doubt).

1 [2014] EWHC 3608 (Comm)



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MARIE-ANNE SMITH, ASSOCIATE

- A director may be found to be in contempt if:
  - The company/director is served with a court order endorsed with a penal notice.
  - It is proven that the director knew of the terms of the order, and failed to comply.
  - The director knew of the facts which made that act a breach, or the act was intentional (in which case it is unnecessary to show that he knew or believed that the act amounted to a breach).
- If a director wilfully fails to take reasonable steps required under an order and the order is breached, then he can be found in contempt. However, if the director reasonably believed another director was taking the required steps, then he will not be in comtempt.

However, the court applied these principles quite narrowly and in favour of the defendants, finding that:

- Whether one or more directors was in a position to meet the requirements of the order, it was still necessary for there to be a wilful failure to take reasonable steps.
- The rule that contempt could not be found where compliance with the order was impossible was to be extended to circumstances where it is impossible *"to comply more fully with the order"*.
- The orders stated that disclosure should be given "to the best of [the directors'] ability", which meant that the obligation was not "absolute" and that evidence of attempts to comply with the orders may be sufficient.
- The obligation for disclosure ceased on the date by which disclosure was to be given and thereafter there was no continuing duty to search for information, even though the disclosure provided was incomplete.

Director found in contempt

The court held that one of the four directors was in contempt of the order as there was *"no evidence of any attempt made to comply… whether to the best of [their] ability or otherwise"*.

Notwithstanding that contempt was proven, the court was still reluctant to imprison the director and therefore allowed him and the relevant company a further 14 days to comply.

Comments

In light of this decision, contempt will be found where a director ignores a court order or makes no attempt to comply with it. Any positive act, however inadequate, by the director, may render it difficult to prove contempt.

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Standard service contract for container shipping launched jointly by BIMCO and GSF

Although there are a small number of very large shippers in container shipping, the majority of shippers are small to medium sized companies. The transportation needs of this sector range from relatively modest cargo movements to significant numbers of containers.

Much of the trade is based on service contracts whereby, in return for favourable freight rates, shippers undertake to transport a minimum number of containers over an agreed period. Larger, multi-national shippers have developed their own bespoke contractual arrangements but despite the number and global value of shipments, no standard contract has, until now, been available to meet the needs of small to medium sized shippers.

However, as a result of discussions between carrier and shipper representatives over a two year period, the BIMCO/GSF SERVICECON standard service contract (SERVICECON) has been developed for use by carriers and shippers to provide a basis for volume carriage in container shipping trades.

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MATTHEW GORE, SENIOR ASSOCIATE

SERVICECON

This contract, was recently launched at the Global Liner Shipping Conference in Hamburg, is based on BIMCO's traditional box layout with standard terms and conditions and supporting annexes.

Part I is for variable information to be agreed and inserted by the parties into the appropriate boxes.

Part II contains the terms and conditions, while supporting Annexes set out Federal Maritime Commission (FMC) provisions where US jurisdiction applies, ports and rates within the scope of the contract and shipper details.

General principles

SERVICECON has been drafted as a starting point for carrier/shipper negotiations. The central feature is shipper's declared "Minimum Quantity Commitment" (MQC), which will be the basis for determining the freight rates and providing carriers with the basic information necessary to reserve cargo space over the contractual period, the assumption being that cargo is evenly distributed throughout the period.

However, as shippers will not necessarily be able to predict the extent of their forward needs, figures are likely to err on the side of caution when agreeing the minimum number. In reality, shipment demands often prove to be much higher than the initial estimate and this is addressed by allowing acceptance, at the carrier's option, of cargo beyond the shipper's declared MQC.

Insufficient cargo/insufficient space

A shipper's failure to fulfil their MQC obligation will mean that cargo space set aside by the carrier is unused, with resulting lost revenue. In such circumstances the carrier is to be automatically compensated through agreed liquidated damages payable by the shipper.

This contrasts with the calculation of damages payable to a shipper when a carrier fails to lift the MQC, which is more complex and will depend on the extra costs and expenses actually incurred by the shipper (such as higher freight for carriage on another vessel). Therefore, unless otherwise agreed, shipper's proven damages will be the basis for determining the compensation payable for a carrier's failure to carry an agreed MQC.

Contract of carriage

Individual shipments are subject to the contracting carrier's own bill of lading or sea waybill which is incorporated, by reference, into the SERVICECON contract. In the event of a conflict between the carrier's contract of carriage and the SERVICECON contract, the latter prevails.

Rider clauses

There is nothing preventing the parties from including rider clauses in Box 9 in Part I. Inevitably, the greater the number of amendments which parties make to SERVICECON, the longer it is likely to take to negotiate and agree the contact.

As awareness of this new standard form service contract increases, it will be interesting to gauge the level of its adoption by carriers and shippers alike.

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hfw Conferences and events

Introduction to Admiralty
HFW London
24 June 2015
Presenting: Alex Kemp, Christopher Garley and Michael Ritter

Ports & Terminals Seminar
HFW London
26 June 2015
Presenting: Craig Neame and Matthew Wilmshurst

Security in Complex Environments Group Conference
London
26 June 2015
Presenting: Richard Neylon
Attending: Elinor Dautlich and William MacLachlan

Chamber of Shipping: Human Element and Accidents Seminar
London
7 July 2015
Presenting: Kaare Langeland and Toby Stephens
HFW will be sponsoring the networking drinks.

JOC Hamburg Conference
Hamburg
23-24 September 2015
Presenting: Matthew Wilmshurst

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