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CILTHK

LOGISTICS NEWSLETTER | MAY 2018

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TOPICS

LIABILITY ISSUES IN COLD CHAIN TRANSPORTATION

Imagine the scenario: A shipper has arranged for a cargo of frozen food goods to be shipped from Europe to Asia by sea. On arrival in Asia, the goods are found to be defrosted and no longer fit for human consumption. On closer inspection, it becomes clear that the reefer container temperature was set at +10°C rather than -10°C as instructed to the Carrier in the booking note. The consignees claim under their cargo insurance and the cargo underwriters sue the Carrier under the sea waybill to recover the losses. The Carrier wants to know what, if any, defences it has to the claim.

On a first reading, you might think that's a tough one for the Carrier to escape from given that the booking note expressly gave instructions for the cargo to be carried at a minus temperature but the reefer was set at a positive temperature. But, as with all contracts, it's important to look more closely at the terms and conditions to determine exactly where liability lies.

In this case, the standard terms and conditions incorporated into the sea waybill were clear: setting the temperature of the reefer container and ensuring that the temperature was correct was exclusively the shipper's responsibility. Further evidence demonstrated that when the reefer was loaded by the shipper's agents at the cold storage warehouse onto a truck for on-carriage to the load port, the loading supervisor had signed a declaration that the reefer temperature was set correctly. As a result, the carrier was able to achieve a nuisance level settlement with the cargo underwriters.

This example demonstrates the importance of contractual terms in managing the risks inherent in cold chain logistics. Drafting a contract or standard terms and conditions that clearly apportion liability for damage allows a logistics operator to more accurately assess its risk and in turn, price in that risk to its contract and / or obtain adequate insurance to mitigate that risk.

Some of the key contractual mechanisms that can help achieve this are as follows:

1. Form of contract

> Consider using a form of contract which is not automatically subject to liability regimes giving you more freedom to incorporate limits or exclusions of liability.

> Enter into back-to-back contracts with the customer and service provider where possible. If not wholly possible at least seek to include back-to-back limits and exclusions of liability. Seek to include indemnity provisions in both contracts to assist with pursuing recourse claims.

2. Include clauses that clearly define the periods and limits of responsibility, e.g.:

> State which party is responsible for setting the temperature of a reefer container and liable for any damage occurring as a result of incorrect temperature setting.

> State what level of responsibility you are accepting as regards shipper-packed containers.

> State when your period of responsibility for caring for the goods begins and ends.

> State which party is responsible for pre-cooling the container and cargo to avoid "hot stuffing".

> Expressly exclude liability for consequential losses.

> Include list of defences / exceptions to liability in contracts not compulsorily subject to the Hague / Hague Visby Rules.

> Exclude liability for inherent vice / inevitability of damage. To assist in proving the existence of inherent vice, consider including a clause entitling you to inspection of the cargo and, if possible, a clause regarding a right to copies of certain key documents such as TempTales data / the data logger records / any pre-shipment surveys.

3. Evidence of condition on loading

> State that as regards shipper-packed and / or refrigerated goods, the bill of lading shall be a receipt only and the remarks *"in apparent good order and condition"* on the face of the bill do not constitute prima facie evidence that the cargo was loaded in good condition / at the required temperature.

> Consider including an express warranty from the shipper that cargo is, upon handover into your custody, in a condition so as to withstand the ordinary incidents of the intended voyage.

Whilst it is not possible to exclude the risk of liability completely, it is possible to narrow the scope of liability or increase the scope for defences to a claim using contractual terms.

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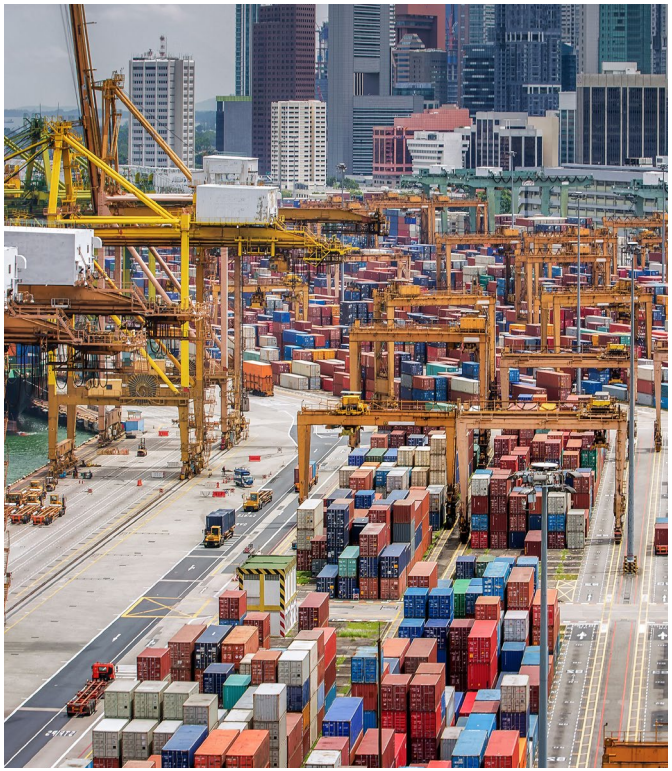

