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Research on the Problems and Countermeasures of the Third Party Logistics in Our Laws and Regulations

Wang Hongchun and Lv Yimiao

School of Economics and Management Engineering, Beijing University of Civil Engineering and Architecture, Beijing 100044, People Republic of China

Abstract: Up to now, formal logistics laws are not legislated in the domestic law, however, the resolutions of pre-existing Third Party Logistics contract disputes are needed. To firm the validity of contract and protect the rights of contracting parties in contract disputes, legal characteristics are analyzed, legal relations are differentiated and the principles of liability fixation as well as law application are confirmed in this article.

Key words: Third party logistics, contract, legal risk

INTRODUCTION

As a way of supply chain coordination, supply chain contracts have played an important role in solving the problems of double marginalization and asymmetric information. The performance of the entire supply chain was significantly affected in the process of supply chain, for the existence of goal conflict and asymmetric information among node enterprises. Previous research on supply chain contract mainly contained Quantity Discount Contract (Lee and Rosenblatt, 1986), Quantity Flexibility Contract (Subramanian *et al.*, 2006), Revenue-sharing Contract (Chen *et al.*, 2007) and Return Policy (Wang and Zipkin, 2009). However, the above contracts were legally effective between the suppliers (first party) and demander (second party) which were also the composition of the contract. And scholars mostly set the premises, established the model, chose different kinds of contract coordination mechanism and established a rational incentive mechanism to promote information sharing and improve the supply chain benefits but little attention was paid on the Third Party Logistics contract legally. Logistics outsourcing has been an inevitable trend to concentrated core competitiveness in the mode of supply chain management (Liu and Li, 2009). The possibility of dispute greatly increased for various aspects of supply chain management were involved in Third Party Logistics contract. To effectively avoid high cost and low efficient caused by disputes, deep research is eagerly needed.

ISSUES OVERVIEW ON THIRD PARTY LOGISTICS CONTRACT PROBLEMS

Overview of third party logistics contract: The third party logistics contract is different from the general civil and

commercial contract which refers to the contractual relation that a third party logistic operator make with his demander, a third party logistic operator provide systematic service to demander as well as demander pay for the service (Huang and Cai, 2010). Compared with the traditional storage and transportation enterprise, the third party logistics enterprise's scope of services consist of warehousing, transportation, processing, packing, distribution and information processing. And the legal relationships between the parties are more complicated, even agency relationships, intermediary brokerage relationship and brokerage relationship are included in some cases. Therefore, the application law of the third party logistics contract is special and its particularity consist of serviceability, onerous contract, principal and subordinate relationship and requisite in form. The legal subjects in the Third Party Logistics Contract comprise demand side (also called the cargo owner enterprise), operating side (third party logistics operator), contract perform party (including transport enterprise, port operation enterprise, warehousing enterprises, processing enterprises, etc.). Contracts are used to regulate and control the comprehensive and personalized logistics service between supplying and purchasing parties which have mutual obligations and consideration relationship, once the logistics service demand party made an offer and the acceptance was given from logistics service enterprise, the contract is established without the delivery of subject matter. And the master contract refers to contract between operator and logistics service enterprise, while contract between logistics service enterprise and actual perform party can be called accessory contract. Both of them need be formal contract in order to avoid dispute as well as maintain the safety of transactions and trade order.

Characteristics of the legal issues in the third party logistics contract:

- The nature of the contract is not yet definite. Multiple perform subject and many aspects were influenced in the Third Party Logistics Contract, especially the third party logistics service enterprise was involved in many contracts made the rights and obligations present the characteristics of universality and complexity
- The principle of liability fixation and the application of law are not explicit. As it is lack of independent legislation in logistics, few independent legal provisions be cited when judges resolve disputes and only according to the existing contract law and the provisions of law. Therefore, determine the application of law and make clear which one have to be responsible on the base of some principle of liability fixation is the foremost thing in the process of inquisition stage
- The contract risks are dispersed. Risks lie in the process of the conclusion or performance, or between the supplying and purchasing parties, operators and performing parties, operators and information supplying parties. As a result, risks control becomes difficult
- Dispute settlement agency and processing mechanism are not clear. Unless the contract has definite agreement, general contract dispute settlement mechanism contains arbitration institutions and court, exclusive railway court and maritime court for special disputes. Therefore, the processing mechanism and procedures also do not have unity as the third party logistics service's large scope

Countermeasures to solve third party logistics contract problems: Tidy up legislation. There has not been an existing logistics law in worldwide countries, however, our country has formed a multi-level and various forms of logistics legal system, almost each aspect has corresponding laws and regulations to adjust and what our attention need to be paid on is to settle, modify and integrate the current various logistics laws and regulations and abolish the conflicting regulations and redundant laws which will create a pretext for independent logistics law in the future.

