Brazilian National Waterway Transportation Agency

International Experience in Demurrage Regulation

Federative Republic of Brazil

Jair Bolsonaro
President

Ministry of Infrastructure

Tarcísio Gomes de Freitas
Ministry of Infrastructure

Brazilian National Waterway Transportation Agency –

ANTAQ Collegiate Board of Directors

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Director

Gabriela Coelho
Interim Director

SEPN Quadra 514, Conjunto "E", Edifício ANTAQ, SDS, 3º andar, 55 61 20296764

CEP: 70760-545, Brasília – DF

sds@antaq.gov.br

gde@antaq.gov.br

Technical team:

Superintendence of Performance, Development and Sustainability (SDS)

José Renato Ribas Fialho – Superintendent

Development and Studies Management (GDE)

José Gonçalves Moreira Neto – Manager

Specialists in Waterway Transport Services Regulation: Ana Paula Harumi Higa

Arthur Felipe de Menezes Il Pak Rodrigo

Guimarães Trajano

Formatting: José Antonio Machado do Nascimento

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SUMMARY

1. INTRODUCTION

As Silveira (2018) points out, in the early 1990s, concomitantly with the imports' explosion caused by the opening of the economy, maritime navigation began to suffer from the lack of containers. Brazilian importers, used to receiving goods and taking them to their facilities, used the containers as warehouses taking months to return them, without incurring any burden. Faced with this situation, some shipowners started to enforce the "container clause" in the bill of lading, where the free days and days on demurrage were noted.

> The objective, at first, was to promote the awareness of importers for the quick return of the units used to package the goods, but it soon became a major source of income, because importers were not able to spawn the units and return them in time to meet the deadline. (SILVEIRA, 2018, p.5)

Therefore, the demurrage of containers stems from the imbalance in the movement of containers in export and import. The logistical bottleneck demanded a positioning by the carriers to guarantee that the containers would be returned within the agreed period and that the logistics chain would not be interrupted.

The causes for non-return within the agreed period are numerous, but they become more relevant when the system does not work optimally. Despite pioneering efforts, a decade after the opening of the economy it was still necessary to publish articles in the specialized press that pointed to the institute of container demurrage as a legal solution for the reinsertion of containers in the logistics chain.

> The reasons for the delay in returning the empty unit are the most varied: delay in starting the procedures with the shipowner; documentary failures; goods that get stuck in the bureaucracy of Customs agencies; seizure of imported goods without meeting legal requirements; commercial disagreements between exporter and importer, causing the abandonment of the cargo and its forfeiture decree; lack of space or conditions to receive the goods at the importer's premises, with the use of the container as packaging; and, finally, where the cause and consequence of the problem are confused, some importers, aware of the difficulty in obtaining empty containers, retain the unit deliberately in order to use it in future exports.
>
> [...]

> One of the ways to overcome the lack of containers obstacle is the awareness of all players in the sector that any problems with the goods do not affect the cargo unit and cannot harm its immediate return to the shipowner. The most suitable way to create this culture in the market is through the charging of container demurrage. Although the legal provision does not have the force to oblige the importer to promptly return the cargo safe, there is a clause in the transportation contracts that obliges the importer to pay a fine for its unreasonable retention.
>
> [...]
>
> The receipt of amounts as demurrage by itself would already have a fairly positive effect minimizing the losses caused by the unavailability of the container, indirectly contributing to moderate eventual increases in freight. However, it is the long-term effects of demurrage collection, carried out in an effective, orderly, and permanent way by all shipowners, which are the most interesting.
>
> The certainty, on the part of importers, that demurrage will be charge, will contribute to avoid delays in the return of the container. The importer, fearful of paying the fine, will be more attentive and diligent, creating mechanisms and procedures to enable the unloading and return of the container in the shortest possible time. The importer will be able to differentiate the load from the load unit. Any problems with the goods will be awaiting solution, prioritizing the delivery of the empty container, with the immediate request for its unloading by the importers.
>
> (GAZETA MERCANTIL, 2004, p. 2)

Currently, charging for container demurrage is already a widespread practice in the Brazilian market, but its legal institute needs to be further discussed. Conceptually, it is a daily amount agreed by the parties in favor of the owner or possessor of the container, resulting from the container not being returned within the agreed-upon period of free time.

> It is, in fact, a pre-fixation of the indemnity for the delay in the return of the container, precisely carried out to avoid uncertainty in the quantification, as is the case with the conventional penalty clause. This value works as a means of repression for the user to return the cargo unit within the deadline provided in the Ocean Bill of Lading and, in case of non-compliance, early settlement of losses and damages due to the injured party. (CECAFÉ, 2020 – Subsidy Collection)[1]

[1] Subsidy Collection N° 03/2020/SRG – ANTAQ was carried out from 09/21/2020 to 10/16/2020 and was later extended until 11/03/2020. Its objective was to send contributions and subsidies for the implementation of topic 2.2 of the 2020/2021 Biennium Regulatory Agenda, which seeks to develop a methodology to determine abusive charging for container demurrage.

Thus, one of the few consensuses in the analysis of the issue is the dual purpose of container demurrage: (i) compensation for losses and damages of the maritime carrier (freight that has not been obtained and logistical losses with the repositioning of containers, for example); and (ii) to compel the return of the container.

These inherent and inseparable functionalities are responsible for conflicting understandings as to the legal nature of container demurrage. The purpose of the indemnity is to compensate for losses and damages and the purpose of the penalty clause is to compel the return of the container. The discussion is relevant because its definition has significant consequences for the need to prove intent, the limitation of amounts, the statute of limitations, tax effects, among others.

It should be noted that there is no law that specifically deals with container demurrage. In the absence of specific legislation, it is the national jurisprudence that has been guiding interpretations about the applicable legal regime. In this context, container demurrage is now charged from users in analogy to the demurrage of ships, consolidating itself as a specific institute for the maritime transportation of containerized cargo.

It is worth mentioning that *Lex Maritima* is recognized by Brazilian Legislation as a criterion for contractual interpretation, as per art. 113, §1, II of the Civil Code and article 4 of the Law of Introduction to Brazilian Rules of Law[2]. However, the internalization of international usages and customs is not unconditional, as it is limited the precepts of Brazilian Law, which require the observance of solidary contractual principles, such as the social function of the contract, objective good faith, and the principle of contractual justice.

[2] As already explained, there has never been a federal legislation in Brazil that specifically deals with the legal provision and legal obstacles arising from container demurrage charges. In the absence of specific legislation on the subject, Decree-Law nº 4.657/1942, known as the Law of Introduction to the Norms of Brazilian Law, expressly provides the content of art. 4, which governs the following: "When the law is silent, the judge will decide the case according to analogy, customs and general principles of Law" – and this is what has been effectively constructed by jurisprudence. [...] Our Commercial Code (Law nº 556/1850) includes maritime trade in its second part, but only issues related to the chartering of ships, being completely silent on the subject of container demurrage, which can even be explained by a temporal aspect, since the phenomenon of containerization in international maritime transportation effectively occurred in Brazil after the 1980s – more than a hundred years after the enactment of the Commercial Code, which, it is worth noting, dates from 1850. (WINTER, 2019, p.42)

The statements of maritime carriers, exemplified in the excerpt transcribed below, emphasize that the transportation of cargo is a private activity, linked to the activity and performed by parties with equal capacities:

> 3. The maritime transportation contract reflects a convergence of wills. It is not an essential public service and the parties, as legitimate and capable legal entities, are free to choose with whom to contract. In this sense, contractual freedom is a corollary of the principles of Private Law applicable to maritime transportation contracts. (CENTRONAVE, 2020 – Subsidy Collection)

On the other hand, scholars, and advocates of users' rights postulate that the Bill of Lading (BL) has previously stipulated clauses with no room for negotiation, which would limit isonomy in the definition of the clauses.

> In fact, although the contract of carriage is formally considered a bilateral contract, it expresses the concrete will of only one of the parties, the carrier.
>
> The carrier imposes its will through a written contract with printed and previously stipulated clauses. Hence the term contract of adhesion.
>
> The will of the shipper or the recipient of the cargo is limited to the adherence to the contractual terms previously stipulated by the carrier. (CREMONEZE, 2012, pp.33 and 34)

The numerous disputes in all instances of the Brazilian judiciary indicate that the issue is far from being settled. If on one hand there are those who defend the existence of isonomy between the parties and the prevalence of the *Pacta Sunt Servanda* principle, others demand some state regulation as to the values stipulated by the carrier. Faced with this situation, ANTAQ has been called upon several times to take a stand.

Currently, in addition to the applicable Civil Code provisions, especially those related to the statute of limitations, we have in force ANTAQ Normative Resolution nº 18/2017 (RN-18), which provides for the rights and duties of users, intermediary agents and companies that operate in maritime support navigation, port support, cabotage and long distance, and establish administrative infractions. The normative reserved Section III (Container demurrage) to address the issue and contributed to reduce information asymmetry, defining, after extensive discussion with the regulated sector, the concept of container demurrage and the concept of free time. Furthermore, RN-18 determined the obligation of transparency and prior knowledge of the amounts charged, in addition to establishing clear milestones for the start and end dates of the free time.

Despite the regulatory advances introduced by RN-18, there are still many disputes and legal actions regarding the amounts charged for container demurrage. Many users of waterway transportation services allege the existence of abusive charges. To analyze the issue, ANTAQ included in its Regulatory Agenda, Biennium 2020/2021, the topic *2.2 – Development of a methodology to determine abusive charges for container demurrage* (ANTAQ Resolution nº 7.754/2020).

Thus, seeking to support the analysis of the theme, the Department of Research and Development (GDE/SDS) was asked to conduct the study "International Benchmark of Demurrage Regulation," in line with its regulatory competences[3].

This study contributes to the understanding of the international experience on the charge for container demurrage and aims to map the treatment applied in other countries to the regulatory problem under analysis, to subsidize the survey of possible actions and identify effects or impacts not yet detected by the Agency.

As specified in the General Guidelines and the Guidance Guide for the Preparation of Regulatory Impact Analysis (RIA) of the Presidency of Brazil[4], the study of international experience can contribute to the various RIA stages. Example:

> Bringing other perspectives on the regulatory problem.
>
> Pointing out approaches and possibilities for action not yet identified by the agency, body, or entity.
>
> Pointing out impacts of the problem or action alternatives not initially identified by the agency, body, or entity.

[3] According to ANTAQ's Internal Regulations (ANTAQ Resolution Nº 5.585/2014, art. 63, it is up to the Department of Research and Development– (SDS), [...] to "IV - carry out studies applied to the definitions of tariffs and prices practiced in cargo handling and storage activities in organized ports and authorized port facilities and transport of passengers and cargo in navigation, in comparison with the costs and economic benefits transferred to users by the investments made; V - carry out studies and research that promote continuous improvement of knowledge of the regulated market, with a view to strengthening the management quality of operators operating within the scope of the national waterway system; VI - carry out studies that support the formulation of public policies within the scope of the national waterway system."

[4] General guidelines and guidance for the preparation of a Regulatory Impact Analysis – AIR/Sub-office of Analysis and Monitoring of Governmental Policies – Brasília: Presidency of Brazil, 2018.

> Bringing useful data to analysis.
>
> Anticipating problems observed in action alternatives already tested.
>
> Anticipating unexpected reactions from agents to already tested action alternatives.
>
> Assisting in the definition of intervention monitoring indicators.
>
> Bringing benchmark performance parameters. (PRESIDENCY OF BRAZIL, 2018, p. 66)

Therefore, the study presented here aims to identify the international experience in the regulation of demurrage of containers and analyze the applicability of international concepts to the Brazilian legal system and the national logistics reality.

Accordingly, the first chapter, entitled "1 – LEGAL NATURE OF DEMURRAGE," addresses the origin of the institute, differentiating the demurrage of containers from that of ships. Then, the doctrinal divergences about the legal nature of demurrage and the dominant jurisprudence are presented. The chapter discusses the practical effects of each possible framework.

The following chapter, "2 – INTERNATIONAL EXPERIENCE," analyzes the solutions pointed out by some countries, bringing other perspectives to the issue, with the suggestions of the International Federation of Freight Forwarders Associations (FIATA)[5] and the regulatory proposal of the Federal Maritime Commission (FMC) being especially analyzed[6].

