

**BEFORE THE
FEDERAL MARITIME COMMISSION**

LCL Logistix (India) Pvt. Ltd. dba LCL Lines ("LCL")

Docket No. _____

PETITION FOR A DECLARATORY ORDER

I. Summary of Petition

Pursuant to the Federal Maritime Commission's ("Commission") Rules of Practice and Procedure, 46 C.F.R. §502.68, LCL Logistix (India) Pvt. Ltd. dba LCL Lines ("LCL"), a non-vessel-operating common carrier licensed by the Commission (License No. 021538N) requests that the Commission issue a declaratory order to remove uncertainty and terminate a controversy in regard to the justness and reasonableness of the demurrage practices of Mediterranean Shipping Company ("MSC").

This Petition is directed to matters involving conduct or activity regulated by the Commission under the Shipping Act of 1984 ("Shipping Act"). The controversy giving rise to the need for a declaratory order has arisen in a proceeding in the United States District for the Southern District of New York in which MSC has sued LCL for demurrage charges.

Mediterranean Shipping Company v. LCL Logistix (India) Pvt. Ltd., dba LCL Lines, 14 Civ. 2037 (KPF) (S.D.N.Y.). The question on which LCL seeks a Declaratory Order from the Commission is whether it is a reasonable practice for MSC to wait to assert a claim for demurrage on containers for more than three years after the parties with an interest in the goods abandoned the cargo in those containers and authorized MSC to dispose of it, when MSC's delay resulted in the accrual of demurrage charges exceeding \$230,000.00, which is many times greater than the value of the containers themselves.

II. Statement of Facts

1. On or about November 14, 2010, LCL tendered a shipment of goods in a 40 foot high cube container to MSC for shipment from Chicago, Illinois through the Port of New York to the Port of Mundra, India with a place of delivery at Tughlakabad, India - - inland container depot (the "First Shipment"). MSC issued a bill of lading for this shipment showing LCL Lines as the shipper and LCL Logistix Pvt Ltd. as the consignee. This shipment arrived in Tughlakabad, India on or about December 29, 2010. The MSC bill of lading for this shipment is attached as Exhibit 1.

2. On or about November 21, 2010, LCL tendered a shipment of goods in a 40 foot high cube container to MSC for shipment from Chicago, Illinois through the Port of New York to the Port of Mundra, India with a place of delivery at Tughlakabad, India - - inland container depot (the "Second Shipment"). MSC issued a bill of lading for this shipment showing LCL Lines as the shipper and LCL Logistix Pvt Ltd. as the consignee. This shipment arrived in Tughlakabad, India on or about January 12, 2011. The MSC bill of lading for this shipment is attached as Exhibit 2.

3. LCL issued its own house bills of lading for both of these shipments. House Bill of Lading No. 017050 was issued for the First Shipment. House Bill of Lading No. 002575 was issued for the Second Shipment. Both shipments showed Goindustry USA Inc. ("Goindustry"), 11425 Cronhill Drive, Suite A, Owings Mills, Maryland 2117 as the shipper and Bajaj Holographics India Pvt. Ltd. ("Bajaj Holographics"), Plot No. 150, Sector - 6, IMT Manesar, Guragon, Haryana, India as the consignee. The LCL bills of lading are attached as Exhibit 3.

4. On December 29, 2010, MSC's agent in India, MSC Agency (India) Pvt. Ltd. issued a Provisional Debit Note / Freight Bill directly to Bajaj Holographics for the First Shipment. A copy of this document is attached as Exhibit 4.

5. On January 20, 2011, MSC's agent issued a Provisional Debit Note / Freight Bill directly to Bajaj Holographics for the Second Shipment. A copy of this document is attached as Exhibit 5.

6. MSC continued to correspond directly with Bajaj Holographics about these shipments. On February 9, 2011, MSC sent an email to Mr. Suresh of Bajaj Holographics regarding the Second Shipment stating: "Please revert on below message. Please note below shipment is also uncleared. Kindly confirm when it will be cleared." A copy of this email is attached as Exhibit 6.

7. On January 27, 2011, MSC wrote to LCL that cargo in the First Shipment needed to be picked up within 15 days and that failure to do so constituted LCL's "explicit agreement that the said cargo will be placed by us under the custody of the relevant Authority for further handling per pertinent prescriptions of the law, such as destruction, salvage sale by public auction, confiscation etc." The notice provided that the demurrage charges were USD \$944. A copy of the correspondence is attached as Exhibit 7.

