Container Late Fees: Is Damages for Conversion the Answer

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Most standard-form bills of lading contain terms which impose monetary charges on the late return of containers to the carrier. These "late fees" are often described as detention or demurrage charges. Often these charges are expressed as a seemingly innocuous sum, such as $25.00 per day. The late charge is included in a freight invoice from the shipping line, and typically paid in the usual turn of events.

This is all well and good, until your client receives an invoice for over USD$700,000 for "container demurrage charges." (In case you are wondering, this actually happened). Is your client exposed?

The answer to that question, typically asked by a panic-stricken client, is unclear. In this article, we argue that container "late fees" should be capped at the cost to replace the container.

Detention vs. Demurrage Charges

Although the words "demurrage" and "detention" are commonly used interchangeably, they do not have the same meaning. Technically, the charge incurred *before* the unloading of cargo is a container demurrage fee, whereas *after* the cargo is unpacked and until such time as the empty container is returned container detention fees are charged.

"Demurrage," in its strict meaning, is a sum agreed by the charterer to be paid as *liquidated damages* for delay beyond a stipulated or reasonable time for loading or unloading.[1] The use of demurrage avoids the difficult issue of trying to determine market value for the loss of use of a ship. The parties agree up front on what will be paid in the event that the charterer exceeds his given lay-days. Demurrage in the context of vessels is therefore considered liquidated damages for breach of contract.

On the other hand, detention charges are *unliquidated damages* for a period of delay beyond the specified days provided for by demurrage. Where the sum is only to be paid for a fixed number of days (demurrage), and a *further* delay takes place, the shipowner's remedy is to recover "unliquidated damages for detention" for the period of the further delay.[2]

Liquidated damages, by definition, cannot be penalties. If a contractual provision provides for fixed damages which are excessive and extends beyond the actual losses incurred by an aggrieved party, the term is generally unenforceable. In the words of the Supreme Court of Canada, "it is always open to the parties to make the predetermination, but it must yield to judicial appraisal of its reasonableness in the circumstances."[3] In those instances, the owner's relief is a claim for damages flowing from any loss *actually suffered* as a result of the contractor's breach.

Australian Decisions: A Case Study

There has been a lack of Canadian decisions regarding container late fees. Some Australian decisions have considered the issue of such fees, and the disparity in the decisions serves to illustrate that there is no general consensus on when such fees should be enforceable.

In a 2010 decision of the New South Wales Consumer Trader and Tenancy Tribunal ("CTTT") in *DV Kelly Pty Ltd v. China Shipping (Australia) Agency Co Pty Ltd*,[4] the Tribunal held that the amount claimed by the respondent in the contract as a container detention fee was "extravagant and unconscionable." The decision of the CTTT was overturned by the Supreme Court of New South Wales in December 2010, leading to further confusion, as the reasons given by the Supreme Court revolved around the CTTT's lack of jurisdiction, rather than any actual consideration of the reasons behind the tribunal's original ruling.

In a 2011 decision of *Ichiban Imports Pty Ltd v. China Shipping Australia Agency Pty Ltd (General)*,[5] the CTTT considered arguments not raised in the *DV Kelly* decision and found that the container detention charges in question did not amount to a penalty and were therefore not void.[6] The CTTT stated that although the words "Container Detention Charge" were used, the use of any particular words is not determinative of the nature of the charge. The Tribunal decided that the charge in question was a charge for use, and not a charge

*Isaacs & Co. (Toronto, Ontario).

for either demurrage (as liquidated damages) or detention (as unliquidated damages).

The District Court of New South Wales, in the matter of *Cosco Container Lines Co Ltd & Five Star Shipping & Agency Company Ltd v. Unity International Cargo Pty Ltd*,[7] arrived at a similar conclusion to that of the CTTT in *Ichiban*. The shipping line alleged that the shipper owed them container detention charges when the shipper failed to return the containers within the "prescribed time," pursuant to an agreement entered between the parties. The shipper submitted that the provision under the agreement requiring it to pay the detention charges was an unenforceable penalty. The Court disagreed, concluding that although there was an obligation on the shipper to return the containers within the prescribed time, there was no amount immediately payable if this was not done. Rather, the parties agreed that the shipper would hire the containers until their return at the agreed contractual rate.[8] In essence, the Court held that the parties had entered into a rental agreement (at a certain rate) for the containers until the containers were returned.

Damages for Conversion: A Complete Answer?

Container late fees can generate enormous bills and, coupled with a lack of guidance from the Courts, it is likely that disputes about them will continue.

In my opinion, at a certain point it is no longer reasonable for the container owner *not* to mitigate its damages. Most carriers are sophisticated and should know better than to let tied up containers affect their business operations beyond a certain period of time. While the Canadian Federal Court of Appeal has suggested that there is no duty to mitigate in vessel demurrage cases, it came to this conclusion as the vessel is "under a continuing obligation to present itself for loading" while receiving demurrage fees.[9] In the case of containers, there is no such obligation. In fact, more often than not, the carrier has a lien on the cargo within the containers and is entitled to arrest or seize the containers.

Therefore, it is suggested that container late fees should be capped at the cost to replace the container. Courts should consider that in an action for conversion, the normal measure of damages is the value of the chattel at the date of conversion, together with any consequential damage flowing from the conversion, provided that it is not too remote to be recovered at law. Damages for conversion are subject to mitigation. There may be cases where the carrier may be able to recover consequential damages flowing from conversion, but those cases should be the exception rather than the norm, given that containers are often interchangeable.

It appears establishing a ceiling for container late fees has already been considered by savvy lawyers. In 2011, it was reported that the Pentagon paid over $720 million in container late fees since 2001.[10] The Pentagon's lawyers came up with a solution: Contracts were modified to limit how much the government pays *before it owns the container*. A rent-to-own arrangement requires it to pay the shipping line about $7,400 for a container worth $3,200.

In most cases, it is not possible for a shipper to modify the standard form contracts used by carriers. However, where container late fees are imposed, there is a strong argument to be made by shippers and their lawyers that the fee should not exceed the replacement cost of the container, regardless of the contractual terms. This is particularly so where the late fees are completely out of proportion to any damages or costs that the shipping line could have sustained or incurred in relation to the delay.

Endnotes

1. Scrutton on Charterparties, Twenty-first Edition, London Sweet & Maxwell 2008, at p. 268
2. Scrutton on Charterparties, Twenty-first Edition, London Sweet & Maxwell 2008, at p. 268
3. *H.F. Clarke Ltd. v. Thermidaire Corp.* [1974] S.C.J. No. 151 (S.C.C.)
4. [2010] NSWCTTT 136 (9 April 2010)
5. [2011] NSWCTTT 153 (18 April 2011)
6. In *Ichiban Imports* the CTTT overcame the jurisdiction issue on the basis that the governing contract was not the bill of lading (in which case the CTTT would lack jurisdiction) but a separate Import Delivery Order which was entered into after the goods were landed.
7. Unreported decision, http://www.hwlebsworth.com.au/latest-news-a-publications/publications/transport/shipping-and-trade/item/838-cosco-judgment.html
8. http://www.hwlebsworth.com.au/latest-news-a-publications/publications/transport/shipping-and-trade/item/838-cosco-judgment.html
9. *Armada Lines Ltd. v. Chaleur Fertilizers Ltd.*, [1995] 1 FC 3
10. http://usatoday30.usatoday.com/news/washington/story/2011-08-28/Pentagon-pays-720M-in-late-fees-for-storage-containers/50168840/1