Then, chapter "3 – CHARACTERISTICS OF DEMURRAGE CHARGE IN BRAZIL" focuses on specific Brazilian regulatory problems and makes a statistical analysis of the taxpayers' positions in Subsidy Collection.

Chapter "4 – COMPARISON OF VALUES" compares the demurrage values of containers and days of free time charged internationally by the main shipowners operating in Brazil, in comparison with the values charged in the national territory.

[5] FIATA is a non-governmental organization that represents freight forwarders and cargo agents in around 150 countries, being a reference source in international policies and regulations that govern the freight forwarding and logistics industry. (Source: https://fiata.com/who-we-are.html)

[6] The FMC is the US waterway transport regulatory agency, whose goal is to ensure that neither the activities of liner shipping groups nor the laws or regulations of foreign governments impose unfair costs on US exporters or US consumers of imported goods. (Source: https://www.fmc.gov/about-the-fmc/)

Finally, chapter "5 – CONCLUSIONS" presents the main notes of the previous chapters, making a critical summary of what was presented.

Considering the stipulated objectives, the methodology applied was exploratory research, gathering information about the international experience in the regulation of container demurrage to support an analysis in Comparative Law. Therefore, the subject was investigated, formulating more precise problems and hypotheses, without intending to end the discussion.

In this sense, the procedural methodology applied was bibliographic research, in which knowledge and information about the topic were collected from different published materials, putting different authors, data and points of view into dialogue.

2. LEGAL NATURE OF DEMURRAGE

2.1. Origin

> When starting the analysis of the origin of the container demurrage charge, it's worth emphasizing Collyer's (2007) etymological analysis. In addition to delving into the meaning of the term, the text indicates the spread of the fee in several countries and languages. Demurrage is a compound word, formed by agglutination (demur + rage). The definition of the term is based on demur: period agreed between the contractual parties during which the owner or operator of the vessel places and keeps it at the disposal of the charterer (or the consignee of the goods) for loading and discharge operations during which no payment is owed. According to this time approach, demurrage is the utilization of a vessel beyond its stay; it is the extra time used.
> This concept can be confirmed by the simple observation of the words used to indicate demurrage: *överliggetidsersättning* or *överliggedagspenge*, in Scandinavian countries; *overliggeld*, in the Netherlands; *Überliegegeld*, in Germany; *surestaries*, in France and Belgium and even *contro-stallie*, in Italy (TIBERG, 1971, p. 2). The prefix (over, Uber, sur) is evident in all of them, meaning beyond, over the stay. It is easy to conclude that the intrinsic meaning of the word carries with it the notion of time, or excess of time. (COLLYER, 2007, pp. 3 and 4)

Its origin goes back to the first charter contracts and is related to the time that the ship remained in the port beyond the established term.

Demurrage was born out of the *Lex Mercatoria*, the uses and customs rooted in customary Maritime Law which is traditionally applied to delayed vessel return based on charter contracts instrumentalized in the charter party.

> However, after the emergence of containers and their widespread use in global transport, especially in the maritime modal, the first cases of container demurrage took place, originating from the maritime transportation contract, not from the charter contracts.
>
> Container demurrage was accepted in our country without ever having been properly regulated or affirmed in Brazilian Law. It was introduced by usage and customs and by analogy with the demurrage of a ship existing in the Commercial Code of 1850. This circumstance calls for urgent discussion about its application and its effects on contemporary reality. (WINTER, 2019, p. 10)

The term is currently used both to define delay and to refer to the amount paid because of the delay. Frequently, the expression is used with different meanings, which can lead to a confusion of concepts. At the wharf, some relate demurrage with the occupation of space in the port, describing it as the overextension of time a container remains in the terminal, and the amount charged if the container does not return to its owner within the agreed time is known as detention. For others, demurrage is the amount paid for prolonged use of the container within the port and detention for prolonged use outside the port. In the present work, the term detention is not used. In addition, the terms "demurrage" or "container overstay"[7] are permutable and refer only to the delay in returning the container, with no relation to the additional stay in port.Although it is relatively easy to adjust the understanding of the term, defining its legal nature brings many controversies. Even in relation to the demurrage of ships, which has been charged for centuries now, there is great disagreement in the doctrine as to its legal nature.[8]

[7] The concept adopted in this work is that of ANTAQ Normative Resolution Nº 18/2017, art. 2, XX - container demurrage: amount due to the maritime carrier, the container owner or the forwarding agent for the days that exceed the agreed period of free time of the container for shipment or for its return.

[8] Defending the indemnity character of the demurrage, DINIZ (1998, p. 56); SAMPAIO DE LACERDA (1984, p. 191); and GILBERTONI (2005, p. 196) apply. Attributing the nature of a fine, KEEDI and MENDONÇA (2002, p. 100); ANJOS and CAMINHA GOMES (1992, p. 187); and LOSTADO (2000, p. 1) stand out.

In comparative Law, French Law and German Law frame the nature of demurrage as a freight supplement if contemplated in the contract. In the same sense, Portuguese Law expressly sustains the nature of demurrage as a freight supplement.

> In American Law, demurrage has a compensatory nature. (OCTAVIANO MARTINS, 2015, p. 419)

The French framing of demurrage as a freight supplement is not a consensus and there are those who understand it as an indemnity, as indicated in the transcript below.

> Georges Ripert himself (1954, p. 234), however, states that the legal nature of demurrages is debatable, but he takes the following position: "When considering compensation paid by the charterer to the shipowner for having exceeded the period provided for in the contract, it must be said that demurrages represent damages." He clarifies that French jurisprudence, considering that the term demurrage can either indicate additional time or compensation, ends up concluding that demurrage is a supplement to the freight.
>
> Ripert explains that, for the aforementioned jurisprudence to reach this conclusion, it certainly started from the definition of charter existing in article 286 of the French Commercial Code: convention or contract for the leasing of a vessel; thus, if the loading and/or unloading operation is extended for a certain time beyond the contracted stay, the rent is extended. Ripert, however, rebels against this position. He states that "the legal analysis is certainly false" and goes back to expressing himself in the sense that demurrages are, legally, "damage and losses fixed conventionally between the parties for the delay in the performance of the charterer's obligations" (RIPERT, 1954; apud COLLYER, 2007, p.5)

This issue in English Law has the distinction between a fine and a pre-fixed indemnity as a peculiarity[9]. This interpretation, based on Common Law, indicates that

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Salgues (2005, p. 2) sustains the character of a penalty clause in demurrage. In the same sense, according to Sorrentino, Higa, D'Antonio and Ribeiro (2006, p. 12), and since demurrage is provided for in the contract, it cannot be attributed to a fine for non-compliance with the obligation. Esteves (1988, p. 61) maintains, based on the Portuguese legislation referred to above, that demurrage is a freight supplement, because although it implies delay, demurrage must not be understood as a situation of delay incurred by the charterer or as a breach of a contractual duty, but a right of the charterer. He also maintains that demurrage consists, at the same time, of a new term granted to the charterer and an additional amount to the freight, to be paid in cash. (OCTAVIANO MARTINS, 2015, p. 418)

[9] The institute of "pre-fixed indemnity" was not established in the Brazilian legal system. In the Civil Code, there is the indemnification, corresponding to the compensation for losses and damages (arts. 402 to 405 of the CC) and the penalty clause, whose value cannot exceed the main obligation (arts. 408 to 416 of the CC). Judicial decisions that understand the demurrage of containers as a pre-fixed indemnity do so based on uses and customs, internalizing this institute of English Law.

demurrage has the nature of a "liquidated indemnity" according to the teachings of Clive M. SCHMITTHOFF (1980)[10] *apud* FARIAS (2020):

In English Law, a fixed amount to be paid for breach of contract may be either a pre-fixed indemnity or a fine. (...) With regard to the treatment of contractual penalty clauses in other legal systems, Peter Benjamin adds that -the extreme complexity of the French, German and Soviet legislations with regard to penalty clauses, assuming that penalty clauses are or are not susceptible to modification, each system elaborated its own rule, adopting a series of exceptions that gave rise to considerable uncertainty in practice. These observations, however, do not apply to Common Law countries, where the English distinction between pre-fixed damages and fines prevails. (FARIAS, 2020 – Collection of Subsidies)

It is further added that:

In English Law, for a long time, demurrage was the sum or amount paid (under a contract) for the detention of a vessel in a loading or discharge harbor, beyond the contracted stay. Nowadays, the prevailing understanding, based on Case Law, is that demurrage is a pre-fixed indemnity for breach of contract (liquidated damages for such a breach), as stated by John Schofield (2000, p. 317).

> It is interesting, however, the understanding of Lord Brandon, of the House of Lords (apud SCHOFIELD, 2000, p. 315), when judging the case "President of India v. Lips Maritime Corporation (The Lips)." For him, demurrage is liability in (or for) liquidated damages, which we could translate as a (contractual) liability or obligation to indemnify (according to the pre-fixed amount) the loss or damage caused by the breach of contract. Other forms used by English Law to conceptualize demurrage are *liquidated damages, agreed additional value for an allowed detention, e sum payable under and by reason of a contract for detaining a ship*.
>
> However, demurrage should not be confused with damages for detention. This expression is commonly used to mean compensation (to be fixed) for detention of the ship, and it can be charged in addition to demurrage or in replacement of it, although the English and American courts resist this claim, which will be detailed below. As a result of what we have said, therefore, we can conclude that demurrage is a species of the indemnity genus (damages for detention).
>
> Therefore, demurrage can either mean the time used beyond the permitted stay, or the agreed amount that must be paid in compensation for the use, or detention of the ship, beyond the permitted stay. In the first case it is time, or delay, and in the second, according to English jurisprudence, it is an (pre-fixed) indemnity for breach of contract. (COLLYER, 2007, p. 5)

[10] SCHMITTOFF, Clive M. Export Trade: The Law and Practice of International Trade, 7th Edition, London, Ed. Stevens & Sons, 1980, pg. 87.

However, it is crucial to note that most Comparative Law considerations and analyses refer to the demurrage of ships. When it comes to the demurrage of containers, frequent transpositions of legal concepts are seen in the doctrine and jurisprudence[11], giving rise to significant distortions in interpretation, since each institute originates from a completely different contract.

> Demurrage of ships should not be confused with demurrage (detention) of containers.
>
> Despite the many differences between the two institutes, both use the same terminology in some legal systems (such as Brazil), due to a common point: lay days, extrapolation of the stay period. (OCTAVIANO MARTINS, 2015, p. 535)

The demurrage of ships is formalized by the ship charter contract, or departed letter, being negotiated between the freighter and the charterer of the vessel. Demurrage of containers, on the other hand, results from the instrumentation of the transportation contract, which binds the carrier (or its representative) to the service taker (shipper or consignee).

As an example of imprecision, when referring to the provision of demurrage of containers in Brazilian legislation, many authors cite the Commercial Code[12] in the chapter that deals with the nature and form of the charter contract and the letters of departure.

> With all due respect to the historical *Lex Mercatoria*, based on usages and customs, and to the adoption of the analogy, there is no way, nowadays, to accept the interpretation that the commercial, contractual and legal treatment destined to demurrage in cases of chartering of ships , as well as its consequences, is the same to be given to container demurrage, as they are, in fact, absolutely different situations, as will be shown below. (WINTER, 2019 p.26)

[11] "Another reason for the legal uncertainty seen in the courts is the confusion of various concepts. This confusion is often generated by specialists in Maritime Law, in order to protect the interests of their clients (generally shipowners), which have been causing the distortion of several concepts and, mainly, the formation of dangerous judicial precedents that do not match the general principles of Private Law, such as the social function of the contract, the balance between the parties, among others." (MOYSES FILHO, Marco Antônio and SILVA, Renã Margalho. In: MARTINS, Eliane M. Octaviano; OLIVEIRA, Paulo Henrique Reis de (Orgs.). Maritime, port, and customs Law: contemporary issues. Belo Horizonte: Arraes Editores (2017, p. 371).

[12] Commercial Code (arts. 567, nº 5 and nº 6; 591/593, 595, 606, 609, 611, 613 and 627).