8. On February 10, 2011, MSC sent an email to both Messrs. Suresh and Kapil of Bajaj Holographics about the two shipments. This email stated: "Kindly comment on both the containers, its been many days now contianers (*sic*) lying in port. Need ur (*sic*) urgent revert upto (*sic*) when it would be clered (*sic*)." A copy of this email is attached as Exhibit 8.

9. On February 15, 2011, MSC sent an email to Mr. Kapil of Bajaj Holographics asking Bajaj Holographics to “please confirm that (*sic*) when you will clear the below shipments.” A copy of this email is attached as Exhibit 9.

10. On March 2, 2011, Captain Khurana of LCL sent an email to MSC attaching a letter from Bajaj Holographics addressed to MSC referencing both shipments and stating as follows:

Please make a note that subject containers won't be able to clear the goods due to some misdeclarations by shipper in commodity. So kindly auction out the same.

In Captain Khurana's email attaching this letter he stated as follows:

Attached is the message we received from the consignee for the subject shipment. Please go ahead and auction the cargo to collect your dues.

A copy of this letter and the email are attached as Exhibit 10.

11. On March 8, 2011, MSC sent Captain Khurana an email stating:

Please respond and advise how the shipper wishes to proceed. Do you wish to issue a declaration of abandonment as well? If so, please provide on the shipper's letterhead the following.

In order to formally abandon the cargo, the shipper of contract (*sic*) will need to furnish a standard letter of abandonment (LOA) on company letterhead, stating acknowledgment of the following:

With reference to bill of lading and container number(s) you, as shipper, are abandoning the cargo and passing the right of disposing of the cargo to MSC.

Cargo will be auctioned, disposed or destroyed and all pending charges and any additional costs involved until the disposal is completed and finished will be on your account.

The LOA will only extinguish your rights over the goods and not your liabilities under the contract of carriage.

Upon receipt of your LOA we will approach our principals for possible settlement offer in order to stop the incrementing costs and close this case.

A copy of this email is attached as Exhibit 11.

12. Captain Khurana responded on March 15, 2011 stating: “The box has been abandoned and you should auction the cargo to get your charges. You should exercise your lien on the goods.” A copy of this email is attached as Exhibit 12.

13. MSC responded the same day telling Captain Khurana that “this is not an acceptable Letter of Abandonment. We need a letter on LCL Lines letterhead following the below guidelines.” These “guidelines” were the same as those set forth in MSC’s email of March 8, 2011 set forth in Paragraph 11 above. A copy of this email is attached as Exhibit 13.

14. Captain Khurana responded to MSC the same day with the following message:

You have the letter from the Cargo Owner. Attached again for your ready reference. We are the Forwarding Agent and not the owner of the cargo.

Based on the attached letter, please exercise your rights on the cargo and do the needful. By writing us again and again, you are wasting time and delaying release of your equipment.

A copy of this email is attached as Exhibit 14.

15. On October 19, 2011, MSC sent an email to LCL stating in relevant part that:

Please note that we confirm your consignee issued a letter of abandonment to MSC however, we need an official letter from the shipper of record LCL LINES on their letterhead in order to process as “do the needful under your normal practice for unclear goods.” MSC is currently waiting for customs to take possession of this cargo to auction same.

A copy of this email is attached as Exhibit 15.

16. Pursuant to Section 45 of the Indian Customs Act, 1962 (“Indian Customs Act”), MSC was the custodian of the goods in both the First Shipment and Second Shipment. See Opinion of Advocate Joy Thattil Ittoop, attached as Exhibit 16.

17. Section 48 of the Indian Customs Act, provides as follows:

If any goods brought into India from a place outside India are not cleared for home consumption or warehoused or transhipped within thirty days from the date of unloading thereof at a customs station or within such further time as the proper officer may allow or if the title to any imported is relinquished, such goods may, after notice to the importer and with the permission of the proper officer be sold by the person having the custody thereof ...

