

28 March 2011

CTT Law Update

The door is not closed on container detention fee issues

The issue of container detention fees remains a real problem for freight forwarders, customs brokers and importers. It has certainly been the subject of many presentations and questions at CBFA State Conventions and Member Forums as well as being discussed in a number of our E-alerts and updates. A large proportion of inquiries addressed to us relate to the enforceability (or otherwise) of container detention fees being charged by shipping companies or their Australian agents and the ability of those parties to take action against cargo to recover those fees.

Many of those subjected to such detention fees (and associated enforcement action) had hoped that the decision of the NSW Consumer Trader and Tenancy Tribunal (“CTTT”) in *DV Kelly Pty Ltd v China Shipping (Australia) Agency Co Pty Ltd* would serve as the basis to cause shipping lines and their agents to review (and reduce) fees and associated enforcement action.

Those same parties were subsequently distressed with a report that the decision of the CTTT had been “overturned” by the Supreme Court of NSW in December 2010. Shortly after that decision was first reported, we issued an E-alert notifying of the decision. At that time, we also indicated that we would provide additional information on the impact of the decision of the Supreme Court once the reasons for that decision came to hand. However, there has subsequently been some confusion as to the status of this issue following the Supreme Court decision and before the reasons for the decision were clear.

The brief reasons for the decision by the Supreme Court have now been published. As suggested in our earlier E-alert, the decision of the CTTT was overturned on the basis that the CTTT did not have jurisdiction to have heard the claim in the first instance. As a result, the Supreme Court made an order “vitiating” and “quashing” the decision of the CTTT.

However, it is important to note that the decision of the Supreme Court does not represent a deeper analysis or rejection of the reasons behind the decision of the CTTT. For current purposes, it only means that a debate over container detention charges (and associated enforcement action) arising out of charges levied pursuant to a maritime bill of lading will need to be litigated in a Court or Tribunal which is vested with appropriate jurisdiction to resolve “maritime” claims. Presumably, it leaves open the possibility that a dispute in relation to container detention fees which are charged pursuant to a company’s terms and conditions (and not through a bill of lading) could still be litigated in a Tribunal as it may not be considered as a “maritime” claim. In any event, the fundamental issue behind container detention claims remains – namely whether the charges are deemed to be for “breach” of the contract to return the container and whether the amount claimed seems reasonable (ie. as liquidated damages) or is excessive (ie. as a penalty) in which the latter case some part of the fees would be unenforceable and any action taken to recover those fees could also be construed as unenforceable.

These disputes still need to be resolved on a case by case basis depending upon facts, circumstances and the documentation based on which detention fees are charged and related enforcement action is taken.

Associated with such disputes (and still to be resolved) is what level of container detention fees would be accepted as being reasonable. The decision of the CTTT included evidence from the agent of the shipping company as to the estimated cost of a container not being returned in the agreed timeframe. An ongoing issue will be the use (if any) to which such admission could be put in future disputes. Further, in any future dispute there would likely to be significant time taken during the discovery process for the costs structure and practices of the shipping companies to be considered and for that to be analysed in terms of what may be treated as reasonable damages for the failure to return a container. While that would be a complex issue, the necessary disclosure of such information in a substantive dispute would be of significant interest to those who actually pay such detention fees. Those charging such fees may not be entirely comfortable with that information being disclosed and considered by a Court.

All in all, the issue of container detention fees and their recovery remains a live issue which deserves further clarity. In an ideal world, an independent party could determine what are appropriate container detention fees. However, such an approach would be controversial and presumably would not be welcomed by many parties in a “free market” economy. In the absence of a comprehensive and well litigated decision of a Court with appropriate jurisdiction, there will presumably continue to be regular disputes as to the enforceability of container detention fees and the means taken to enforce them.

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