

Port Legal Issues Workshop

Legal & Regulatory Limitations on Leases

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Overview

- FMC Filing Requirements
- Exemptions for certain Marine Terminal Facilities Agreements and Marine Terminal Services Agreements
- What constitutes an unreasonable preference post October 26, 2016
- Some practical observations about the dangers of boilerplate
- Demurrage petition (4-16)

Basic Rules for FMC Filing

- General rule for agreements between regulated entities
- Non-regulated entities and their relation to agreements (just how far from the water does the Shipping Act reach)
- Non-exempt agreements – public filing and 45 day waiting period
- FMC enforcement/compliance issues (\$58,562/day) and increased scrutiny
- FMC “cleanup” program for agreements

Exemptions for MTFAs

- 535.310 – Facility Agreements
 - Between two MTOs or between MTO and OCC
 - Covers right to operate a marine terminal facility by lease, assignment
 - Public document, available to anyone on request, subject to reasonable fee



Exemptions for MTSAs

- 535.309 – Service Agreements
 - Between MTO and OCC
 - Covers dockage, wharfage, free time, cargo handling, storage
 - Does not include carrier agreement to lease marine terminal facilities
 - Cannot include rates set through a conference
 - Confidential under Shipping Act

Exclusions from the MTSA/MTFA exemptions



- Exclusive, preferential or cooperative working agreements
- Conference agreements
- Voluntary filing for MTSA to get antitrust immunity

Impact on Terminal Leases after the final *Maher* ruling

- Context of the dispute
- The search for the elusive legitimate transportation factor
- Caustic comments from the D.C. Circuit
- Terms of advisory opinion
 - Market conditions, nature and character of lessee
 - Need to assure adequate, consistent service to carriers and shippers, and generally advance a port's economic well-being

Maher et al. (continued)

- Comparability issues
 - Different leases at different times
 - Deference to public port authorities, “especially in the context of their leasing decisions”
 - Interport competition not in need of a regulatory fix
- Relationship of charge to service
- Responding to VOCC Alliances

Policy Issues Post *Mahe*

- Reading Tea Leaves Through a Crystal Ball
- Coal
 - How (if at all after *Mahe*) does legitimate transportation factor apply to policy preferences (inside or outside port authority) re ACC
 - Some practical factors that likely are transportation factors
- *Millenium Terminals Case*

Practical Considerations for Drafting & Negotiating Leases

- Comparative Pricing
- Exclusive and productive maritime use
- Facility access
- Subleasing
- Termination



Detention & Demurrage Petition (4-16)

- The initial petition
- Hearings in January 2018
 - The cargo/trucker arguments
 - The carrier/terminal arguments
- FMC Reaction
- Impact on landlord ports (CAPA comments)
- What's next?

Questions?

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