18. Section 20.3 (Notification and Delivery) of MSC's bills of lading covering the First and Second Shipments provides as follows:

If the Goods are unclaimed within a reasonable time or whenever in the Carrier's opinion the Goods are likely to deteriorate, decay or otherwise become worthless, or incur charges whether for storage or otherwise in excess of their value, the Carrier may at its discretion and without prejudice to any other rights which it may have against the Merchant, without notice and without any responsibility attaching to it, sell, abandon or otherwise dispose the Goods at the sole risk of the Merchant and apply any proceeds of sale in reduction of the sums due to Carrier from the Merchant or in connection with this Bill of Lading.

19. Section 7 (Carrier's Lien) of MSC's bills of lading covering the First and Second Shipments provides as follows:

The Carrier, its servants or agents shall have a lien on the Goods and any document relating thereto for Freight ... The Carrier shall have the right to sell any Goods liened by public auction or private treaty, without notice to the Merchant.

MSC's bill of lading defines (in Section 1) "freight" as including "the freight and all charges, costs and expenses whatsoever payable to the Carrier in accordance with the applicable Tariff and this Bill of Lading, including storage, per diem and demurrage."

20. Notwithstanding the abandonment of the goods and authorization to sell them from Bajaj Holographic and LCL as well as its clear legal authority to dispose of the goods in these two shipments under the Indian Customs Law and the terms and conditions of its bill of lading, MSC has taken no steps for over three years to dispose of the goods or reclaim its containers.

21. On March 24, 2014, MSC filed a lawsuit in the United States District Court for the Southern District of New York seeking recovery of in excess of \$230,000.00 in demurrage charges as well as for additional demurrage charges which, according to MSC's complaint, continue to accrue as the container(s) have yet to be retrieved. A copy of the Complaint is attached as Exhibit 17.

The Controversy

MSC has asserted in the Complaint it has filed against LCL in the U.S. District Court for the Southern District of New York that LCL owes in excess of \$230,000 for demurrage fees on two containers. LCL contends that MSC's failure to dispose of the goods in those containers for three years and counting after they were abandoned by the Indian importer and LCL, despite MSC's authority under the Indian Customs Act as well as the terms and conditions of its bill of lading contracts to sell the goods, and despite MSC's obligation to mitigate its damages, is an unjust and unreasonable practice in violation of Section 10(d)(1) of the Shipping Act, 46 U.S.C. § 41102(c). This is clearly an actual controversy arising directly under the Shipping Act for which the Commission is the appropriate forum for resolving the issue. Concurrently with the filing of this Petition with the Commission, LCL is filing a motion with the Court seeking a referral of this issue to the Commission pursuant to the doctrine of primary jurisdiction. A copy of that motion is attached hereto as Exhibit 18.

MSC's Unjust and Unreasonable Practices

As set forth in the Statement of Facts, MSC transported the two shipments at issue from the United States to Tughlakabad, India. As the carrier of the goods, MSC became their

custodian under Section 45 of the Indian Customs Act. *See* Exhibit 16A. The two shipments arrived on December 29, 2010 and January 12, 2011, respectively. On March 2, 2011, LCL sent MSC a letter from the Indian importer of the goods, Bajaj Holographic, abandoning both shipments. In its email covering the letter, LCL instructed MSC to sell the goods in these shipments pursuant to its lien, referencing Bajaj Holographics' intention not to clear them through Indian customs. (Exhibit 10) Thus, within 63 and 50 days, respectively, of the two shipments' arrival dates, MSC had clear notice that the only parties with an interest in the goods had relinquished all of their rights in them and instructed MSC to sell them.

MSC had clear authority to sell the goods. Indeed, in its correspondence to LCL dated January 27, 2011, MSC acknowledged that it had the authority to place the cargo with Indian Customs for "salvage sale, by public auction." *See* Exhibit 7. Under Section 48 of the Indian Customs Act, MSC had the right as the custodian of the goods to sell them with the permission of the Indian customs authorities.¹ And, if both Bajaj Holographics' and LCL's abandonment of the goods was not sufficient to give MSC the authority to dispose of them – which they were – MSC manifestly had adequate authority under its bill of lading and carrier's lien to sell them. MSC, however, failed to take any steps to dispose of the goods. Rather, it contented itself with sending notices to LCL for the next three years demanding payment of increasingly higher demurrage charges. When LCL responded to those notices by reminding MSC that the cargo had already been abandoned, MSC stated that LCL's notice of abandonment was not acceptable unless it appeared in a format acceptable to MSC. Finally, MSC has filed suit against LCL claiming demurrage charges approaching a quarter million dollars.

