



**WORLD SHIPPING COUNCIL**  
PARTNERS IN TRADE

**Comments of the World Shipping Council on the  
Brazil ANTAQ Detention and Demurrage Rulemaking**

**Question 1: Among the existing interpretations about the legal nature of demurrage, which one is better suited to this type of collection, indemnity or penalty clause? Justify.**

WSC Comments:

The World Shipping Council (“WSC”), submits these comments in response to the Agência Nacional de Transportes Aquaviários’ (“ANTAQ”) Public Subsidy Taking Notice 3/2020 (“Notice”) regarding practices associated with the collection of detention and demurrage charges.

WSC is a global non-profit trade association that represents the international liner shipping industry on regulatory and policy matters. WSC has 19 ocean carrier members that represent approximately 90 percent of global liner vessel capacity. WSC members have invested hundreds of billions of dollars in ships, port terminals, and related infrastructure to ensure that a wide variety of options continue to exist for safe, dependable and economical international ocean transportation of cargo. A number of WSC’s members provide substantial ocean transportation service to importers and exporters in the Brazilian market. More information about WSC and its member companies may be found at [www.worldshipping.org](http://www.worldshipping.org).

WSC became aware of the Notice through Centronave, which is providing the Brazilian Government with comments on each of the questions raised in the Notice.

In regards to the first question related to the existing interpretations about the legal nature of demurrage, WSC will not go into the legal concept adopted by Brazilian law, but intends to provide the below observations from both a general shipping industry and international trade perspective.

Demurrage and detention charges serve both compensatory as well as incentive purposes. While these dual purposes are distinct, they are equally important to ocean carriers as well as international trade generally. A primary purpose of container detention and demurrage charges is to incentivize consignees to promptly pick up their loaded containers from the marine terminal and to promptly return the empty containers to the carriers after the cargo has been unloaded. Without that financial incentive to keep containers moving, cargo interests have an incentive to use marine terminals as warehouse substitutes for loaded containers, and to allow empty containers to linger at the place of unloading.

Pursuant to longstanding commercial practices in the shipping industry, when cargo interests fail to pick up their cargo from the marine terminal or depot or fail to return empty shipping containers to ocean carriers, ocean carriers will charge demurrage and detention fees. In this regard, detention and demurrage charges serve an important transportation and trade purpose – to keep cargo flowing by

providing an incentive for cargo interests to promptly and efficiently remove their cargo from the ports and marine terminals and return empty containers. Keeping cargo moving is important to all supply chain participants. These charges help ensure that cargo does not pile up in marine terminals and depots, which would create port congestion that would delay the delivery and processing of export and import cargo shipments that need to use the terminal. These charges also motivate carriers' customers to return empty containers promptly so they can be used to transport export cargo.

In addition to this incentive purpose, it is also important to understand that when equipment is not returned and cargo does not flow freely, there are real costs involved. Detention and demurrage charges are used to allocate risk and provide compensation for those costs. Specifically, detention charges compensate ocean carriers for direct equipment costs and lost opportunity costs associated with containers that are not returned on time.

WSC recognizes that the global COVID-19 pandemic has caused severe disruptions to the ocean transportation system in Brazil and around the world as production and demand have been interrupted. One result of these disruptions has been an increase in the amount of cargo – especially containerized cargo – that is being left and even abandoned on marine terminals or adjacent off-dock depots. Closures of stores, factories and warehouses and shortages of cargo handling personnel and truck drivers can lead to cargo becoming stranded at ports. Adding to the problem is the fact that some cargo interests have chosen to leave cargo on the docks rather than to retrieve it and enter it into their inventory systems. A related problem is that some cargo interests fail to return empty containers to the carrier, which prevents those containers from being used to transport export commodities. These forces, when taken together, can create container shortages, supply chain blockages and port congestion at the very moment when containerized cargo imports and exports must move fluidly to help restore the global economy and to support the pandemic response through the delivery of critical relief and emergency supplies.

Detention and demurrage charges, which are part of the commercial contracts between carriers and their customers in trades worldwide, are thus critical to keeping supply chains flowing. Replacing this element of a commercial agreement between shipper and carrier with any kind of a uniform government directive would undermine the contract of carriage, making it difficult for carriers to provide reliable transportation services, and foster supply chain disruptions and port congestion as cargo interests fail to return empty containers and leave import cargoes on the docks or in container depots for long periods of time.

