

Container detention when it is impossible to return empties

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What's the problem

Container parks are full:

- what to do with empty containers in the interim
- who will bear the costs of storage / failed returns
- detention for late returns
- redirection costs / delays
- are shipping lines liable



Position of the shipping lines

- Will waive detention
- Many will bill detention and then waive it on application
- No acceptance of third party charges
- Situation is out of their control
- It is financially impacting them as well

Topics

Implications for
contract

Storage of empties

- What to do with empties
- Liability of shipping line
- Passing on costs

Detention

- General enforceability
- Frustration / force majeure
- Limiting detention charges

Liens

Who in the supply
chain is liable for
increased costs

What to do now

Some ground rules

- This advice is general only – each case is very fact specific:
 - what is the agreement under which the container is hired
 - different issues for different shipping lines
 - who are the parties to that agreement
 - the reason for no return date
 - length of delay
 - agreements between:
 - forwarder and transport company
 - forwarder and consignee
 - what is the rate of detention and was there notification of this
 - what costs have been incurred and how have they been charged

Contractual issues and carrier liability



Contractual basics



What is the contract for the hire of containers

- usually the bill of lading

What is the obligation of the shipping line:

- make available a container;
- carry the container;
- release the container;
- provide a return location.

Without the above, the contract has no commercial purpose

The obligation to return the container implies the giving of a return location

Obligation to nominate a return location

MSC v Cottonex Anstalt

- There is no obligation to nominate a return location at the time of discharge
- There is an obligation to nominate a return location once the merchant was ready and willing to redeliver the containers

“If at that stage the carrier had failed to nominate a place for redelivery and had thereby prevented the merchant from redelivering the containers ... a claim for demurrage would be met with a cross-claim for damages in an equivalent amount”

Effect of failure to nominate

1. Breach of contract

- sue for damages

2. Inability to claim detention

3. Repudiation of contract

- Contract comes to an end
- Has a party has shown, through its conduct, that either: it no longer intends to be bound by the contract; or. it intends to fulfil the contract only in a way that is substantially inconsistent with the party's obligations
- is the delay in nominating a return location such as to render performance of the remaining obligations (return container, pay detention) radically different from those which the parties had originally undertaken
- It is a question of fact and degree on which reasonable opinions may differ – length of delay

Repudiation of contract

Effect:

- contract is terminated and the parties are discharged from further obligations
- accrued rights and obligations remain

Election:

- the innocent party must either accept the repudiation (elect to terminate); or
- elect to continue performance (return the container)
- be careful of wrongful repudiation

Seek legal advice about the merits of repudiation

Frustration

Frustration – where after formation, and without fault of either party, the contract is unable to be performed due to unforeseen events resulting in the obligations under the contract being radically different to those contemplated by the parties

Issues:

- was the issue known at formation of the contract (when BOL issued)
- is the event unforeseen
- are both parties without fault

Hard for the shipping lines to prove frustration for more recent shipments

Force majeure

- A clause that relieves a party of its obligations due to an unexpected external event that prevents it from performing
- There must be a force majeure clause
- BOL terms and the Hague Visby rules do contain clauses to this effect but do they apply:
 - after the goods have been delivered to the consignee
 - to the obligation to provide a container return address
- Generally, the clauses apply to either the Goods or the “Carriage”
 - depends on each bill of lading
 - position a lot less certain than if it was a delay in delivering the goods

Breach of contract - damages

- Any contractual limitations on damages – terms of BOL
- Damages are designed to put you in the position you would have been in had the contract been performed
- Test - *may fairly and reasonably be considered either arising naturally, ie, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it*

What damages would be available



Detention charges

Container storage costs

Lift costs

Additional transport costs

Loss of ability to store other goods

Administrative cost of seeking remission of detention

Issues with damages



Proof of loss

Have you incurred extra costs

- Difference between storing in your own yard at no cost to you and paying a third party
- has a third party stored the containers and not charged you

When would return have occurred



Mitigation of loss

Must take reasonable steps to minimise the loss



Giving of notice

No requirement to give notice of damages if they are foreseeable

Different if you seek to charge the shipping for storing their containers

Other issues

- Can you abandon empties
 - No - the contract is still on foot and you will still be liable for damage to the containers
- Carrier charging detention
 - Could argue there is an implied term that detention cannot be charged if there is no return address
 - Carrier may argue that the contract is still on foot and detention continues
 - If detention continues you have a right to sue the carrier for the same amount
 - While painful, the most cost effective outcome will be to dispute detention

Detention charges - General



Enforceability – General

Each case depends on the terms under which detention is payable

The general position is that detention charges are enforceable

- DV Kelly v China Shipping (Australia) Agency [2010]
 - » Amount claimed was extravagant and unconscionable in amount in comparison with the greatest loss that would follow from the breach – no room from argument
 - » Overturned on appeal on jurisdictional ground
- Ichiban Imports v China Shipping Australia Agency [2011]
 - » Charges for use of the container, not charges for breach
 - » Was more concerned where the rates doubled from day 26
 - » Hard to argue it's a penalty when you still have possession of the containers
- Cosco Container Lines v Unity Int'l Cargo [2012]
 - » The amount payable was not for breach of a term
 - » There was no amount immediately payable for failure to return on time
 - » The defendant agreed to hire containers at the agreed rate until their return

Penalty vs Rental fee

- Penalties are not enforceable
- Whether detention charges are a penalty will always come down to the wording used
- Most carriers will draft as a rental fee payable, not as a result of a breach
- Even if payable as a breach, is it so high as to be a penalty
- ANZ cases – penalty test is harder
 - is the fee out of proportion to the interests of the party which it is the purpose to protect
 - look at the highest possible loss
 - not confined to the loss directly resulting from the breach