¹ Equally clearly, LCL as an NVOCC not having physical custody of the goods had no right to dispose of the goods in any manner.

MSC's actions are not just or reasonable in a number of respects. First and foremost, MSC did absolutely nothing when it had the power and authority to dispose of the cargo in the two containers. Clearly, a reasonable carrier would have understood that, as the only party with the ability to get rid of the cargo and reclaim its containers, it had a duty to pursue all avenues to accomplish that result, particularly when there was a road map in the Indian Customs Act showing what MSC had to do. This is not a case where MSC tried and failed to obtain permission from Indian customs authorities to dispose of the cargo. It never even made the effort. As MSC confirmed to LCL in October, 2011, it simply waited for Indian customs to auction the cargo and release the containers. (Exhibit 15) Presumably, MSC is still waiting for this to happen.

Further, MSC cannot claim that it was unsure about whether the cargo had been abandoned by Bajaj Holographics and LCL. MSC was given written notice by both companies instructing it to "auction the cargo." (Exhibit 10) MSC admitted that Bajaj Holographics' instruction to auction the cargo was a letter of abandonment. (Exhibit 15) It refused, however, to treat the identical instruction from LCL in similar fashion. Instead, MSC took the position that it would not honor LCL's abandonment of the shipments until LCL completed MSC's standard letter of abandonment which required LCL to accept responsibility for "all the pending and additional charges." This is clearly unreasonable. Either LCL was already responsible for the pending and additional charges as a party to the MSC bills of lading, in which case requiring LCL to sign MSC's standard letter of abandonment was meaningless, or LCL was not responsible for those charges, in which case requiring LCL to sign the standard letter giving up its rights or face a demurrage claim for a quarter of a million dollars was extortionate.

The requirements for abandonment in maritime law are clear. “[A] valid abandonment occurs through the act of deserting property without hope of recovery or intention of returning to it. See 3A Norris, Benedict on Admiralty § 134 (7th ed. 1980)” *Nunley v. M/V Dauntless Colocotronis*, 863 F.2d 1190, 1198 (5th Cir. 1989); see also *Jiri Mucha v. Charles King*, 792 F.2d 602, 610 (7th Cir. 1986) (“Abandonment is a voluntary relinquishment of rights ...”). There is no requirement in the law of abandonment that any special form of words or particular documents be used to effect a genuine abandonment. MSC’s failure to recognize and act upon LCL’s clear abandonment of these two shipments is, in the circumstances, unjust and unreasonable.

Moreover, MSC had an obligation to mitigate its damages. *Rose International, Inc. v. Overseas Moving Network International, Ltd.*, 29 S.R.R. 119, 191 (FMC 2001) (“Mitigation is a principle used in damages analysis to prevent a party from recovering damages for losses it could have reasonably avoided without an undue risk or burden, and is one applied by the Commission.”) The law is clear that an injured party cannot simply wait and let its damages accrue. It must take steps to avoid any extra damages as part of the implied covenant of good faith and fair dealing that is a part of every contract. See *Adair v. Penn-Nordic Lines, Inc.*, 26 S.R.R. 11, 20-21 (I.D. 1991). In contrast, here MSC is simply sitting on its damages and allowing them to multiply beyond any reasonable measure. It certainly would not have suffered any undue risk or burden by attempting to comply with the requirements of the Indian Customs Act to dispose of the goods in the two containers at issue.

Finally, the unreasonableness of MSC’s practices in this case is highlighted by the enormous magnitude of the difference between the demurrage charges MSC is claiming from LCL and the value of the containers for which those charges are being claimed. MSC itself values its 40 foot high cube containers at \$5,400 each. See MSC Container Interchange

Agreement at 8, attached as Exhibit 19. Thus, MSC could have simply disposed of or destroyed the containers in question and purchased or leased replacement equipment for prices that probably would not have exceeded \$11,000. As an ocean carrier that buys or leases containers in bulk, MSC undoubtedly can obtain containers even more cheaply than this. How then, can asserting a claim for almost a quarter of a million dollars for the loss of use of these containers be considered reasonable?