(2) Classify the third party logistics contract according to the third party logistics operation mode. Due to the third party logistics development is not mature, the legal nature of contracts also cannot be treated in the same way, which is divided into assets logistics operation mode and agent logistics operation mode (Zhang, 2008). In assets logistics operation mode, logistics service operator own the basic assets for logistics activities, such

as the facilities, equipment, personnel engaged in logistics activities, operation network and other productive conditions, which means that logistics function activities such as transport, storage, handling, packaging, circulation, distribution and information processing can be contracted by operators in accordance with logistics process and scheme designed by purchasing parties. In this mode, supplying and purchasing parties construed as forming any trust relationship, purchasing party is principal (the trustor) and the third party logistics operator is the entrusting party (the trustee). The agreements between the parties are part of contract for services and named contracts for labor supply contains agency appointment contract, warehousing contract, contract of carriage. And both warehousing contract and contract of carriage are signed out from agency appointment contract, while the legal names of the third party logistics operator are warehouse and actual carrier (Long, 1999). These contracts can be considered from the nature of agent contract of consignment. In the agent operation mode, planning scheme, providing logistics information, seeking for suppliers, distributors and carriers from the outside world and taking corresponding supervision and management function belong to the third party logistics operator. Civil agency relationship was constructed when operators perform functions in the name of customers and the legal status of operators is agent, whose legal action consequences within the scope of the agency power be taken by principle named logistics service demand party. But the legal relationships between parties would be complicated if operators perform functions in its own name, both principle contract (between operator and demander) and accessory contract (between operator and actual carrier) emerged in this case. Whether subcontract the work to the third party or fulfill by itself, the third party logistics operators must be held liable for legal consequences, which is called trading-trust contract legally. And the legal status of operators is commission (Lin and Wang, 2005) who are responsible for all the obligation and responsibility while subcontractors take responsibility within the scope of the contract.

(3) It should be flexible when consider the application of law. Clause 8 of Contract Law of the People's Republic of China (PRC) expressly provide that a lawfully formed contract has legally bonding force on the parties. And contracts between the third party logistics service supply and demand parties based on independent and real intention of both parties has legally bonding force on the parties. When the third party logistics contract disputes happened, judges should consider their contracts as trial basis firstly, if relevant matters had not agreement in contract or unclear, supplementary agreements were allowed to signed out. To the disputes that can not be judged according to contract specification separately, civil law and regulations can be used as basis of trial. But

systematic interpretation need be taken before civil law and regulations be applied which means presumed the real intentions of the parties combined with related terms when the contracts concluded. If the basis of trial to logistics contract disputes still can not be confirmed, previous transaction practices should be considered according to clause 61 of Contract Law. If law basis still could not be obtained based on contract definite agreement, supplementary agreement, systematic interpretation and previous transaction practices, the insufficient agreement between the parties were allowed to be supplemented or complementary random norm in civil law be quoted to deal with disputes. As a systematic, unified, complete and special logistics law has not been set up in our country, Maritime Law and Contract Law has supreme legal authority, both of which are set by national congress and its standing committee, then is administrative regulations formulated by the state council and its departments, such as provisional regulations for Harbour Management (Zhang, 2010), Several Opinions on promoting the development of integrated logistics transportation enterprises released by State Department of Transportation, Office Procedure of Foreign Merchants Investment on International Forwarders by Ministry of Foreign Trade and Economic Cooperation in 2002, Regulation of Railway Transportation by Ministry of Railways, China's Civil Aviation rules of the international transport by China's Civil Aviation Administration (Tang and Yn, 2010) and some government regulations like The interim regulations on commodity packaging set by the central ministries and commissions. In addition, International laws and regulations such as Final Act of the United Nations Conference on Contracts for the International sales of goods contract, Hague Rules, Visby Rules and other International treaties and international practices (Gao, 2007). The third party logistics contract belongs to the unnamed contract. Generally it is said that analogy interpretation can be applied in unnamed contract on the base of clause 124 of Contract Law. However, the third party logistics contract is not general unnamed contract which characterized by complex context, integrity and versatility

and be seemed as type union unnamed contract. It is unsuitable to apply analogy procedure in the generalization as neither Contract Law nor current legal system has similar provisions. The general principles of contract law should be taken into consideration firstly in dealing with contract conclusion, effectiveness, performance, amendment, assignment, rights and obligations, termination and liability for breach of contract and when it comes to the specific rights and obligations, the laws at the locality of loss act shall be applied if the loss locality could be determined. Take Contract of Carriage or warehousing contract for example, the general principles of contract law and general rule of the civil law should be adopted if the loss locality could not be determined.