Therefore, there is no factual support for treating the two concepts as analogous. Corroborating the arguments raised, the renowned American legal dictionary Black's Law Dictionary[13] brought in its edition published in 2004, different definitions of ship and container demurrage. On the demurrage of ships, it defines that it is *"pre-fixed indemnity due by the charterer to the shipowner for the charterer's inability to load embark and disembark the cargo at the agreed time"*; and the demurrage of containers defined as *"charge derived from the late return of maritime containers or other equipment."*

> 12. The conclusion is that ship demurrage and container demurrage are completely different institutes: while in the first case the charge takes into account that the service has not yet been completed, in the second the amount charged is based on the incentive to return the cargo units for a brief resumption of the shipping carrier's logistical flow, and also to indemnify for the impediment in providing a new maritime transport service with the respective cargo box. (CENTRONAVE, 2020, pp. 2 and 3 – Charging of Allowances)

2.2. Doctrinal differences

The legal nature of the demurrage of containers generates great doctrinal and jurisprudential discussion, as its framework has consequences for the need to prove intent, the limitation of amounts, the determination of the statute of limitations, tax effects, among others.

The relevance of investigating the different positions in the doctrine about the legal nature of demurrage, framing it in one of the existing institutes in the Brazilian positive system, stems from the dogmatic science of Law, which, according to Tercio Sampaio Ferraz Jr. (*apud* ROSSI and CASTRO JÚNIOR, 2018, p. 10), *"is thus constructed as a process of subsumption dominated by a binary schematism, which reduces legal objects to two possibilities: it is either about this or about that."*

> Basically, there are three exponent theories that attempt to determine the core of container demurrage as: (i) additional freight (or supplementary freight); (ii) penalty clause, whose terminology is best used when there is a contractual provision regarding pre-established amounts (demurrage) or not (detention), due as demurrage (when there is none, it is preferable to refer to it only as a fine); and (iii) indemnity. (MARCHIOLI, 2020 – Subsidy Collection)

[13] GARNER, Bryan A., Black's Law Dictionary, Edition 8, U.S.A., Ed. Thomson West, 2004, p. 465, *apud* FARIAS, 2020 – Subsidy Collection.

The examination of the matter is a challenge for both the factual analysis, since its presence in maritime transport relations is inevitable due to logistical and administrative problems in Brazilian ports, and the legal analysis, due to the enormous confusion regarding doctrinal concepts and the diametrically opposed interests involved.

> Regarding the doctrinal understanding to define the legal regime applicable to container demurrage, there is a tendency for some scholars to defend and define the indemnity nature of the institute without limitation of values, based on the principle of *"Pacta Sunt Servanda,"* which favors the maritime carrier.
>
> On the other hand, there is part of the specialized doctrine that understands that container demurrage must be interpreted under the legal regime of a penalty clause.
>
> Specifically, regarding the framework of the legal regime to be applied to container demurrage, there have been many doctrinal theses, for example: freight supplement, lending, fine, lease, pre-fixed indemnity (penalty clause) and simple indemnity.
>
> Notably, those who defend the interests of shipowners use legal arguments in favor of the indemnity legal regime, and those who defend the interests of cargo or importers use the legal grounds for applying the legal regime of penalty clause. (WINTER, 2019, p. 56).

It is worth remembering that container demurrage collection does not have an express provision in Brazilian legislation at the level of ordinary law. In the absence of a positive reference, there are those who defend the analogy with the rules for demurrage of ships provided for in the Commercial Code of 1850, especially regarding what must be stated in the charter contract (known as charter party). However, as highlighted above, the container demurrage originates in the transportation contract and not in the charter contract.

Given the inapplicability of the Commercial Code, it is within the scope of the Civil Code, Law Nº 10.406, of January 10, 2002 (CC), that the issue can be settled.

The current that understands demurrage as a penalty clause is based on the fact that demurrage is an accessory obligation, since there is no demurrage without the main obligation, which is the transportation contract. From this point of view, it must be previously fixed in the contract, with a determined deadline and amounts for the delay. This framework would result in the application of art. 412 of the Civil Code (CC), which determines the limitation of the value of the sanction imposed in the penalty clause to that of the main obligation.

However, article 408 of the CC provides: "The debtor incurs by right in the penal clause, provided that, culpably, he fails to fulfill the obligation or constitutes a delay." Important information brought by the aforementioned article is that only the culpable default of the obligation will incur in a penalty clause.

In that regard, the framing of the container demurrage as a penalty clause would depend on the assessment of the debtor's fault or willful misconduct, which would go against the grain of international practice. On the other hand, in the agreed penalty clause (provided for in the contract), it is not necessary for the creditor to claim damage (art. 416 CC), that is, it would waive the effective proof or settlement of the damage.

In summary, the text below describes the understanding of the current that defends that demurrage is a penalty clause:

> Notably, it is an ancillary obligation derived from the Maritime Bill of Lading, which main purpose is to transport the cargo from one point to another upon payment of freight. As the container is an integral part of the ship from the moment it is made available to the consignee, it must be returned within the agreed period of time.
>
> Its character as a penalty clause arises precisely from the prefixation of an amount already paid to compensate for any damage in the face of non-compliance with the accessory obligation, that is, the non-timely return of the container. Hence, arises the penalty, already predetermined in the contract, either in the Bill of Lading or in the Term of Commitment to Return the Container, in the exact terms of article 408 of the Civil Code.
>
> Due precisely to the dynamics of maritime transport, the penalty clause does not require proof of damage, in order to prevent the carrier from having to, in each situation, survey and prove, on a case-by-case basis, its losses, which would really affect its activity, given the difficult procedure to be carried out on a case-by-case basis. (WINTER, 2019, p. 67)

The current that defends that container demurrage is an indemnity bases its argument on the fact that it derives from a contract resulting from a private relationship between actors with isonomy of decision and based on the autonomy of the parties' will. In addition, it reinforces the jurisprudential understanding, which, with a large majority, understands it to be an indemnity.

> The aforementioned doctrine has already shown a strong inclination towards the indemnity nature of demurrage, and national jurisprudence although in isolated situations it has stated that it is a lease, a lending, and even a fine, tends to accept a container demurrage as compensation for the loss of the carrier in not being able to have the equipment for other international trips for the transportation of goods, the value of which to be indemnified is pre-

adjusted by the parties

> involved or, as others prefer to say, the demurrage is pre-determined by the carrier and admitted by the consignee or importer of the transported goods, which does not change the obligations assumed since it comes from some form of pact. (SILVEIRA, 2018 p. 36)

By understanding the demurrage of containers as an indemnity, it would fit into art. 402 of the CC and it must be considered that the losses and damages owed to the creditor cover, in addition to what he lost, what he reasonably failed to profit from. However, it cannot be forgotten that the amounts owed only include actual losses and lost profits as a direct and immediate effect of the debtor's non-performance (art. 403 of the CC), that is, the creditor's obligation to prove the losses would be unavoidable.

2.3. Dominant jurisprudence

Currently, the prevailing jurisprudence understands that demurrage collection or container demurrage has the legal nature of a pre-fixed indemnity for breach of contract, in order to compensate the owner for the retention of the safe for a longer period than the one previously agreed upon, regardless of the demonstration of guilt or injury. Thus, the judgments of the Superior Court of Justice (REsp 1.286.209-SP; AgInt in AREsp 842151-SP; AgRg in REsp 1451054-PR, among others) stand out, which understand the legal nature of container demurrage as a pre-fixed indemnity and not as a penalty clause.

Among the judgments that caused the greatest repercussion in the maritime sector was the one that decided, in 2016, Special Appeal nº 1.286.209, of which João Otávio de Noronha was the Minister Rapporteur. By unanimous decision of the Third Panel, the following amendment was generated:

> SPECIAL RESOURCE. ACTION FOR COLLECTION OF CONTAINER OVERSTAYS (DEMURRAGES). DENIAL OF JURISDICTIONAL PROVISION. NON-OCCURRENCE. LEGAL NATURE. INDEMNITY. CONTRACTUAL BREACH. DEBTOR'S LIABILITY. LIMITATION OF INDEMNITY VALUE. *PACTA SUNT SERVANDA*. 1. The negative allegation of delivery of full jurisdictional provision is unreasonable if the Court of origin examined and decided, in a motivated and sufficient manner, the issues that delimited the controversy. 2. Demurrages have a legal nature of indemnity, and not of a penalty clause, which excludes the incidence of art. 412 of the Civil Code. 3. If the value of the demurrages reaches an excessive level only due to the negligence of the party obliged to return the containers, the *Pacta Sunt Servanda* principle must be privileged, otherwise the Judiciary will reward the wrongful conduct of the debtor party. 4. Special resource known and provided.

With due respect, the main criticisms of the positioning emanated derive from the lack of differentiation between the charter contract (which gives rise to the demurrage of ships) and the transportation contract (which gives rise to container demurrage).

> The doctrinal quotes by J. C. Sampaio de Lacerda[113], Carla Adriana Comitre Gibertoni[114] and Carlos Rubens Caminha Gomes/Edson Antônio Miranda[115], all used to support the vote, are clearly directed to charter contracts, not to maritime cargo transportation contracts (as, in fact, it occurred in the specific case).
>
> Notably, the wrong direction of the vote remains clear due to the basis of interpretation used, confusing the demurrage of a ship (chartering) with the demurrage of a container (transportation contract – BL or Term of Commitment). (WINTER, 2019, p. 58)

To exemplify the importance of not exchanging the concepts of demurrage of ships and containers, it is enough to verify how each contract is carried out and what is the bargaining power of each party.

> Even more attention should be given to these differences in cases where the "consignee" did not even have prior access to the transportation contract, or who, due to the requirement to release the cargo, signed the Container Return Commitment Term by their legal representative. (WINTER, 2019, p. 59)

Despite the prevailing understanding, one cannot forget the discordant positions. In this sense, it is worth mentioning the position of Judge Cauduro Padin, of the São Paulo Court of Justice, when reporting an Appeal involving container demurrage, especially as it occurred after the STJ judgment (Resp Nº 1.286.209-SP), as shown in the excerpt below:

> Action of obligation to do c.c. damning request. Sea freight transport. Demurrage overstay. Similar nature to the penalty clause. Anticipation of loss and damage. Incidence of the sanction value in accordance with the terms of the liability waiver. Guilty conduct that is equivalent to the delay/default itself. Exclusion of liability only in fortuitous cases. Innocence. Non-incidence of the Consumer Protection Code. Sentence maintenance. Resource not provided.

The argument previously discussed Is extracted from the above decision:

> Demurrage has an effect and nature comparable to the penalty clause and this is a lawful agreement between the parties. It seeks to achieve the disincentive to the total or partial breach of the obligation or even to remove the delay in the performance. The clause brings with it a prior assessment of the losses and damages freely adjusted by the

> parties. As a result, it does not depend on proof of damage. (ROSSI and CASTRO JÚNIOR, 2018, p. 16)

Thus, despite the existence of discordant opinions, Brazil adopted through jurisprudential decisions, demurrage as a pre-fixed indemnity. Although in Brazil there is no distinction between pre-fixed indemnity for damages and a penalty clause, as it exists in the law originating from countries that apply the Common Law, Brazilian Courts continue to understand that container demurrage should not be treated as a penalty clause.

Finally, it is noted that despite the prevailing jurisprudence there are still many complaints from users and those who defend their interests, as can be seen in the excerpt below.

> We realize, with undisguised concern, that the legal nature of demurrage has been subverted over the years, in such a way that it is no longer a legitimate protection mechanism for the shipowner against possible abuses by their container users, to become a reprehensible form of oppression and undue enrichment. Not all, but many shipowners profit more from demurrage charges than from the freights themselves, and the demurrage charge does not serve the purpose of profit, it serves only to "punish" possible abuses by cargo consignees regarding the use of containers for longer than is due and agreed. (CREMONEZE, 2012, *apud* ROSSI and CASTRO JÚNIOR, 2018, p. 32)

3. INTERNATIONAL EXPERIENCE

In recent years, the demurrage rate has increased considerably worldwide, and the free time has decreased. There were indications that shipowners abused demurrage charges to maximize profits, not necessarily from freight. (ROEMER, 2018)

The increase in demurrage charges generated many disputes, complaints, as well as legal disputes.