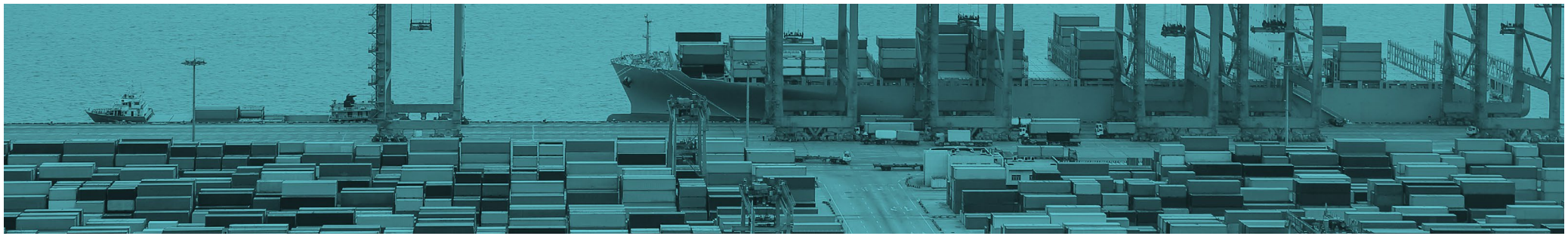

LEGAL UPDATE: CONTRACT FORMATION AND TERMINATION

Formation of a contract or settlement agreement
Goodwood Investments Holdings Inc v Thyssenkrupp Industrial Solutions AG [2018] EWHC 1056

In this case the court had to consider whether a binding settlement agreement had been made following a series of "without prejudice" exchanges. The negotiations involved a series of offers and counter-offers, culminating in a draft settlement agreement said to be *"subject to board approval"* and *"subject to contract"*.

The Judge held that there had been no binding settlement agreement because:

1. It is well-established that words such as *"subject to contract"* indicate that parties do not intend to be bound until a formal contract is executed.
2. When a person concludes an agreement on behalf of a company which is stated to be subject to its board approval, he makes clear he does not have authority, or at any rate is not prepared, to commit the company unless and until the approval is given. Neither party is bound until the approval is given.
3. An offer which is made (i) subject to contract and (ii) subject to board approval is not an offer capable of being accepted so as to give rise to an immediately binding contract.

The case highlights the importance of ensuring that any offer to contract is capable of acceptance without further approval or formalities and if not, that those approvals formalities are completed to ensure the contract is binding.

Termination of a contract – contractual v common law right
Phones 4U v. EE [2018] EWHC 49 (Comm)

This case dealt with the consequences of termination of a contract. A right to terminate a contract can arise in two ways: (i) contractually, where the contract expressly gives the right to terminate in certain circumstances or (ii) under common law, where there is a breach of contract which entitles the innocent party to terminate. The distinction is important because it determines what damages a party is entitled to with damages for loss of bargain being, in principle, available for common law termination but not contractual termination (unless the contract provides otherwise). It is possible for a party to terminate in reliance on a contractual clause whilst preserving its rights to claim common law damages but that requires the terms of any termination notice to be clearly and carefully worded.

The parties entered into a contract under which the Claimant was required to pay a monthly fee. The Claimant ran into financial difficulties which ended in the company appointing administrators and suspending trading. Two days after, the Defendant terminated the contract.

The appointment of administrators was not a breach of contract but it was an event which gave the Defendant a contractual right to terminate, so there was no question as to whether the termination was lawful. The question for the court to decide was whether the termination, based on a contractual right to terminate, also entitled the Defendant to damages for the loss of bargain resulting from the early termination of the contract.