To keep cargo flowing, ANTAQ should preserve, not prohibit or otherwise regulate in any prescriptive manner, measures that create incentives for cargo interests to promptly retrieve their cargo containers from the ports, unload those goods from the containers, and return the empty containers to the ocean carriers. Any efforts by ANTAQ to restrict the ability to collect detention and demurrage charges would promote unhelpful behavior by cargo interests that would slow down the movement of goods and the containers that carry them, contribute to port congestion, and reduce the reliable flow of commerce into and out of Brazil.

**Question 2: Can it be said that the Container Return Commitment Term (TCDC) assumes the characteristics of an “adhesion contract”? Justify.**

As a trade association, it is not for WSC to respond to an inquiry regarding specific contractual terms. WSC also reserves its rights not to answer this question due to a lack of visibility about local operational issues

**Question 3: In the event that demurrage takes on the legal nature of a penalty clause, in which (s) law (s) is it best suited? Why?**

WSC reserves its rights not to answer this question due to a lack of visibility about local legal issues.

**Question 4: Is it possible to legally support the understanding of demurrage to be of a hybrid nature, composed of a portion of the penalty clause (fine) and an indemnity portion (cost of opportunity)? Would market practices fit into this definition?**

WSC makes reference to its comments to question 1.

**Question 5 : What is the legal nature of demurrage in other countries, cite examples.**

WSC Comments:

As shipping is, by definition, an international business, any unilateral decision that ANTAQ makes with regard to its oversight of the shipping industry in Brazil without consideration of international perspectives could have broad consequences on its trading relations and the overall supply chain. WSC therefore appreciates that ANTAQ, as part of the Notice, is seeking input about other international regulatory regimes on this issue before taking any action.

In this context, it is important to first recognize that Brazil already has existing regulations governing detention and demurrage practices in Normative Regulation 18/2017. Section III of NR 18/2017 (Articles 19-21) provides that demurrage practices, including “free time” rules, must be made available to consignees at the time of booking. The regulations also set forth when “free time” begins to run for purposes of collection of these charges, and describes particular instances, such as force majeure events, when a cargo interest is not responsible for the payment detention and demurrage charges. Thus, Brazil already has comprehensive rules governing detention and demurrage. WSC is not aware of any other major trading jurisdiction that regulates detention and demurrage charges to even this extent. Importantly, ANTAQ already has meaningful oversight over these practices, and the regulations specifically identify factual circumstances that adequately protect cargo interests. In WSC’s view, however, there is a danger in adopting more prescriptive regulations in a manner that appears to at least be contemplated by ANTAQ in the Notice, which could lead to confusion and more disputes among the parties.

In this regard, WSC believes a recently concluded administrative proceeding in the United States, which has consistently been one of Brazil’s top import and export trading partners, is relevant to ANTAQ’s current review of the issue. The U.S. Federal Maritime Commission (“FMC”) recently conducted a review of ocean carrier detention and demurrage charges in the United States, and issued a final interpretive rule on May 18, 2020. In addition to being a key trading partner of Brazil, this administrative proceeding is instructive to ANTAQ’s current review of a similar issue because, despite requests from U.S. importers and exporters that the FMC adopt restrictive rules governing detention and demurrage charges, the FMC ultimately decided that such sweeping regulations were counter-

productive, and decided instead to take another less prescriptive approach of providing guidance to all segments of the industry in an effort to promote fluidity in the U.S. freight delivery system without unnecessary government intrusion.

As background, in 2016, a number of U.S. importers, exporters, transportation intermediaries, and truckers petitioned the FMC to adopt a formal set of rules relating to ocean carrier and marine terminal operator detention and demurrage practices. The so-called “Coalition for Fair Port Practices” argued that ocean carriers’ detention practices and terminology lacked uniformity and transparency, and that ocean carriers were unreasonably collecting detention charges even when the cargo and equipment could not be retrieved or returned due to circumstances outside the control of the shipper. The Coalition argued that these practices weakened incentive for the ocean carriers and marine terminal operators to address port congestion and operational inefficiencies, and asked the FMC to adopt a formal set of rules that would place financial responsibility on ocean carriers and marine terminal operators when a cargo interest is unable to pick up cargo or return equipment in the case of “any event or circumstance that is beyond the control of the shipper, receiver, or motor carrier, including but not limited to: (1) port congestion; (2) port disruption; (3) weather-related events; (4) delays as a result of governmental action or requirements, unless such delays could have been prevented by the shipper or receiver.”

