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## Container Detention Charges Held Not To Be Penalties

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In a decision handed down on 18 April 2011, the Consumer, Trader and Tenancy Tribunal (“CTTT”) of NSW has held that container detention charges are not penalties.

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### Container Detention – Previous and Current Decisions

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Readers may recall that in the decision of *DV Kelly Pty Ltd v China Shipping (Australia) Agency Co Pty Ltd*,<sup>1</sup> the CTTT previously held that container detention charges amounted to an unenforceable penalty at law. The outcome of the decision was questionable, given that available substantive arguments against this finding were not advanced by China Shipping at the CTTT hearing and were therefore not considered by the CTTT in coming to its decision.

In any event, the *DV Kelly* decision was subsequently quashed on appeal to the Supreme Court of NSW, with the Supreme Court holding that the CTTT did not have jurisdiction to determine claims relating to contracts for the carriage of goods by sea, which was reserved to the Federal and State courts.<sup>2</sup>

In the recent CTTT decision of *Ichiban Imports Pty Ltd v China Shipping (Australia) Agency Pty Ltd*<sup>3</sup>, the CTTT considered the arguments that were not previously raised by China Shipping at the hearing of the earlier *DV Kelly* proceedings and found that, on a more fulsome assessment of the issues, the container detention charges in question did not amount to a penalty and were enforceable at law.

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<sup>1</sup> [2010] NSWCTTT 136.

<sup>2</sup> *China Shipping (Australia) Agency Co Pty Ltd v DV Kelly Pty Ltd* [2010] NSWSC 1556.

<sup>3</sup> [2011] NSWCTTT 153.



In *Ichiban Imports* the CTTT sought to overcome the above Supreme Court decision to the effect that the CTTT does not have jurisdiction to determine claims relating to contracts for the carriage of goods by sea on the basis that the governing contract in question was not the bill of lading contract (in respect of which the CTTT would not have jurisdiction), but a separate Import Delivery Order which was entered into after the goods had been landed and which was not strictly a contract for the carriage of goods by sea.

The basis of the decision in *Ichiban Imports* was as follows:

- (a) a penalty is a fixed amount required to be paid for a breach of contract which is not a genuine estimate of the actual losses arising from the breach and/or is extravagant or unconscionable; and
- (b) if the fixed sum is not imposed in respect of a breach, but is merely an agreed sum payable in certain circumstances, then the doctrine of penalties has no application and cannot be called upon to strike down any such charge.

The CTTT in *Ichiban Imports* held that the container detention charges of \$80 per day did not amount to a penalty on the basis that they were not imposed for any breach of the Import Delivery Order, but rather, were merely amounts agreed to be paid upon *Ichiban Imports* continuing to possess the containers after the expiration of the 'free time'.<sup>4</sup> Accordingly, the doctrine of penalties did not arise for consideration.

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## Implications

Whilst a more thorough analysis and discussion of the application of the governing legal principles to the issue of container detention charges would be welcomed, we consider that the outcome reached by the CTTT in *Ichiban Imports* represents the correct application of the law to the issue and is to be preferred to the *DV Kelly* decision.

This is the position put forward for by us previously in our article published in the Summer 2010 edition of the *Shipping Australia Magazine*.<sup>5</sup> It also accords with a common sense and commercial assessment of the issue of container detention charges as being amounts agreed to be payable upon the happening of certain events. After all, the incurring of container detention charges is always in the hands of the Consignee or their agents – if they do not wish to incur container detention charges, they can simply bring the containers back within the 'free time'.

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## Contact

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<sup>4</sup> The CTTT did not have to determine whether the container detention charges of \$160 per day which were payable after 26 days were a penalty. We submit that, given the CTTT's findings in relation to the container detention charges of \$80 per day payable between 11 and 25 days, this issue could only properly be determined consistently with a finding that the increased charges were also charges agreed to be payable and not penalties for breach.

<sup>5</sup> "Maritime Law – What is it good for?", *Shipping Australia Magazine*, Summer 2010 at p40.