Other factors like port congestion, such as the one that occurred in the United States between 2014 and 2015, due to climate and labor problems, also partly influenced the increase in the collection of this fee.

This chapter addresses how the demurrage issue was dealt with by the Federal Maritime Commission (FMC), as well as the suggestions given by FIATA (International Federation of Freight

Forwarders Associations) for handling commercial disputes around the practice and charging of demurrage.

3.1. FMC interpretive rule

On May 18th 2020, the final interpretive rule (FMC, 2020) of the Federal Maritime Commission (FMC) dealing with container demurrage came into force. This decision represented an important reference for a problem repeatedly pointed out in international maritime transportation and related to the high charge for container demurrage in several ports around the world.

Under this new interpretive rule, the FMC can assess the extent to which the container demurrage rate and policy fulfill the objective of encouraging the movement of cargo and promoting the fluidity of transportation. The rule also provides guidance on how the Commission can apply this principle in the context of cargo (and information) availability, considering factors related to the content and clarity of shipowners' and maritime terminals' policies, as well as in relation to the terminology used and the return of empty containers.

Although the final interpretive rule is the result of Fact-Finding Investigation Nº 28, from 2018, the FMC's attention to the issue of demurrage dates back to 2014 when this Commission hosted four regional forums on ports that addressed congestion in the international maritime chain. Although these forums did not directly address the issue of demurrage, it was clear that shippers and truck drivers were unhappy with the demurrage practices and free time stay period of the container.

In 2015, the FMC published a Report on demurrage rules, fees, and practices (FMC, 2015). This Report contained the following definitions[14]:

> Demurrage is a charge for the use of space; detention is a charge for the use of equipment. Free time is the grace period for which neither of these charges will be incurred. Both are meant to compensate for the use of space and equipment, and to encourage the efficient movement of cargo by importers, exporters, and drayage providers.

[14] It is noteworthy that the definition of container demurrage in the present study is based on the RN-18 and, as explained in Chapter 1, does not cover the costs related to the occupation of space in the port terminal.

While the 2015 FMC Report provided a definition, terms and practices related to demurrage are not uniform even among shipowners, as noted by the Fact-Finding Investigation Nº 28 research team, which identified two main approaches used to determine demurrage charges:

> 1. Based on whether the container is (a) on-terminal (inside the gate) or (b) off-terminal (outside the gate). In this case:
>
> a. "Demurrage" is a charge for exceeding allotted free time on the terminal – i.e., between when cargo is off-loaded from a ship until it moves out the terminal gate. Such "demurrage" may represent use of terminal space (terminal demurrage) and the use of equipment (carrier demurrage – i.e., in-port detention).
>
> b. "Detention" is a charge for use of equipment (containers) beyond the allotted free time outside the port – i.e., after the full container has left the port and until the empty container is returned.
>
> 2. Based on whether the container is: (a) being charged for extended use of terminal space, or (b) for extended use of carrier equipment (container). In this case:
>
> a. "Demurrage" is the MTO's charge for exceeding allotted free time on the terminal (but not for carrier equipment use). If there is a carrier charge for use of the container while cargo is on the terminal, it would be labelled as some form of "detention" – e.g., in-port detention.
>
> b. "Detention" is the charge for use of equipment (containers) beyond the allotted free time – whether at the terminal or outside the port. (FMC, 2018)

As pointed out in the FMC preliminary Report (2018), the different approaches to the definition regarding the term and occurrence of demurrage give rise to doubts and questions, mainly for users of maritime transport:

> Under the first approach, it might be less clear to a VOCC's customer what it is being charged for – terminal space usage or container usage, or both. Moreover, because MTOs sometimes collect carrier demurrage on a VOCC's behalf, it might not be clear to a customer to whom their payment goes.
>
> Under the second approach, it is clear the MTO who controls the terminal is charging for extended use of its asset (terminal space), and the carrier who controls the container is charging for the use of its asset (the container).

From the FMC Report (2015), the following main points can be highlighted: the total average of demurrage and detention prices can be higher for importers than exporters; demurrage rates are higher than detention rates; US ports have similar rates, except New York/New Jersey ports that have higher prices; demurrage practices seem to be more

under the control of shipowners than of maritime terminal operators[15] (MTOs); the terminology is not uniform, nor are the circumstances in which these fees are not charged, get reimbursed, or have another form of mitigation, making comparison in the sector unfeasible.

The FMC Report (2015) also corroborated the perception that demurrage was not serving the purpose of speeding up the movement of cargo, which was its original goal.

It should be noted that the final interpretive rule is the result of a process that began in December 2016, when a coalition of shippers called the "Coalition for Fair Port Practices" submitted a petition to the FMC for the adoption of an interpretive rule that would clarify what "fair and reasonable rules and practices" would be regarding the assessment of "demurrage," "detention" and "per diem":

> The Coalition for Fair Port Practices ("Petitioners" or "Coalition"), a group of 26 trade associations representing importers, exporters, drayage providers, freight forwarders, Customs brokers, and third-party logistics providers ("3PLs"), requests that the Federal Maritime Commission ("FMC" and "Commission") initiate a rulemaking proceeding, pursuant to 46 C.F .R. § 502.51, for the purpose of adopting a rule that will interpret the Shipping Act of 1984, as amended, and specifically 46 U.S.C. § 41102(c), to clarify what constitutes "just and reasonable rules and practices" with respect to the assessment of demurrage, detention, and per diem charges by ocean common carriers and marine terminal operators when ports are congested or otherwise inaccessible. Specifically, Petitioners are proposing a rule for adoption by the Commission and request specific guidance as to the reasonableness of such charges when port conditions prevent the timely pick up of cargo or the return of carrier equipment because of broad circumstances that are beyond the control of shippers, receivers, or drayage providers. (COALITION, 2016)

For some years now, North American importers and exporters, transportation intermediaries, and truck drivers complained that shipowners and maritime terminal operators (MTOs) were adopting unfair demurrage practices that penalized shippers, intermediaries, and truck drivers for circumstances beyond their control.

Thus, the intermediaries and truck drivers petitioned the Commission to adopt a rule specifying certain circumstances in which the charge for demurrage

[15] As defined by the FMC, MTOs include public port authorities and private terminals.

and detention would be unreasonable. They requested that shipowners and terminals not be allowed to charge for demurrage when cargo and equipment could not be recovered or returned, and that charging in these situations weakened the incentive for these companies to seek solutions to port congestion or their own operational inefficiencies.

Thus, in early March 2018, the FMC approved the initiation of an investigation headed by Commissioner Rebecca Dye[16], focusing on practices related to demurrage. This investigation, called Fact-Finding Nº 28, aimed to clarify five main points:

- Whether the alignment of commercial, contractual, and cargo interests increases or worsens the ability to efficiently move cargo through US ports.
- If, and when, the carrier or MTO delivered the cargo to the shipper or consignee.
- What are the demurrage and detention collection practices.
- What are the practices regarding delays caused by external events or stakeholders.
- What are the practices regarding dispute settlement.

During the investigation, hearings, field interviews, meetings with industry leaders, and information gathering were carried out to ascertain the facts. In September 2018, a preliminary Report was published, and in December 2018 the Final Report was published.

Among the findings of the investigation and presented in the Final Report (FMC, 2018) the following points can be highlighted:

- Demurrage and detention are valuable charges when applied to encourage the prompt movement of cargo from ports and maritime terminals.
- The entire international maritime logistics chain can benefit from transparent, consistent, and reasonable demurrage practices.

[16] The FMC's governing body consists of the President and four Commissioners, all appointed by the President of the United States and confirmed by the US Senate for a four-year term.

- The performance of the international logistics chain can be improved by providing information on the status of the cargo.
- Standardized and transparent demurrage language would also improve the international freight system.
- Billing practice and dispute settlement process should be clear, streamlined, and accessible.
- There should be explicit guidelines as to the types of evidence that are relevant to resolving disputes.

In August 2019, Commissioner Dye recommended the FMC to issue an interpretive rule[17] to implement the general guidelines contained in the Final Report on the application of demurrage charges. She also recommended that the Commission establish an Advisory Board of Shippers and continue to support the work of the Supply Chain Innovation Team in Memphis (FMC, 2019).

According to Commissioner Dye's recommendation, the suggested interpretive rule seeks to clarify how the Commission will assess the reasonableness of demurrage and detention practices. In this sense, the purpose of charging these fees is to serve as a financial incentive for those interested in the cargo to timely remove it and return the equipment. However, when the incentives no longer work, as shippers are unable to collect cargo or return containers within the agreed time frame, the charges must be suspended.

As for the Advisory Board of Shippers, Commissioner Dye points out that it will allow the assessment of the implementation of the recommendations of Fact-Finding Nº 28, as well as contributing to obtain advice from North American importers and exporters on other matters of the Commission.

In September 2019, the FMC published a proposed interpretive demurrage rule that received several comments. After analyzing these, the Commission published the final interpretative rule in May 2020 (FMC, 2020), the full text of which can be viewed in Attachment I of this Report.

[17] Interpretive rule is an agency rule that clarifies or explains existing laws or rules/regulations. An interpretive rule does not need to satisfy the requirements set out in the Administrative Procedure Act, e.g., notifying the public and providing an opportunity for comment.

The rule sets out a non-exhaustive list of factors that the FMC may consider in the analysis to assess whether demurrage practices are fair and reasonable, and builds on the understanding that demurrage charges serve to expedite the movement of cargo in terminals, as they are an incentive for the various agents acting in the logistics chain to seek to move with agility in order to give fluidity to transportation. Considering this, the interpretive rule of the FMC premises that the more the demurrage practices are aligned with the search for agility and fluidity of transportation, the less they should be considered unreasonable.

The guidelines adopted by the FMC in the final interpretive rule aim to help shipowners and MTOs to avoid penalties provided for in the Shipping Act, as well as to increase the awareness of shippers, intermediaries and truck drivers about their obligations in order to promote fluidity of the freight system, bring clarification, reduce and speed up disputes, in addition to increasing competition and innovation in operations and commercial policies, emphasizing the issue of providing information, especially regarding cargo availability.

It is worth noting that shipowners and maritime terminals agree that these points are part of their list of obligations.

With the rule, the FMC can consider whether the regulated entities are providing adequate information to those responsible for the cargo. Thus, in practice, the Commission may consider the type of notice and to whom the notice is addressed, providing the format, method of distribution, timing, and effect. As a result, shipowners must include in their contracts the obligation to inform consignees when they can remove the cargo. The alignment of this information between shipowners, MTOs, intermediaries, and truck drivers contributed to an efficient removal of cargo from the terminal space.

In addition, the Commission's guidelines (FMC, 2020) focused on the existence, clarity, content, and accessibility of dispute settlement and demurrage charging practices. They also highlighted the issue of terminology used, as investigations found that demurrage practices and rules were complex, inconsistent, variable, and lacked transparency. Some of the main points addressed by the FMC are listed below:

a) The interpretive rule applies to container demurrage practices and regulations. Thus, for the purposes of the rule demurrage includes

all charges, including per day, determined by shipowners, maritime terminals, or maritime intermediaries for the use of terminal space (onshore) or container, not included in freight (FMC, 2020).

b) Historically, the FMC recognizes that demurrage has penal elements that were established to encourage the prompt movement of cargo off the pier, but also includes an element compensating for the use of facilities, security, fire protection, etc., in the case of non-withdrawal in the free period.

c) While the focus of the FMC is on the incentive principle and its applications, the guidelines presented in the interpretive rule also include other factors that the Commission may consider as contributing to the reasonableness of the matter. For example, the existence of accessibility to regulations and the practice of demurrage. This is due to the fact that, during investigations, it was found that there was a lack of transparency regarding demurrage practices, including dispute settlement processes and collection procedures.

d) Regarding dispute settlement, the FMC considers it important that information such as contact channels, deadlines and requirements for conciliation be made available.

e) A controversial point that emerged in the investigations concerns the burden of proof, that is who should gather evidence relevant to the issue of demurrage. The FMC points out that demurrage disputes can be settled more efficiently if the shipper or truck driver knows in advance what kind of documentation or other evidence the shipowner or terminal needs to extend the free period or not charge demurrage fees.

f) The interpretive rule states that the Commission may consider in the reasonableness analysis the extent to which the regulated entities have defined demurrage terms, the accessibility of definitions, and how much the definitions differ from terms used in other contexts. The FMC understands that a basic principle of demurrage practices is the clear definition of the terms used.

g) While not a rule-specific subject, the term "carrier haulage" appeared many times during the rule-building process. "Carrier haulage" is a transportation arrangement also referred to as "store door" or "door move" or "door-to-door" delivery, as we know it in Brazil. In this type of transportation arrangement, the shipowner is responsible for arranging the container's transportation from one terminal to another location, such as a consignee warehouse. The "merchant haulage" is also known as CY ("container yard"[18]) or "port-to-port" transportation. In the latter case, the shipper makes the arrangements for land transportation.

h) Some argue that in the case of "door-to-door" transportation, the shipowner does not charge for demurrage, as he is responsible for ensuring that the containers are picked up in time from the terminal and delivered to the appropriate place.

i) During the investigation, it was recorded that some shipowners charged demurrage to businessmen who do "port-to-port" arrangements but did not charge businessmen who do "door-to-door" arrangements. When shipowners make a "door-to-door" arrangement, they compete with cargo intermediaries. In this sense, markets tend to be less efficient when companies have the power to collect unreasonable charges from their competitors.

j) The interpretive demurrage rule does not address this specific situation, but the Commission has concerns about this matter and will seek ways to appropriately address practices involving "door-to-door" and "port-to-port" transportation.