The doctrine of liability fixation in the third party logistics contract should be based on whether the loss locality could be acquired (Table1). The so called the attribution of the contractual liability refers to the legal principle that ascertain the contractual liability due to the certain legal reason for attributing liability, that is a deterministic process of whether the default party be responsible to the consequences caused by nonperformance. Once the attribution of the contractual liability be confirmed, the party that be responsible for loss be determined according to relevant rules (Yang, 2003). If loss locality could be acquired, the attribution of the contractual liability be in accordance with loss locality. For example, suppose the loss occurred in the international at the stage of carriage of goods by sea, incomplete fault liability principle be applied. If not, named hidden losses existed, the principle of no-fault liability should be taken into close consideration according to the general principles of contract law which is network liability system of the carrier's liability system in multimodal transport.

It can be seen that the third party logistics operator undertake the due obligations in principle of no-fault liability generally, fault principle happened only in warehousing contract, commission contract and the contract of carriage of goods by sea.

Table 1: Doctrine of liability fixation in sub-contract and other civil law

Contract types	Laws and regulations	Doctrine of liability fixation
The contract of carriage of goods by road	Clause 68 rules for road transport by department of transportation	Principle of no-fault liability
The contract of carriage of goods by water	Clause48 of rules for waterway transport by department of transportation	Principle of no-fault liability
The contract of transport of cargo by air	Clause 125 of civil aviation law by civil aviation administration of china	Principle of no-fault liability
Contract of railway freight transportation	Clause 18 of the detailed rules for the implementation of the contract of carriage of goods by railway byministry of railways	Principle of no-fault liability
The contract of carriage of goods by sea	Clause 51 of maritime law	Incomplete fault liability principle
Warehousing contract	Clause 394;374 of contract law	Fault principle
Processing contract	Clause 262 of contract law	Principle of no-fault liability
Commission contract	Clause 406 of contract law	Fault principle

To avoid the loss caused by the third party logistics contract risk, risk can be recognized from the static and dynamic points (He, 2009). Static risk consist of indemnity risk for the loss of or damage to goods, risk in delivery delay and incorrect transport (contract risk between operator and customer), differences risk between principal contract and accessory contract in law application, exception clause, package limitation and limitation of action (contract risk between operator and subcontractors), system failure risk, trade secrets risk (contract risk between operator and information system supplier) and so on. Dynamic risk contains that big customers put forward harsh requirements and contract terms by virtue of their strong economic strength in the negotiations (Gao, 2008) (contract conclusion risk), differences risk in goods name, quantity, present situation and the contract (perform risk). It is reasonable to transfer risk by insurance purchasing no matter from the perspective of enterprises logistics or from the perspective of the customer. But how to response to unreasonable demands put forward by customers, the third party logistics enterprises have to make full use of the demander's insurance, combine with their own insurance and try to seek another measures to deal with the risks that can not be transferred. And they also should have a clear idea about the types of insurance which they are going to buy. Insurances that are not practical and can not be implemented should be canceled and explained in the negotiation which are not undertake by the third party enterprises.

Dispute mechanism and procedures must be expressly provide in the construct as much as possible. Buck-passing always happen among courts as the high possibility of disputes, the difficulty of producing evidence, various aspects and conflict of jurisdictions (Gao, 2007). At the same time it is not good for the establishment of strategic partner relationship (Li, 2004). As a result, suit is not the best way to solve disputes, while negotiation is the most simple and the most economical way to continue to perform the construct and cooperate in a long term. Even if the consultation fails, charge has began, both parties still can reach a settlement agreement through litigation, put an end to the dispute. Contract arbitration clauses or separate arbitration agreements are allowed to be reached. The arbitration procedure is characterized by simple, low cost, unopen and it can protect the business secrets as well as judicial proceedings is the final resolution process which is the last line of defense for both the parties. However, the parties have to obey strict procedures, pay great money, bear a long trial period and are under restrictions of prescription. In addition, both parties or multi-parties

can reach an agreement and resolve the dispute make an agreement on substantive rights and obligations within the people's court, mediation committee and relevant organizations.

CONCLUSION

The third party logistics in our country is still in the initial stage, the corresponding laws and regulations are not perfect, logistics disputes between the parties are easily to happen, because of the universality and complexity of logistics activities which can also lead to complex and extensive logistics disputes, comprehensive level and application of law and influence the dispute processing mechanism and the diversity of the program. The paper analyses the legislative margin in third party logistics contract, clarify the legal relationships and status between the parties and provide some ideas to resolve contract disputes reasonably.

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