Liner Terms Prevailed Over Fine Print on the Back of the Booking Note

A carriage of wind turbine blades was delayed due to congestion in the port of loading. The shipper and the carrier disagreed on who was to bear the risk of the delayed loading. The carrier claimed that the print on the back of the booking note prevailed over the standard liner terms of the Danish Merchant Shipping Act and that the shipper therefore had to bear the risk. The Maritime and Commercial High Court did not find that the liner terms had effectively been derogated from. Therefore, the carrier was not entitled to demurrage.

A shipper and a carrier agreed on a voyage charter concerning a carriage of turbine blades from Qinhuangdao in China to Rostock in Germany. However, the ship could not berth in the port of loading due to congestion. Hence, the questions brought up were who had to bear the risk of congestion and whether the carrier could claim demurrage.

The Danish Merchant Shipping Act states that lay time in connection with a contract on liner terms does not, by default, include delay due to congestion. Thus, when a contract of carriage has been concluded on liner terms the carrier bears the risk of delay due to congestion and the carrier cannot claim demurrage. However, these rules of the Danish Merchant Shipping Act are not mandatory and may be set aside by agreement.

In this case it was specifically stated in the text of the parties' agreement that the carriage was on liner terms. Individually negotiated conditions (so-called rider terms) were attached to the agreement. Furthermore, the carrier's standard conditions were preprinted on the back of the booking note. The carrier claimed that the rules concerning liner terms in the Danish Merchant Shipping Act had been set aside by the carrier's standard conditions, which inter alia stated that the shipper was obliged to pay demurrage in case of congestion. Therefore, the carrier claimed demurrage.

However, the shipper claimed that the default liner terms of the Danish Merchant Shipping Act had not been derogated from. During the negotiations, the parties had specifically agreed that the carriage should be on liner terms. This also appeared on the front side of the booking note. Furthermore, the shipper claimed that the standard conditions were drafted unilaterally by the carrier and that the derogation had not been negotiated between the parties. For that reason, the shipper claimed that the carrier should bear the risk of congestion in accordance with the default liner terms prescribed.

The Maritime and Commercial High Court: Liner terms had not effectively been derogated from

The Maritime and Commercial High Court found that during the negotiations the shipper had emphasized that the agreement should be concluded on liner terms; including the standard risk allocation set down by these terms. This had also been a factor in connection with the calculation of freight.

The Maritime and Commercial High Court also emphasized, that no clear reservations had been made concerning the default definition of liner terms in the Merchant Shipping Act through the carrier's standard conditions; neither in the parties' correspondence, nor in the wording of the agreement. Nor had the carrier referred to or in any other way dealt with the question of payment for demurrage in case of congestion in the remaining conditions, which were drafted specifically in connection with the agreement.

Therefore, the Maritime and Commercial High Court found that the carrier's standard conditions did not apply. The carrier had to bear the risk of congestion and thus could not claim demurrage. The court gave judgment in favour of the shipper.

IUNO's opinion

The judgment is in line with previous decisions in this field. The parties had agreed on liner terms which, by default, should be understood as defined in the Danish Merchant Shipping Act. The carrier had not sufficiently emphasized his

intention to derogate from the default rules. Generally, one cannot “slip” such an onerous condition into an agreement; if a contracting party want his own standard conditions to apply, these conditions must be made known to the other party, and it must be clearly stated how the conditions will affect the terms of the agreement. This applies in particular in relation to onerous conditions.

The outcome of this case might have been different if the carrier – either during the negotiations or in the wording of the agreement – had emphasized the condition concerning congestion and demurrage towards the shipper.

The judgment also shows that the agreed price may be important if the parties disagree about the contractual risks. A very low price may sometimes be said to indicate that the carrier has not accepted any special responsibilities. Similarly, a high price may indicate that a shipper has expected a reduction of risk in return for the higher payment. However, this argument is not decisive and will never trump a clear agreement between the parties. In this case the Court found that it had been conditional for the shipper’s accept of the freight offer that the risk allocation was in line with the liner terms in the Danish Merchant Shipping Act.

[Judgment of the Danish Maritime and Commercial High Court on 4 November 2013, case no. S-3-13.]

M E E T U S O N L I N E

We are keen to develop our dialogue with clients, prospective employees and the world around us. Therefore, we are active on LinkedIn, Twitter and Skype.

Interested in transportation and insurance? Feel free to join our LinkedIn group: Nordic Transportation and Insurance Law.

IUNO
Njalsgade 19
2300 Copenhagen S
Denmark
Phone +45 5374 2700
iuno@iuno.dk

Aage Krogh
mobil: +45 53 74 27 02
twitter: iuno_aak
skype: iuno_aak

Pia Mark
mobil: +45 53 74 27 05
twitter: iuno_pm
skype: iuno_pm

Lisa Brændstrup
mobil: +45 53 74 27 12
twitter: iuno_lb
skype: iuno_lb