In this way, it was possible to verify that the interpretative rule of the FMC consists of a series of general guidelines about container demurrage, which seek to clarify the motivation for the charge, in addition to establishing parameters that allow the evaluation and punctual action of the FMC in each concrete case.

Finally, it's important to highlight that although most of the guidelines are of a general nature with universal application, special care must be taken to

[18] Container yard.

internalize the rule in other countries outside the North American reality, considering the local arrangement of the economic agents involved in the logistics chain, as well as the current regulatory framework.

3.2. FIATA recommendations[19]

The FIATA International Federation of Freight Forwarders Associations is a non-governmental organization that represents, promotes, and protects the interests of the international freight intermediary industry. FIATA members cover 108 logistics associations and cargo intermediaries in 97 countries, approximately 6,000 logistics and freight service providers worldwide.

The FIATA Maritime Transport Working Group has developed a Best Practices Guide to support both FIATA National Associations and individual members acting as freight forwarders in commercial disputes (FIATA, 2018).

The guide brings the understanding that, in principle, the demurrage charge has two main purposes: to compensate the owner for the use of the container, and to encourage the cargo holder to return the container as soon as possible. On the other hand, it is the duty of shipowners to grant a realistic free period to the cargo holder so that he can fill and deliver a container for export, and remove a container, unload it and return it empty in the case of an import.

In the guide, demurrage is understood as the fee that the cargo holder pays for the use of the container inside the terminal in addition to the free period, and detention is the fee that the cargo holder pays for the use of the container outside the terminal or deposit in addition to the free period. FIATA also presents the concept of "merged demurrage & detention," which adds the demurrage and detention periods, combining them into a single period, which is the same concept adopted in RN-18 and used in this Report.

The Best Practices Guide released by FIATA (2018) recognizes that demurrage and detention rates are important and valid instruments for shipowners to ensure the return of their equipment as soon as possible, and users who exceed the contractual duration must be billed accordingly.

[19] Fact-Finding Nº 28 encouraged FIATA to develop a Best Practices Guide regarding demurrage that was released in September 2018 (FMC, Final Report, 2018).

However, FIATA does not believe that shippers should be subject to unfair or unreasonable charges of this nature, especially when the delay is due to the owner's fault.

FIATA suggests that a range of issues related to demurrage and detention be analyzed and an agreement be negotiated including, but not limited to:

- Limit accumulated demurrage to a maximum amount.
- Extend the free time period if the terminal is unable to release / receive a container within a period equal to the duration of the inability.
- Ensure a level playing field for containers in port-to-port transportation and negotiate terms to reduce unfair differentiation.
- Support the modal shift to more environmentally friendly modes of transportation, increasing the period of freedom from detention.
- Amend the calculation of export demurrage to transfer responsibility for ship delays to the shipping company.
- Make sure that demurrage charges on import shipments are collected faster, preferably within a week.
- Contribute to relieving congestion at the terminal, as well as the on-land concentration of pickups and deliveries due to larger ships and higher peaks and allowing cargo holders more flexibility increasing periods of free time.
- Encourage greater data sharing in the maritime logistics chain, which would lead to greater transparency of information related to these fees.

4. DEMURRAGE CHARGE IN BRAZIL

In addition to the international experience analysis, some singularities of the container demurrage charge in Brazilian national territory are detailed, such as the Term of Responsibility for the Return of the Container (or Term of Commitment for the Return of the Container – TCDC), the adherence of the Customs broker as jointly responsible, the charging of differentiated values by the cargo agent, and the Brazilian logistical difficulties that can increase the incidence of collection.

4.1. Term of Responsibility for the container's return

> Regarding comparative foreign Law, considering that the focus of this study is container demurrage in Brazil, in which there are practical operational peculiarities that do not exist in other countries, such as the requirement to sign the TCDC and some specific regulations of our legal system, different from Common Law, [...]. (WINTER, 2019, p. 14)

The requirement to sign the Term of Responsibility was created by the carriers to facilitate the execution of demurrage collection actions, but it is presented as a document that facilitates the bureaucratic procedures for the release of containers, as observed in the text below:

> By means of this document, whoever signs and delivers it to the carrier's local agent aims to expedite the release of the cleared cargo unit, reiterating the terms of the maritime transport bill, if it is the consignee or importer in the contract, or a third party that claims to be personally responsible for the fulfillment of obligations arising from the transport relationship, expressly assuming the joint liability for the payment of any incidental debts that are not paid by the consignee or importer. (SILVEIRA, 2018, p. 23)

To capture the dynamics involved in signing the Term of Responsibility, it is necessary to understand how international maritime transport is contracted. In summary, it can be said that the maritime sale is embodied in two international contracts: a purchase and sale contract, which is the main one, and a transportation contract. It should be emphasized that there is no contract legally typified as "sea sale." This denomination arises in the doctrine due to the incidence of maritime transport in the purchase and sale contract.

That said, it appears that the contracting of waterway freight results from a prior negotiation made between the buyer/importer and the seller/exporter, without the carrier's participation.

The purchase and sale proposals are formalized by issuing a Proforma Invoice and/or a Letter of Intent. Usually, the proformas mention the Incoterms® Rules (International Rules for Interpretation of Trade Commercial Terms), which are not mandatory, but given the safety of the standardized and unison language of their terms they facilitate the understanding of the parties guaranteeing the efficiency of operations and contracts regarding obligations related to the transportation of negotiated cargo. These rules specify costs and

responsibilities of the exporter and the importer in the transaction. Through the Incoterms®, it is defined who will hire transportation.

> The use of the Incoterms® Rules, therefore, makes it possible to define the party involved in the purchase and sale contract that assumes the procedures for contracting transportation, and assumes the costs of freight and other expenses related to transportation. It therefore designates who the shipper is and specifies the party that will be at risk during transportation and that eventually will bear the burden of damage.
>
> Despite the existing link between the contract for the purchase and sale of goods and the transport, charter and maritime insurance contracts, each contract retains its autonomy, the effectiveness of which is limited to the contractual relationship itself. Interconnection does not affect the relationships emanating from each type of contract.
>
> The incidence and interference of the maritime modal's designation in the trade of goods affects the system of rights and duties relating to the purchase and sale of goods and the relations between the seller and the buyer, but the parties of the related transport or charter and maritime insurance contracts remain separate. (OCTAVIANO MARTINS, 2015, p. 500 – no emphasis in the original)

Considering the legal autonomy between purchase and sale contracts and maritime transportation contracts, it should be noted that container demurrage arises solely from the transportation contract.

> 19. Container demurrage derives from the Maritime Transportation Contracts, instruments that, as a rule, involve three actors: the shipper, the maritime carrier, and the consignee. In fact, the Transportation Contract is the legal basis for charging demurrage, the amount due by the recipient, shipper, or consignee of the container – jointly and severally – per day of container retention beyond the franchise term (free time) agreed between the parties.
>
> 20. According to maritime practice, the issuance of the Bill of Lading containing the clauses that will govern the contracted transport, occurs when the goods are shipped. This contract is issued in at least three copies, two of which are delivered to the shipper, who, after all commercial aspects have been agreed, sends an original copy to the consignee at the port of destination, so that he can present it to the carrier, and, thus, remove the goods. (CENTRONAVE, 2020 – Subsidy Collection)

It should be noted that, according to the Civil Code, Section III – Transport of Things[20], the only requirement regarding the consignee in contracting the transport is that he

[20] Art. 743. The thing, delivered to the carrier, must be characterized by its nature, value, weight, and quantity, and whatever else is necessary so that it is not confused with others, and the addressee must be indicated at least by name and address.

is nominated at the time of delivery of the goods. This unequivocally demonstrates that contracting can take place even without his direct participation. Indeed, it is not up to the consignee to establish the terms and conditions for charging demurrage fees. However, it is up to him to answer before the shipowner in the event of delay in returning the container.

Thus, despite the interconnection between the contracts, the lamented bilaterality between the carrier and the consignee in the contracting of transport does not match the factual reality, since in most cases the consignee does not even participate directly in this contracting[21].

> The cargo's consignee is the main actor in cases of container demurrage, as he will be responsible for returning the container within the free time to the shipowner in cases of import. He will be entitled to respond in court in the passive part of the lawsuit, being able, in practice, to be the real owner of the cargo, the trading company (which appears as a consignee in imports on behalf of third parties), the cargo agent, the NVOCC and even, in some cases, the Customs broker himself. In the situations mentioned above, those responsible may subrogate the right to subsequently collect reimbursement from the actual importer, who is the owner of the cargo and contracting services. (WINTER, 2019, p. 17)

Furthermore, although demurrage is a customary and usual right, it is often not included in the Bill of Lading. Some shipowners neglect the charge forecast clause. However, the demurrage continued to be charged and considered due, even without legal or contractual provision, but justified in terms of usage and customs.

> It happens that the fact that an institute is inserted in the uses and customs does not make it enforceable in any, and all, business relationships without any contractual provision. Container demurrage is a matter already consolidated in *Lex Maritima*. However, *Lex Maritima* does not determine its collection without any provision, and the contrary interpretation is wrong, because Comparative Law, especially English Law which is the supporting pillar of Maritime Law, does not determine this. (FÓES, 2017, *apud* ROSSI and CASTRO JÚNIOR, 2018, p. 4)

[21] Traditionally, Brazil imports CIF (Cost, Insurance and Freight). In this Incoterm, the responsibility for the payment of insurance and freight is the supplier's, who is responsible for all costs and risks with transportation until arrival at the port of destination.

From the moment the Judiciary started demanding the express clause of demurrage in the Bill of Lading, the Term of Responsibility for Returning Containers was created[22].

Fóes (2017) also highlights that the Term of Responsibility "[…] only integrates the relationship after the arrival of the cargo at the port of destination, which makes evident the inexistence of any negotiation between the parties." However, it should be noted that the Term of Responsibility is not an essential document and should not be required for cargo release.

> This new way of formalizing the relationship with the final recipient of the cargo was demanded by shipowners, to oblige consignees of cargoes to sign a return commitment and, thus, establish a formalized liability in writing. Said document has no relation to the Bill of Lading (or BL) and is required by the carrier (shipowner) when the cargo arrives at the port of destination, because without the consignee or his legal representative signing the document, the shipowner, in a very contestable way, does not release the BL so that the recipient of the cargo can initiate the release and nationalization of cargo with the SISCARGA system. (WINTER, 2019, p. 19)

4.2. Customs broker role

Initially, it should be noted that the retention of cargo (or BL) for not signing the Term of Responsibility is illegal. Decree-Law Nº 116/67, art. 7, establishes that: "The shipowner is entitled to determine the retention of the goods in the warehouses, until the freight due or the payment of the contribution for declared gross average have been settled." That is, only two cases are presented in which the retention of goods is allowed: non-payment of freight or declared gross average. The legal order was reinforced in art. 12 of RN-18.