Under the U.S. Shipping Act, the FMC is authorized to regulate ocean common carriers, marine terminal operators, or transportation intermediaries by, among other things, enforcing the statutory mandate that such entities “may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, storing, or delivering property.” 46 U.S.C. 41102(c). Whether any particular practice would run afoul of the “just and reasonable” standard in the U.S. Shipping Act can only be decided in light of the particular facts of each case, and the complaining party has the burden of proof to demonstrate that such practices is unjust or unreasonable. The Coalition’s Petition sought to replace the FMC’s longstanding fact-specific inquiry and burden of proof rules with sweeping new uniform regulations.

Using its regulatory authority under the Shipping Act, the FMC responded to this Petition by opening a formal Fact-Finding Investigation into detention and demurrage practices at U.S. ports, which consisted of hearings, field interviews, and document production. These included the issuance of questions and requests for documents to 23 ocean carriers and 44 marine terminal operators concerning their own individual detention and demurrage practices. In December 2018, the FMC issued a final report, concluding that all supply chain actors would benefit from greater transparency and consistency in cargo retrieval notification, billing practices, dispute resolution, and terminology. While not proposing to adopt any formal rules, the FMC’s final report noted the complex web of contractual relationships and longstanding commercial practices in the shipping industry.

In September 2019, the FMC published a notice of proposed rulemaking (“NPRM”) in the form of an “interpretive rule” seeking to clarify how the FMC would assess the reasonableness of detention and demurrage practices moving forward. Relevant to ANTAQ’s Question No. 1 regarding the legal nature of detention and demurrage charges, the FMC’s notice placed primary emphasis on the FMC’s view of the “incentive principle” — that demurrage and detention practices function to incentivize cargo flow — and provided many examples of potentially unreasonable regulations or practices. The FMC reported that over 100 comments were received in response to the NPRM, many of which took issue with the FMC’s oversimplification of the underlying dual purposes of demurrage and detention, thus

making the analysis unbalanced and inconsistent with the “totality of the circumstances” approach that the FMC typically applied to unreasonable practices claims.

The final rule, codified at 46 C.F.R. §545.5, maintained that the FMC would consider, when assessing the reasonableness of demurrage and detention practices, the extent to which such charges are serving their intended primary purposes as financial incentives to promote freight fluidity. Under this “incentive” principle, the FMC regulations state that the FMC may also consider “the existence, accessibility, content, and clarity of policies implementing demurrage and detention practices and regulations, including dispute resolution policies and practices and regulations regarding demurrage and detention billing, [including] the extent to which they contain information about points of contact, timeframes, and corroboration requirements.” *Id.* at §545.5(d). Likewise, the FMC may consider “the extent to which regulated entities have clearly defined the terms used in demurrage and detention practices and regulations, the accessibility of definitions, and the extent to which the definitions differ from how the terms are used in other contexts.” *Id.* at §545.5(e).

Importantly, however, in response to the many comments received from stakeholders, the FMC emphasized that the “incentive principle” was not the sole factor that would be considered, and that the compensatory aspect of detention and demurrage charges could be considered as part of its reasonableness determination. The FMC also expressly noted that the new interpretive rule was only intended to be a guidance document, and that the rule did not create any new legal requirements or binding commitments on the parties. In the rule, the FMC repeatedly stated that the listed factors that might be relevant in any particular complaint case are “a non-exclusive list of factors that the Commission may consider” and that the rule does not set out specific “mandates” or “requirements.” The rule explicitly states that “it does not prescribe specific practices that regulated entities must adopt.” Thus, after issuance of this rule, cases in the United States will continue to be decided on their particular facts, and the new interpretive rule does not foreclose parties from raising, or the FMC from considering, factors beyond those listed in the rule when considering whether certain detention and demurrage practices are reasonable.

Without adopting a “one-size-fits-all” set of regulations, the new FMC rule in the United States encourages transparency and provides guidance to the industry on how the regulator will look at various factors that may arise in detention and demurrage complaint cases, which allows individual companies to review and tailor their practices as they believe necessary.

**Question 6: What is the regulatory policy regarding demurrage in other countries, cite examples.**

WSC Comments:

In addition to what WSC already responded in question 5, it is worth noting that during the FMC’s review of this issue, it specifically asked stakeholders to identify other countries’ laws that regulate detention and demurrage practices. While those responses to the FMC were individual and confidential, WSC has surveyed its ocean carrier members on this issue in light of ANTAQ’s similar question in the Notice and, other than NR 18/2017 in Brazil, it can confirm its members are not aware of any maritime nation that has laws or regulations that regulate demurrage or detention or when demurrage and detention should or should not be charged. This review included nations in Central and South America (Mexico, Guatemala, Honduras and Chile), Europe (Germany, the UK, the Netherlands, Belgium, Italy, Spain, Malta, Greece), Asia (China, Korea, Hong Kong, Japan, Singapore, Malaysia, Thailand, Vietnam), and other locations such as Egypt, United Arab Emirates, South Africa, and Australia.