English case law - MSC v Cottenex

Facts

- 2016 English Court of Appeal decision
- Concerned a scenario where the containers could not be returned due to the acts of the consignee
- The claim was against the shipper
- Containers discharged May – June 2011
- Shipper informed carrier they could not deal with the goods – Sep 2011
- Carrier offered to sell the containers to the shipper – Feb 2012
- Carrier claimed against the shipper – June 2013

English case law - MSC v Cottenex

Findings

- Detention could not be charged indefinitely
- The delay will reach a point where the commercial purpose of the contract had become frustrated
- Found that from Feb 2012 the contract had been repudiated by the shipper – it could not perform its obligations
- The carrier had to accept repudiation as the contract had become frustrated
- Carrier entitled to detention to that point plus the value of the containers
- Detention at the daily rate is not a penalty just because it can run indefinitely

General contractual law

- Are you a party to the contract that imposes container detention
 - if BOL it will depend on:
 - are you a principle or agent – did you issue a house BOL
 - are you merely a booking agent
- What is the agreement:
 - BOL
 - Equipment hire agreement
 - Delivery Order
- If there is a reference to the carrier's "tariff" did you have notice of it – it shouldn't be impossible to find on the internet
- Were you given notice of the length of free time
- Notice bigger issue when detention passed onto the shipper

Enforceability – Other legal issues

Other issues affecting enforceability

- Force majeure:
 - strike, weather event, government action
 - not implied in Australian law
 - if in the BOL, will only be in favour of the carrier
- Unfair contracts:
 - only applies to companies with less than 20 employees
 - does not apply to terms that set the fees payable
 - does not apply to shipping contracts
 - but would apply to equipment hire agreements
- No general duty of good faith
- Freedom of contract – may be unfair and unjust, but this does not mean it is unenforceable

Detention – other legal issues

- Start time:
 - time of discharge
 - this is set out in BOL
 - Court's have enforced this even though it may be unfair
- When should the clock stop
 - where return is impossible due to no return address
 - where the return location is not accepting
 - where return is delayed due to congestion
- Liens
 - If detention is properly payable the shipping line can exercise a lien
 - Lien clause is contained in the BOL
 - It will apply to consignments unrelated to the debt where the debtor is the shipper or consignee

Liability within the supply chain



If there are extra costs, who is liable

Lets assume that the shipping line is not liable, who in the supply chain is liable for additional storage and transport costs

Third party transport company costs

- These costs should be paid by the customer of the transport company
- The transport company is performing a requested service
- Has the transport company notified its customer of the costs

Costs incurred by the freight forwarder

- The FF may incur third party storage and transport costs
- Usually it will have a contractual right to pass on these costs to its customer (consignee)
- Review FF terms and conditions – often there will be an indemnity from the consignee to the FF
- Is the FF acting as agent of the consignee

These costs are no longer surprising – tell your customer at the time of quoting

Liability for detention – Transport company

- Is the company liable in the absence of negligence, misrepresentation or contractual commitment?
 - Generally shipping line will pursue other parties
 - Transport company should not be a party to the agreement imposing detention charges
- Has the transport company been negligence?
- Did the transport company perform the service with due care?
 - check for redirections
 - check for return date
- Did the transport company make any misrepresentations about what costs it would cover or charge

Liability – trucking company

- Could the transport company have reasonably avoided the container detention charges:
 - redirections
 - » was notice given
 - » should a redirection have been reasonably expected
 - » did the transport company check before attempting delivery
 - other delays
 - » was it outside of the control of the transport company
- Set-off
 - does a FF have a right to short pay a transport company for a detention charge incurred by the FF
 - is there a set-off clause in the contract
 - no general common law right of set-off
 - limited rights of equitable set-off
 - litigation set-off

Limiting detention charges



Limiting disputes

Make sure you have a written record of:

- notifying customers of:
 - free time
 - detention charges
 - when the container was available
 - when you required the container to be available for collection
 - need for the container to be clean
 - what daily fees will apply if the empty cannot be returned
- when the transport company was notified to pick up the container
- attempts to confirm redelivery address prior to attempting redelivery
- date of notification of any redirection

Limiting detention

- Have systems in place to track the return of the containers and contact consignees before the end of the free period if a container has not been returned
- How will you know when a container has been returned – bigger issue with exports
- Take extra care with new customers / first time importers
- Take every step possible to allow pre-arrival clearance:
 - asbestos / stink bug / dumping duties
- Contact the consignee where you do not have authority to release the goods due to non-payment
- For any requested extension of free time – contact the carrier before the expiry of the free time – what is the factor beyond your control – what makes your case different – record the response
- Identify high risk products and take extra care

Disputes between parties

- If there is a dispute between the consignor and consignee push for an interim resolution that allows the containers to be returned
- Experience shows that in many cases the main dispute becomes over demurrage and detention charges
- Make consignee aware that the carrier can pursue them regardless of the reasons for the delayed return
- Even if in the right, the consignee has an obligation to mitigate their losses – this will often include limiting demurrage/detention

Potential claim against shipping lines

- Keep a record of when each container could have been returned
- Keep a record of attempts to obtain a return date/location
- Notify the shipping line of daily costs of storing empties
- Take reasonable steps to find cost effective storage
- Record all storage, lift, transport costs
- Record any instance where you have turned away customers due to your yard being full

Questions



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