> Art. 12. Maritime carriers and intermediary agents may withhold goods or the issuance of the bill of lading or BL, until the settlement relating to the payment of freight or general average contribution, withholding being prohibited for any other justification. (Normative Resolution-ANTAQ nº 18/2017)

Despite this, retention of goods is a recurrent practice due to the non-signature of the Term of Responsibility. According to Winter (2019), some scholars when dealing with the

[22] "In this context, the container demurrage scenario, which, until 1995, was totally against the carrier, became favorable to the latter. If before they lost, they started to win all the actions on the subject, using the powerful term of responsibility signed by the representative (Customs broker), the consignee/importer or exporter." (CASTRO JÚNIOR, Osvaldo Agripino (org.). Container demurrage theory and practice. São Paulo: Customs, 2018, p. 225)

subject vehemently refute the usual way in which the Container Return Liability Terms are required by shipowners, usually imposed improperly as true adhesion contracts required under coercion[23].

> However, it cannot even be argued that the retention aims to prevent, preserve, defend, and ensure the effectiveness of the right to demurrage credit, as a preventive act promoted because there is supposed gravity or certain factual particularity that demonstrates the risk of injury of a heritage nature. Even if the requirements are present – (i) lawful and peaceful retention of another's property; (ii) conservation of someone else's property; (iii) net credit, certain and payable, with connectivity to the thing withheld; and, (iv) the absence of a convention or law excluding the right of retention are present – the impossibility of matching makes retention unfeasible.
>
> Therefore, regardless of the existence of a fair reason, retention cannot be used as a guarantee to prevent imminent damage, or to cover the value of obligations related to demurrage. Therefore, despite its main function being to induce the debtor to fulfill his obligation, he cannot be deprived of possession of the property that belongs to him until he has satisfied the demurrage debt, regardless of whether present or past, that is, of previous shipments, even when dealing with a foreign legal entity. Because, according to international practices, retention clause itself, when it exists, is only applicable for non-payment of freight. (MARCHIOLI, 2020 – Subsidy Collection)

Thus, to start the internalization process of goods in SISCARGA, the carriers demanded that the consignee, or his representative, sign the Term of Responsibility. In this way, the document began to reflect the adhesion not only of the importer or consignee of the transported cargo, but also of those who through it enter the legal relationship as a new subject, the Customs broker.

> The Customs broker is the professional qualified by the Brazilian Federal Revenue Office (RFB) to clear bureaucratic orders in the import or export, acting before the intervening agencies of foreign trade, such as ANVISA, MAPA, INMETRO, DECEX and, mainly, with Customs for release and agility in the dispatch of the goods included in the processes under their care, checking and providing all the documentation, fees and licenses required on a case-by-case basis. Its activities are contemplated in art. 808 of Decree Nº 6.759/2009 (Customs Regulation).

[23] "In the same vein, when the supposed Term of Agreement is "offered" with the signature of the importer's representative, normally his Customs broker, the cargo is already at the port. This is because freight payments cannot be processed before the cargo has been unloaded at the port of destination, but only after signaling the presence of cargo launched in SISCARGA, a system created by Normative Instruction RFB n. 800/07." (CREMONEZE, 2012, pp. 35 and 36, apud SOUZA. Sávio José Di Giorgi Ferreira de. NVOCC, container and demurrage: the systemic controversies of multimodalism – Law 9.611/98. Curitiba: Institute of Education and Promotion, 2014, pp. 163-165).

> The Customs broker does not participate, in any of its phases, in the formation of the international maritime transportation contract, which is signed between the shipper and the shipowner, consigning the cargo to the final recipient, so it should not be a legitimate party to answer for questions linked to cargo transportation or demurrage. This professional, acting by mandate whether of the exporter or the importer, has the primary function of making the correct nationalization of the cargo. (WINTER, 2019, pp. 17 and 18)

The Customs broker plays an important role in the import process, providing preventive guidance to ensure compliance with all legal, tax and Customs rules. However, in some cases[24], he appears on the defendant side of lawsuits for demurrage collection due to having signed alone or jointly the Term of Responsibility as the legal representative (mandatory) of the cargo's consignee. This accountability is a reason for harsh criticism by dispatchers.

> There is a crime being committed every day by shipowners and their representatives, which is to demand from the Customs broker, from the legal entity of the Customs clearance commissioner who are only hired to carry out the Customs clearance of goods, a TERM OF JOINT RESPONSIBILITY, obliging the broker to be the GUARANTEE of the importer. When the importer defaults on the demurrage, the demurrage credit holders legally, jointly, and severally sue the importer and the broker who gave in to pressure and signed the Term.
>
> The dispatch commissioner, the Customs broker, is not an economic agent in the operation, does not participate in the purchase or sale of goods or freight, is only included in the process to carry out the Customs clearance, but in order to expand the range of possibilities for receiving the possible demurrage, numerous difficulties are created to deliver the BL, which, in order to avoid delay in clearance, is solved by presenting the Term as guarantor. It's almost extortion.
>
> The regulation must be clear: when the Customs broker or representative of the dispatch commissioner signs the term of commitment to return the container, he can only sign as the importer's representative, never under any circumstances as the importer's "GUARANTEE." (Dispatcher's Manifestation – Subsidy Collection, 2020)

[24] SÃO PAULO (State). São Paulo Court of Justice. Civil Appeal Nº 1016902-81.2017.8.26.0562. Demurrage charges for the use of containers. Judge Rapporteur Gilson Delgado Miranda. Judged August 6, 2018. Appeal granted in part. Also: SÃO PAULO (State). São Paulo Court of Justice. Civil Appeal Nº 1066830-29.2017.8.26.0100. 22nd Chamber of Private Law. Rapporteur Roberto Mac Cracken. Judged May 22, 2019, in SANTA CATARINA, Santa Catarina Court of Justice. Civil Appeal Nº 0019631-65.2012.8.24.0033. 3rd Chamber of Commercial Law. Rapporteur Tulio Pinheiro. Judged November 22, 2018. (WINTER, 2019, p. 18)

4.3. Spread charge on demurrage

The spread refers to the difference between the purchase and sale price of a share, security, or monetary transaction. In the context of container demurrage, it occurs when an intermediary agent increases the amount initially charged by the shipowner or when he reduces the previously stipulated free time.

To start this discussion, it is important to point out that the shipping agent acts largely on behalf of the shipping carrier but should not be confused with him as he acts as an agent[25].

> In general terms, the shipping agent represents the interests of the shipowner when the vessel arrives at the port, acting and endeavoring to resolve bureaucratic, operational, and emergency issues (if applicable), always as an agent, to guarantee the best loading and unloading operation, port-to-port. He can also perform the commercial function of the sea freight sale, when it will be the legitimate party to charge the demurrage in the event of non-return of the container within the established period (free time). (WINTER, 2019, pp. 15 and 16)

The impossibility for the shipping agent to charge for demurrage is already expressed in art. 13 of RN-18:

> Single paragraph. The shipping agent may only charge the shipper, consignee, endorser, or Bill of Lading (BL) holder for those amounts that are due to the represented maritime carrier.

In the case of the cargo agent[26], which is the intermediary agent hired by the user to meet their interests, there is no rule preventing the collection of the demurrage fee.

> One of the distorted practices in demurrage charges occurs when the intermediary agent (NVOCC or cargo agent), without the shipowner's own knowledge, unilaterally decreases the free time granted to the consignee of the cargo, and increases the demurrage daily rates, precisely to increase his profit in the shipping agency operation because in this way the cargo's consignee

[25] The designee role of the maritime agent is reinforced in RN-18, art. 24. Single paragraph. *"The maritime agent, in the designation of ships under his agency, is not responsible for the obligations of the one who appointed him, except for the responsibility that corresponds to him for his personal faults."*

[26] The freight forwarder is called a forwarding agent on RN-18. Art. 2, II, *a) forwarding agent: anyone who coordinates and organizes the transport of third-party cargo, acting on behalf of the user, in order to execute or arrange for the execution of operations before or after the maritime transport itself, without being responsible for issuing the Bill of Lading – BL.*

> (importer) will pay demurrage to the intermediary without in fact it having occurred.

In an article published on its website, the company specialized in foreign trade consultancy reports the indication of an abusive increase in freight:

> We have noticed a progressive increase in the practice of abusive demurrage collection by some cargo agents. Charges received by customers in 2017, when compared to the shipowners' table, were up to 220% above these. Which is not correct, considering that the agent only forwards the charge, often claiming not to profit from it[27]. [...] We understand that the conditions signed up to the confirmation of the ship's place reservation must reflect the same understandings in the BL or in the Term of Commitment to Return the Container, under penalty of characterizing the abusiveness and nullity of the documents, under the principle of contractual good faith. (WINTER, 2019, p. 32)

This characteristic in charging for demurrage in Brazil makes users and their representatives demand action from the Regulatory Agency, as can be seen in the excerpt below, extracted from Subsidy Collection:

> ANTAQ's effort to regulate the problem is commendable, but the Agency's regulatory option, at this point, by allowing the intermediary agent to charge a higher demurrage value than the effective maritime carrier, is a serious problem and one of the main obstacles to the affordability of the proper service. (AGRIPINO, 2020 – Subsidy Collection)

However, it should be borne in mind that hiring a cargo agent differs substantially from hiring a maritime carrier. It is worth mentioning that the cargo agent is hired directly by the consignee and the number of providers of this service is indeed greater than that of maritime carriers. In this case, competition facilitates the self-regulation of the market, reducing abuses. This does not mean that the issue dispenses all types of regulation but, comparatively, ANTAQ's action is less necessary.

4.4. Brazilian logistical problems

As mentioned before, the reasons for the delay in returning the empty unit are the most varied and logistical inefficiency is at the root of most of them. Thus, to analyze demurrage charges in different countries, it is first necessary to understand logistical problems in Brazil.

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[27] VASCONCELLOS, M. Alert on abusive demurrage charges. Kotah BR. Rio de Janeiro, Nov. 2, 2017, *apud* WINTER (2019).

According to Bazani, Pereira and Leal (2017), to facilitate comparisons between countries regarding logistics competitiveness, the World Bank published the Logistics Performance Index (LPI) with the objective of diagnosing the main areas with symptoms of logistics inefficiency. In composing the LPI, the World Bank uses six indicators: 1) Customs efficiency – border transit (speed, simplicity, predictability, formalities); (2) infrastructure – quality of trade and transport infrastructure; (3) international shipments – ease of arranging shipments at competitive prices; (4) logistics competence – competence and quality of logistics services; (5) tracking – traceability of shipments; and (6) punctuality.

It can be concluded that Brazil appears as a country of average logistical performance, however it is still far below most of its main competitors. Its worst logistical performance consists in Customs dimension, while its best performance refers to predictability. Considering the evident relationship between Customs inefficiency and the delay in returning containers, it would be necessary to equalize free time with the logistical reality of the country to reduce the occurrence of demurrage.

Winter (2019) also points out the Customs problems among the main logistical problems in Brazil that result in demurrage:

> i) Lack of logistics infrastructure at ports/terminals in relation to the speed and capacity of handling containerized cargo, which eventually leads to the occurrence of congestion or even internal accidents that cause delays in the removal of loads or queues.
>
> ii) Issues related to the beginning of Customs clearance, such as the registration of the Import Declaration (DI) of the loads in SISCOMEX and its parameterization channels (green; yellow; red; gray), according to article 21 of IN SRF nº 680/200636, and the Customs conference, pursuant to article 564 37 of Decree Nº 6.759/2009.
>
> iii) Problems related to land road transportation, widely used in Brazil to remove goods packed in containers from ports/terminals and take them to the industries or warehouses indicated by the consignees of the cargo or importers and to later return the container to the place agreed upon in the BL or TCDC, among which are risk factors such as queues or congestion, possible accidents in the transport route, possible theft of cargo and stoppages or strikes by truck drivers, locally, statewide or nationally.

iv) Public agents involved in the import process. Especially for the case of this study directed to containerized loads, we will highlight for the purposes of exemplifying situations involving strikes and stoppages, which generate effects on the import process the three most recurrent:

a. Brazilian Federal Revenue Office (RFB) (RFB), an agency in which, in addition to declared strike situations, tax operations called "standard," "target zero" or "red tide" are not uncommon, in which, purposefully so that they are not considered strikers, employees carry out the analyses slowly causing absolute slowness in the Customs clearance procedures, and still, in other cases, they implement, also on purpose, a high level of rigor in the documental and physical analyses causing accumulations and delays in Customs clearances.

b. Brazilian National Health Surveillance Agency (ANVISA), which stands out for its intervention in granting the Import License (LI) for various products, especially those subject to the sanitary surveillance regime.

c. Brazilian Ministry of Agriculture, Livestock and Supply (MAPA), responsible for the inspection and licensing of products of animal and plant origin and their derivates.

v) The carelessness or lack of diligence of the cargo's consignee (importer), either due to commercial disagreement, lack of tax planning for the collection of taxes, or possible lack of planning and economic difficulty caused (WINTER, 2019, pp. 27 and 28).