Among other issues, the court considered the wording and effect of the termination notice. The notice did not (i) refer to any breach of contract on the part of the Claimant or (ii) set out any facts that might give rise to a common law right to terminate. Instead, the notice only referred to the Defendant's contractual right to terminate for an event that was not a breach of contract. The court held therefore that the termination had been made solely in reliance on the contractual right to terminate, independent of any breach of contract, and that therefore the Defendant was not entitled to damages for loss of bargain. This was the case even though circumstances existed that would have given the Defendant a common law right to terminate too.

The case highlights the importance of exercising the right to terminate carefully so as to avoid inadvertently losing potentially valuable claims for damages for breach of contract.

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EXTRA-TERRITORIAL REACH OF GDPR AND NON EU ORGANISATIONS

The EU's General Data Protection Regulation ("**GDPR**") enters into force on 25 May 2018. As an EU legal instrument, you may think this is of no relevance to your business in Hong Kong. However, the GDPR is designed to have extra-territorial reach, impacting on non-EU companies who have an establishment in the EU or who process personal data of EU citizens. Whilst the GDPR shares some common features with Hong Kong's Personal Data (Privacy) Ordinance ("**PDPO**"), it also includes significant developments which go beyond the requirements of PDPO. Compliance with PDPO therefore does not automatically mean compliance with GDPR.

This article discusses the applicability of GDPR to non-EU companies. If you would like to learn more about the obligations and requirements of GDPR please click here.

An establishment in the EU

Article 3(1) of the GDPR applies to the processing of personal data by a controller or a processor established in the EU. Provided there is an establishment in the EU it does not matter where the processing is actually carried out. Therefore, the loophole of a company in the EU deciding to process personal data of individuals at a location outside the EU is removed.

An establishment does not have to be a legal entity. The recitals of the GDPR suggest that an establishment: *"implies the effective and real exercise of activity through stable arrangements. The legal form of such arrangements, whether through a branch or a subsidiary with a legal personality, is not the determining factor in that respect"*.

Weltimmo v NAIH (C-230/14) examined the interpretation of "an establishment" under the current Directive and determined that the presence of a single representative in a Member State may be sufficient to amount to an organisation having an establishment in that Member State.

Therefore a consultant who carries out work in an EU Member State on behalf of a Hong Kong company may result in that Hong Kong entity being classed as having an establishment in the EU. Therefore the company's data processing activities will fall within the scope of the GDPR.

Offering goods and services/monitoring

Article 3(2) of the GDPR also applies to a data controller or processor who is not established in the EU where the processing of personal data:

> Relates to offering goods or services to individuals in the EU

> Relates to the monitoring of behaviour of individuals in the EU

The accessibility of a non-EU website from the EU and the availability of an email address/contact details in the EU will not be enough to show the intention to offer goods or services. However, Recital 23 of the GDPR states that the following would be strong indicators of an intention to offer goods and services in the EU: using the language of a Member State which is not relevant to customers in the home state; using the currency of a Member State that is not generally used in the home state; offering delivery to a Member State; and referencing EU citizens.

The monitoring of behaviour will be relevant to scenarios such as tracking user behaviour through cookies and tracking individuals through the use of location data.

Almost every corporate website will use tracking cookies to retrieve usage information. Where that information relates to an EU user the GDPR is likely to apply and therefore it is hard to envisage a scenario where a company with full accessibility and cookie usage on its website would not have to comply with the GDPR.

It is easy to see how a logistics company based in Hong Kong, but which has a website that allows EU customers to make bookings through on online portal, or who employs a sales agent in the EU to sell or market its services, could be caught by the provisions of GDPR.

As breaches of the obligations imposed by GDPR can result in serious fines (of between 2% and 4% of annual turnover or EUR 10 – 20 million), it is important that companies in Hong Kong review their data protection policies to ensure these are in line with the GDPR requirements.

Conclusion

The GDPR is often referred to as an evolution and not a revolution of data protection rules. For non-EU organisations, this descriptor will not have the comforting ring it may have for many EU organisations who are more familiar with the current Directive.

However, doing business in the EU will require a change in data protection practices to ensure compliance on a legislative level and the expected commercial approaches to data protection.

The logistics and transport industries have an international reach across complex supply chains. These factors will require intra-group transmission of personal data, transfer of personal data to business partners, and prospecting new revenue streams where collection of personal data for business development purposes will be necessary. All of these activities are essential and valid operations. They now need to be reviewed to ensure that GDPR compliance can be achieved.

If you think you may be affected by GDPR and would like to learn more about how to ensure compliance, please contact our dedicated GDPR team [click here] or your usual Ince contact.

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