In sum, the demurrage and related charges MSC is demanding that LCL pay have accumulated as a result of MSC's own, intentional actions. As the Commission has clearly held, "the practice of billing for demurrage resulting from carrier fault . . . is unjust and unreasonable." *Plaza Provision v. Maritime Services*, 17 F.M.C. 47, 51 (1973). There is no question that MSC has failed to take the actions it was clearly authorized by Indian law and its bill of lading to pursue to dispose of the goods and reclaim its containers many years ago. It should not be permitted to unjustly benefit from its own unreasonable practices.

The Filed Rate Doctrine Does Not Excuse MSC's Actions

MSC may argue that it is required, pursuant to the filed rate doctrine, to collect the demurrage charges as set forth in its tariff. As the Commission has made clear, however, it is not a derogation of the filed rate doctrine to find a carrier has violated other, substantive sections of the Shipping Act such as Section 10(d)(1). *Total Fitness Equipment d/b/a/ Professional Gym v. Worldlink Logistics*, 28 S.R.R. 534 (FMC 1998). There, the Commission found that "[t]he filed rate doctrine does not function as a carte blanche to justify whatever action the carrier deems is appropriate" *Id.* at 539. Similarly, here, MSC should not be allowed to engage in unjust and unreasonable practices and then hide behind the filed rate doctrine to collect an exorbitant amount of money that is out of all proportion to any legitimate damages it may have suffered.

Moreover, MSC has not filed the demurrage charges it is seeking to collect from LCL in its tariff published pursuant to the Shipping Act. There are, in fact, no provisions in that tariff regarding demurrage charges in India. Rather, it appears that MSC is relying on a local Indian tariff, a copy of which is attached hereto as Exhibit 20. Section 10(b)(2)(A) of the Shipping Act, however, prohibits carriers such as MSC from providing services that are “not in accordance with the rates, charges, classifications, rules and practices contained in a tariff published . . . under Chapter 405 of [the Shipping Act].” 46 U.S.C. §41104(2)(A). In its lawsuit, MSC is attempting to do precisely what the Shipping Act prohibits. Manifestly, it is an unjust and unreasonable practice for a carrier to blatantly violate the Shipping Act in seeking compensation from a shipper at rates not included in its publicly filed tariff.

**MSC’s Attempt to Collect Penal Demurrage Charges
Is Also an Unjust and Unreasonable Practice**

As can be seen from Exhibit 20, the demurrage charges MSC is seeking to collect from LCL pursuant to its local Indian tariff provide, with respect to 40 foot high cube containers such as those at issue, for a free time of 5 calendar days and, after that, demurrage charges for a 1st period of 7 days at \$44 per day, then for a 2nd period of 10 days at \$90 per day and thereafter, charges at \$135 per day. In past cases, the Commission has presumed that the first period demurrage charges “represents a compensatory charge” and that charges for the second and subsequent periods “are penal to the extent of the excess of those charges over charges for the first period” *Free Time and Demurrage Charges - - New York*, 3 U.S.M.C. 89, 109 (1948); *Midland Metals Corp. v. Mitsui O.S.K. Line*, 15 F.M.C. 193, 199 (1972). Consequently, any charges by MSC for demurrage in excess of the \$44 daily rate for the first period should be considered penal. When, as is the case here, the consignee cannot take any actions to claim or

dispose of the cargo to stop demurrage from running, the Commission has held that the carrier cannot impose the penal element of the demurrage of its demurrage charges. *Id.* Because LCL was not the owner or importer of the goods into India, it had no rights to handle or dispose of the goods under the Indian Customs Act, 1962. Therefore, even if MSC were entitled to collect demurrage charges, in whole or in part, from LCL - - which it is not - - it would not be authorized to collect the penal amount of those charges. Thus, to the extent MSC is demanding that penal portion of its demurrage charges, it is also engaging in an unjust and unreasonable practice.

III. CONCLUSION

For all of the foregoing reasons, LCL respectfully requests that this petition be granted and that the Commission issue an order declaring that the demurrage practices described in this petition are unjust and unreasonable in violation of Section 10(d)(1) of the Shipping Act of 1984; 46 U.S.C. § 41102(c).

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of August, 2014, I served the foregoing via U.S. mail, first class postage prepaid, as follows:

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