The National Federation of Maritime Shipping Agencies – FENAMAR (2020) presents another point of view on the issue, pointing to a less bleak picture and redeeming the shipowner's responsibility.

From the results of the research carried out, we highlight some points that we believe are important in the evaluation of this topic:

- For each container released or received, there is a document issued by the depot[28] or terminal called EIR that demonstrates unit data, reception time, driver data and carrier name.

- The cases that generate demurrage are mostly caused by problems of the importer himself or by problems caused in the cargo's release before the authorities.

- When there is a blockage at Mercante/Siscomex-cargo, the importer can unload the unit and return it empty to the shipowner, keeping the cargo under the terminal's responsibility,

[28] The depot is a warehouse or yard for storing and moving empty containers. It is where transport and logistics companies keep their containers until it is time to reload (receive the empty import container and/or release the empty export container).

> thus, avoiding entering a period of demurrage according to the agreement between the parties.
>
> • Several companies responded that there is prior, abundant, and available information on the demurrage format applied and agreed by the shipowner to its customers regarding the use and return of containers.
>
> • The use of the container as a deposit/warehouse, for periods beyond the established, causes an imbalance in the logistics of the shipowner who, in the absence of equipment retained by importers, must resort to container rental companies to meet the demand. (FENAMAR, 2020 – Subsidy Collection).

Considering the sometimes-antagonistic interests involved in charging for container demurrage, it is expected that there will be disagreements about the reasons leading to the collection of values and what should be done to mitigate the cost.

4.5. Positioning of interest groups in taking grants

From September 21st to November 3rd, 2020, ANTAQ carried out the Public Subsidy Collection Nº 03/2020, aiming to send contributions and subsidies, for the implementation of theme 2.2 of the Biennium Regulatory Agenda 2020/2021, which seeks to develop a methodology to determine abusiveness in charging for container demurrage.

It is not the scope of this study to respond to the statements made therein. But the analysis of the taxpayers' position allows us to visualize how each interest group understands the demurrage charge in the national market and what would be the need to regulate the subject.

Thirty (30) contributions were recorded[29], divided into five interest groups[30] classified as follows:

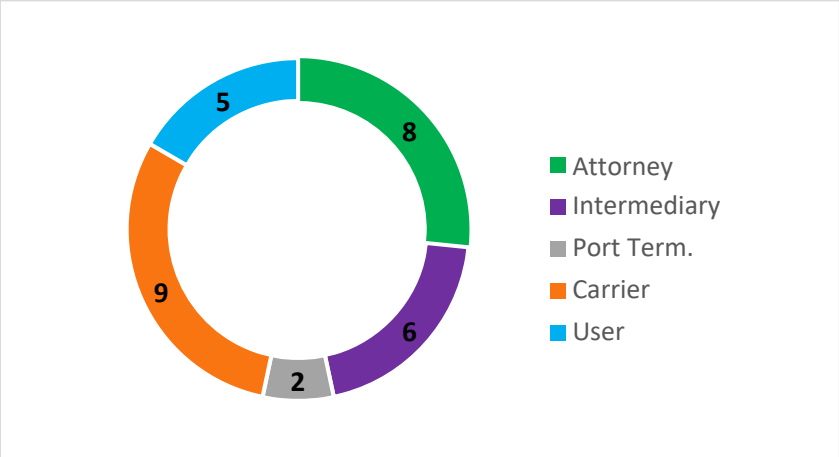
- Attorney (academics, Maritime Law operators and their representatives).

[29] Contributions made by the same person representing the same entity/company were counted only once.

[30] It should be noted that in the Subsidy Collection, it was asked which interest group each contributor identified with. However, because the "others" option exists, the vast majority of taxpayers indicated it, and it's necessary to make a subsequent classification to better frame them. The list of counted contributors, classification and manifestations is in Attachment II.

- Intermediary (shipping agents, cargo agents/forwarders, cCstoms brokers, and their class entities).
- Port terminal.
- Carrier (representatives of companies and their national and international class entities).
- User (class representatives and entities).

Figure 1 – Contributor profile



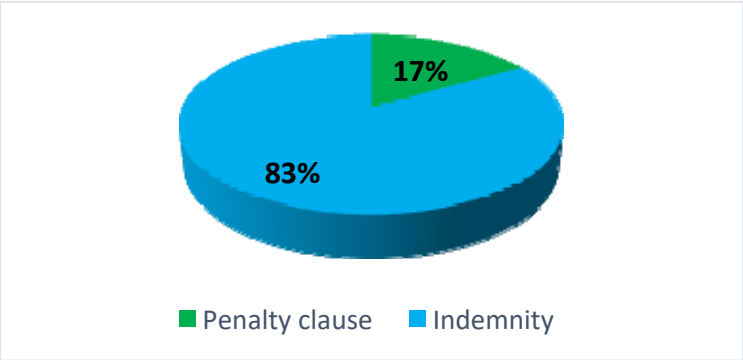
Source: Subsidy Collection 03/20 – Preparation GDE/SDS/ANTAQ

It can be seen from Figure 1 that the group with the greatest representation in contributions is the group of transporters (30%), followed by the group of attorneys (26.7%), intermediaries (20%), and only then the group of users (16.7%) and port terminals (6.7%).

As will be shown below, the group of lawyers (second largest) aligned itself primarily with the understanding of transporters. On the other hand, the group of intermediaries, including maritime agents, was aligned, in general, with the users.

This underrepresentation of users in Subsidy Collection may have influenced the fact that a significant majority of taxpayers (83%) frame the legal nature of container demurrage as compensation and not as a penalty clause, as shown below in Figure 2.

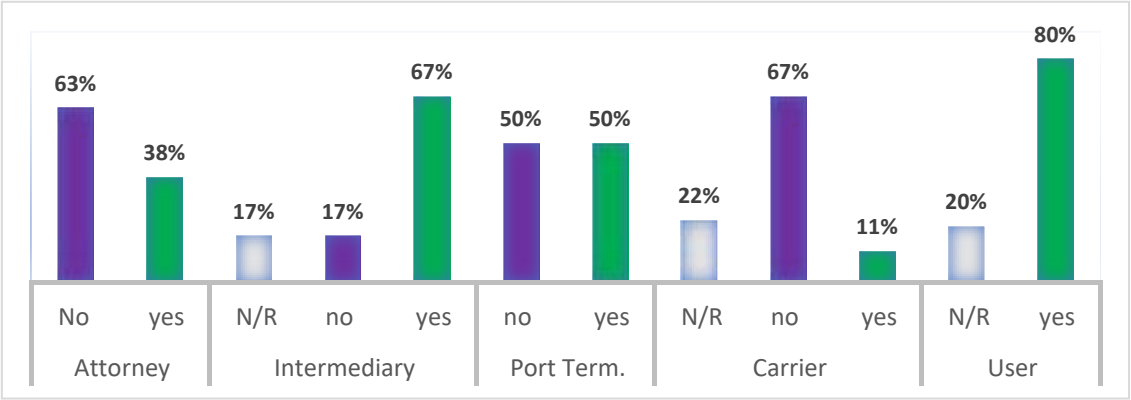
Figure 2 – Legal nature of container demurrage.



Source: Subsidy Collection 03/20 – Preparation GDE/SDS

When analyzing the position of taxpayers about the Term of Responsibility being or not an adhesion contract, it appears that the answer changes drastically according to the interest group. On one hand, we have the group of transporters, accompanied by the group of attorneys, with the majority understanding that it is not. In opposition, we have the group of users and intermediaries, whose majority of contributions understands that the Term of Responsibility is a contract of adhesion.

Figure 3 – Is the Term of Responsibility an adhesion contract?

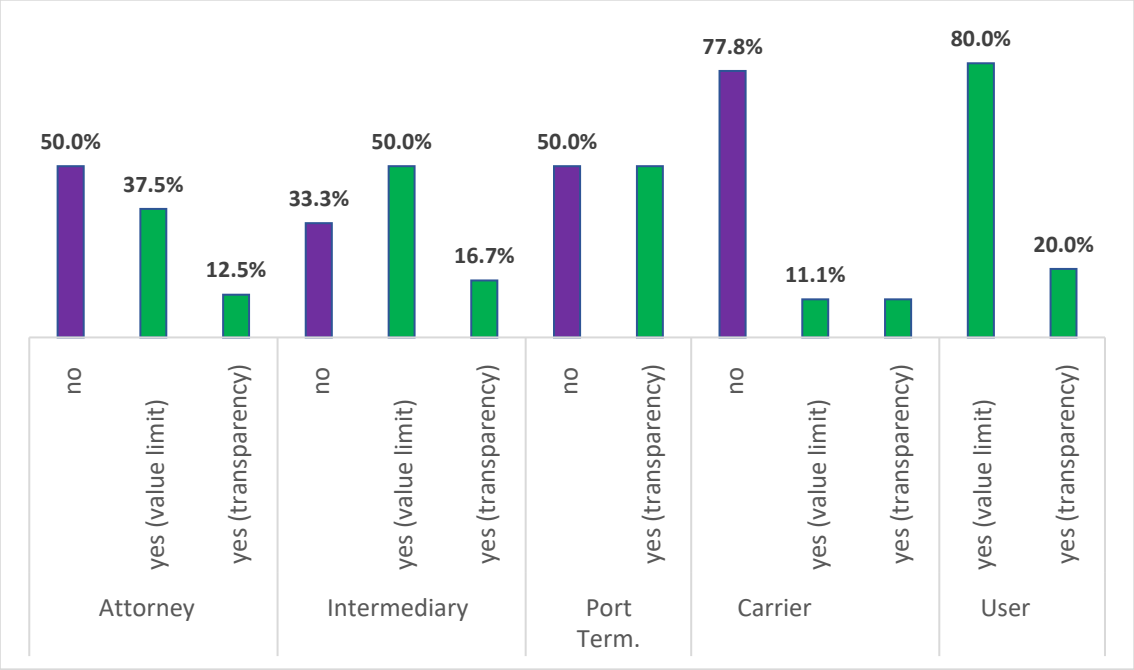


Source: Taking Grants 03/20 – Preparation GDE/SDS/ANTAQ

The understanding of intermediaries that the Term of Responsibility is an adhesion contract may be a consequence of the significant participation of forwarding agents, who, in general, fight the obligation to sign the document for the release of cargo. The positioning of law firms denying the framework as an adhesion contract may be an indication that these taxpayers are more aligned with the defense of transporters than users in legal disputes.

The last examination carried out refers to how interest groups position themselves regarding the need to regulate demurrage. After an interpretive verification of the contents, the manifestations were divided into three categories of contributors: those who are against any type of regulation, which were grouped as "no" and those who are in favor were identified as "yes." Among those in favor of regulation, two groups were created: those in favor of regulation by increasing transparency – yes (transparency); and those in favor of a regulation where there is some value limitation – yes (value limit).

Figure 4 – Favorable to some form of demurrage regulation?



Source: Subsidy Collection 03/20 – Preparation GDE/SDS/ANTAQ

The dichotomy of interests was once again remarkable. All users were in favor of some type of regulation, with 80% wanting a limitation on the amount of demurrage and the other 20% believing that an improvement in transparency would be enough. In the group of transporters, the majority (77.8%) was against any form of regulation. Once again, the lawyers aligned themselves with the understanding of the transporters, and the intermediaries with that of the users.