Indeed, as confirmed by the recent rulemaking in the U.S., common global practice continues to be that ocean carriers and their shippers or consignees work out issues or disputes relating to demurrage or detention on a commercial basis.

**Question 7: Given a hypothetical reference price, which band, in percentage terms, do you consider fair for demurrage for purposes of checking for abuse? Justify.**

As a trade association, it is not for WSC to respond to an inquiry about what a “fair” price for detention would be. In this regard, WSC makes reference to its comments to questions 8 and 9.

**Question 8: Does the amount charged for demurrage have a direct relationship with the freight rate present in the BL?**

WSC Comments:

The business of shipping companies is not to lease containers to its customers, but rather to move cargo from one location to another. As an instrumentality of international commerce, the value of the container is as a tool with which to move that cargo. Therefore, detention and demurrage charges are set at levels that reflect the value of the container as an integral part of the international transportation network, and is not tied to the underlying freight rate or the value of that container as a stand-alone asset to be sold or leased. From the carrier’s perspective, detention charges are structured to serve as a recovery mechanism for the capital investment and cost of the container, including repair, maintenance, and leasing, as well as opportunity costs associated with not having the equipment available for revenue-producing cargo transport.

When containers are held beyond allowable free time, the primary harms are: (1) opportunity costs associated with not having equipment available to move customers’ cargo; and (2) overall loss of efficiency in the carrier’s international network associated with not being able to freely position containers where they are required for loading goods, this causing knock-on delays and excess equipment re-positioning costs.

**Question 9: Discuss these regulatory options:**

**I – not to propose methodology, but policy to increase transparency. That is, the ANTAQ could request shipowners who sent their values/fees practiced (table values) of demurrage and also ask cargo agents and/consignees the average values of demurrage rates/fees. These information could be made available to all those interested in the Agency in digital media.**

**II – propose to the market a methodology for pricing the d&d of reference, example, from formula  $D = a + bX$ , where  $D$  = demurrage;  $a$  = value of fine/compensation;  $b$  = coefficient that represents the compensation/indemnity and  $X$  = freight rate.**

**In case you identify third options, present and justify.**

WSC Comments:

As noted in the other answers, detention and demurrage charges are part of longstanding commercial practices in the shipping industry serving multiple purposes, and WSC is not aware of any country that has taken the drastic step to insert itself into the private commercial negotiations of parties

as it relates to these charges. While ocean carriers understand the benefits to all stakeholders of increased transparent practices as described in Item 1 above, and certainly other countries like Brazil in NR 18/2017 and the United States in the recently adopted interpretive rule have supported such concepts of transparency, it would indeed be extremely unusual for ANTAQ, under Item II above, to go a step further and propose to the market that a particular methodology be used in all cases for the pricing of detention and demurrage, or otherwise mandate that certain commercial contract terms be used on a generic basis.

The absence of provisions like Item II above in other countries' laws arises from the recognition in those countries that such restrictions would be antithetical to free trade, to efficient ocean transportation and to freedom of contract. Indeed, the FMC in the United States expressly declined from taking this kind of exclusive and prescriptive approach to regulating detention and demurrage practices. One key reason for this is the danger in imposing a "one-size-fits-all" approach to this issue. These charges are an integral part of the overall negotiated agreement between carriers and their shipper customers. Carrier equipment and lost opportunity costs are different, and how each carrier decides to allocate such costs in their individual negotiations with their customers are a basis upon which carriers compete against one another. Competition in the marketplace – not excessive regulation – is the best mechanism for setting the terms of that allocation. Most governments are therefore of the view that it is best left to the parties to their commercial arrangements to decide how to allocate their costs and obligations among themselves depending on the circumstances involved.

To have this element of the commercial agreement superseded by government directive would undermine the entire contractual arrangement and place in jeopardy the ability of commercial parties to rely upon their commercial agreements. If ANTAQ were to pursue a regulatory approach similar to Item II above, and seek to impose restrictions on freedom of contract or autonomy of the will principle, the entire international trade contracting environment would become much less flexible and responsive to market forces.

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