5. VALUES COMPARISON

This chapter refers to the carrying out of a quantitative research of container demurrage values and container free time in Brazil and in other countries of the world, using as research data, primary sources, that is, those obtained via individualized search, on the websites of maritime carriers, in the form of demurrage prices and free time terms, both tabulated/over-the-counter prices, by type of container, by port, in import and export.

As for the applicability of tabulated/over-the-counter values, it should be clarified that, in the case of users with considerable volumes of cargo, negotiation between shipper/consignee and maritime carrier may occur through service contracts[31], which grant special conditions.[32] In addition, there are cases in which NVOCC and freight forwarders apply demurrage and free time values that are different from the tabulated/over-the-counter prices and terms. Finally, there are exceptional circumstances in which demurrage fees are not charged, are reimbursed, or have some other form of mitigation.[33]

Having made these initial observations, the following will be presented: I) sampling; II) methodology for calculating average demurrage fees; III) methodological observations; IV) type of research; V) demurrage values and free time periods; and VI) comparative analysis of demurrage values and free time periods.

[31] Demurrage (is) imposed on cargo interests by carriers via tariffs and service contracts. Source: FMC Fact-Finding Investigation nº 28 – Conditions and Practices Relating to Detention, Demurrage, and Free Time in International Ocean-borne Commerce. Final Report. December 3, 2018.

[32] By way of example, Maersk stipulates that customers with special conditions of demurrage and free time negotiation apply different rules: "(…) *for customers with special deals, after the extended free time expires, any additional days will be subject to the demurrage and detention charges as per the relevant day count in our tariff tier structure. This means that the subsequent demurrage and detention charges beyond extended free time will not automatically be calculated basing on the tariffs of 1st tier*." Source: https://www.maersk.com/local-information/latin-america/brazil/import

[33] *There was little uniformity in demurrage and detention terminology or the circumstances under which ocean carriers would waive, refund, or otherwise mitigate demurrage and detention, making comparisons across the industry difficult.* (Italics not included in the original) (FMC, Interpretive Rule on Demurrage & Detention under the Shipping Act, 2020).

5.1. Sampling

To conduct the study, the following sample cut was carried out:

a) 6 ports
b) 4 sea carriers
c) 4 types of containers

5.1.1. Ports

For the sampling of foreign ports, ports with greater participation in the transportation of containers with Brazil were selected (ANTAQ, 2018).[34]

Table 1 – Accumulated movement, in TEU, between Brazilian and foreign ports (2018)

Name of the Port	TEU commercial rel. Brazil	TEU accumulated	TEU percentage Accumulated
Shanghai	391,942	391,942	5%
Buenos Aires	384,740	776,681	11%
Singapore	377,590	1,154,271	16%
Cartagena	313,563	1,467,834	20%
Ningbo	302,508	1,770,342	25%
Antwerp	270,294	2,040,636	28%
Rotterdam	246,221	2,286,857	32%
Hong Kong	245,248	2,532,105	35%
Hamburg	225,049	2,757,154	38%

Source: ANTAQ. Statistical Yearbook (2018).

By methodological choice, among the ports in the table above, two (2) ports were selected per continent:

Table 2 – Sampling of ports by continent

Continent	Port
South America	Santos
	Buenos Aires
Europe	Antwerp
	Rotterdam
Asia	Singapore
	Shanghai

Source: Preparation GDE/SDS

[34] ANTAQ. Statistical Yearbook. (2018). Available at: www.web.ANTAQ.gov.br/anuario. Accessed on: August, 2019.

For the selection of the Brazilian port, the Port of Santos was chosen as it is the port with the highest movement of containers in Brazil (ANTAQ, 2018).

5.1.2. Maritime carriers

Sampling of ocean carriers was based on the table below which lists the world's largest maritime carriers, presented in descending order of market share, and the respective sources of demurrage and free time data.

Table 3 – Market share and demurrage data source for each maritime carrier

Maritime Carrier	Market Share	Demurrage and free time data available at:
Maersk	16.9%	https://www.maersk.com/local-information
MSC	16.0%	https://www.msc.com/country-guides
COSCO	12.6%	https://elines.coscoshipping.com/ebusiness/demurrageDetentionTariff
CMA CGM	12.1%	https://www.cma-cgm.com/ebusiness/tariffs/demurrage-detention
Hapag-Lloyd	7.2%	https://www.hapag-lloyd.com/en/online-business/tariffs/detention-demurrage.html
ONE	6.5%	https://ecomm.one-line.com/ecom/CUP_HOM_3701.do?sessLocale=en
HMM	2.9%	http://www.hmm21.com/cms/business/ebiz/tariff/demdetFreetime/index.jsp
Yang Ming	2.6%	https://www.yangming.com/e-service/demdet/demdet.aspx
PIL	1.2%	https://www.pilship.com/en-pil-lms-det-dem/200.html

Source: Market share available at: https://alphaliner.axsmarine.com/PublicTop100/. Access on 11/13/2020.Preparation GDE/SDS.

Once again, by methodological choice, among the maritime carriers in the table above, the sample cut included four (4) companies: Maersk, MSC, CMA CGM and Hapag-Lloyd.

5.1.3. Types of containers

The selection of containers was based on the importance of the following types of containers in world maritime transport (source: "Comparative study of THC values in container terminals in Brazil and worldwide" available at: http://portal.antaq.gov.br/index.php/estudos/):

- 20-feet dry containers – dry container (DC): 20’ DC
- 40-feet dry containers – dry container (DC): 40’ DC
- 40-feet dry high cube containers – dry high cube (HC): 40’ HC
- 20-feet refrigerated containers – reefer: 20' Reefer

For this study, 40' Reefer and 45' HC containers were not considered.

5.2. Average demurrage calculation methodology

Demurrage is charged with reference to a daily price per container which is generally forecasted for periods or ranges of days. In a hypothetical example:

Free time: 5 days
1st period 3 days (from the 6th to the 8th day): US$50 a day
2nd period 4 days (from the 9th to the 12th day): US$80 a day
3rd period following days (from the 13th day onwards): US$100 a day

Day	1 º	2 º	3 º	4 º	5 º	6 º	7 º	8 º	9 º	10 º	11 º	12 º	13 º	14 º
Price per day	$0	$0	$0	$0	$0	$50	$50	$50	$80	$80	$80	$80	$100	$100
Accumulated demurrage	$0	$0	$0	$0	$0	$50	$100	$150	$230	$310	$390	$470	$570	$670
Average demurr	$0	$0	$0	$0	$0	$8.33	$14.29	$18.75	$25.56	$31	$35.45	$39.17	$43.85	$47.86

In the example above, at the end of 10 days the user would accumulate a total amount of payable demurrage of US$310.

Comparison of demurrage values is not trivial, as each carrier determines different periods and different days of free time. Both directly influence the total accumulated demurrage value.

As an example, a higher daily demurrage value will not necessarily result in a higher accumulated demurrage value, if the free time is also high.

Thus, the methodology of "average demurrage" was developed, according to which:

$$\text{é} = \frac{\quad}{\text{ú}}$$

Which equates to:

$$= \text{é} * \text{ú}$$

The "average demurrage" methodology makes it possible to compare different ports and carriers that use different periods and different free time, provided that a certain day is arbitrated for the analysis.

Thus, for free stay periods and demurrage prices to form a single comparable value, the present research uses the 14th day as a comparable basis.[35]

5.3. Methodological observations

- Data were collected on prices and deadlines referring exclusively to the use of the container (use of equipment only), charged by the shipowner, whenever this information is clearly indicated on the maritime carrier's website[36]. On the other hand, prices and terms related to the use of terminal space, sometimes called demurrage[37], charged by the terminal or by the shipowner, was not collected. This is because the definition of container

[35] In 2015, the FMC published a Report in which it adopts the 12th day as a comparable basis for calculating demurrage. "Report: Rules, Rates, and Practices Relating to Detention, Demurrage, and Free Time for Containerized Imports and Exports Moving Through Selected United States Ports, 2015 (available at: https://www.fmc.gov/wp-content/uploads/2019/04/reportdemurrage.pdf). In turn, the Container xChange survey adopts the 14th day as a comparable basis for calculating demurrage (available at: https://container-xchange.com/blog/demurrage-detention/)

[36] "*The terminology and application of charges with similar names are distinct across these VOCCs, making direct comparisons difficult"* (FMC Report: Rules, Rates, and Practices Relating to Detention, Demurrage, and Free Time for Containerized Imports and Exports Moving Through Selected United States Ports, 2015 Report). More on terminology: "*It is apparent, then, that there are a number of different, often conflicting, and not always clear ways that demurrage and detention are used in the industry. (…) Such "demurrage" may represent use of terminal space (terminal demurrage) and the use of equipment (carrier demurrage – i.e., in-port detention). (…) it might be less clear to a VOCC's customer what it is being charged for – terminal space usage or container usage or both*." (FMC Fact-Finding Investigation nº 28 – Conditions and Practices Relating to Detention, Demurrage, and Free Time in International Ocean-borne Commerce. Interim Report. September 4, 2018)

[37] Sometimes called demurrage, storage costs, port storage, terminal storage, terminal demurrage, among others.

demurrage[38] in this study is based on RN 18 and as already mentioned does not cover the costs related to the occupation of space in the port terminal.

- Most of the time, the shipowner provided data for the so-called Merged Demurrage and Detention, also called Combined Demurrage and Detention, which is nothing more than the combination in a single demurrage amount and in a single free time of the franchises for the container inside or outside the port terminal.
    - In a few cases, the data is provided as Split Demurrage/Detention, which means that there is a specific demurrage value and demurrage period for containers located inside the terminal and specific demurrage values and demurrage periods for containers located outside the terminal.[39] In these cases, the following criterion was adopted:
        - On import: the experience of a user who uses the entire free time of the full container inside the terminal (gate-in free time) was simulated, after which the container is removed to spawn in its facilities using the entire free time outside the terminal (gate-out free time), returning the empty container on the 14th day. Thus, on the 14th day, the demurrage value is calculated considering the detention value (demurrage value outside the terminal) and the sum of the gate-in free time and the gate-out free time (e.g., free time = 3+5).
        - On export: the experience of a user who uses all the free time outside the terminal to stuff the empty container (gate-out free time) was simulated, after which he enters the full container at the terminal and uses the entire free time inside the terminal (gate-in free time). Thus, on the 14th day, the demurrage value is calculated considering the demurrage value (demurrage value inside the terminal)

[38] Container demurrage is very commonly known internationally as Demurrage & Detention and depending on the sea carrier and/or country it is also called per diem. In turn, the free time of a container is commonly called free time or free days.

[39] Data in split demurrage/detention format occurred in this research: on import, only in Singapore, for shipowners CMA CGM and Hapag-Lloyd; and on export, only to CMA CGM in Santos and Buenos Aires, and Hapag-Lloyd in Singapore.

and the sum of the gate-out free time with the gate-in free time (e.g., free time = 5+3).

- When there is no data available by the shipowner, the result is indicated in the spreadsheets by a hyphen (-). On the other hand, whenever the free time is ≥ 14 days, the average price on the 14th day, logically, will be equal to zero ($0), given that there was no demurrage in the period.
- In terms of counting deadlines:
    - Differentiation in the treatment of data between shipowners/countries that use calendar days and/or working days[40] to count deadlines was not equalized.
    - Start and end time of the free time was not equalized. Maritime carriers, depending on the country or even the route, include or exclude the first day of the free time (first/last day included/excluded), differently from what is strictly stipulated by RN-18 for Brazil.[41]
    - Notice of cargo availability was not equalized, which varies according to the shipowner/port/country[42], influencing the start of the import period.
- No data was collected for specific types of cargo.[43]
- Data were collected for FCL (Full Container Load) and not for LCL (Less than Container Load).[44]
- When data on demurrage and free time that consider the transport mode in the hinterland (railway, highway, waterway) were available, data were collected for the road mode.[45]

[40] Like the CMA CGM in the US that uses working days to count.

[41] Art. 20. The free time of the container will be counted:

I - on embarkation, from the date of removal of the empty container(s) by the shipper at the agreed location; and II - on disembarkation of the full container(s), as of the following day after delivery of the cargo at the agreed location.

[42] Issue widely discussed by the FMC in Fact-Finding Investigation Nº 28.

[43] Like Maersk with specific free time deadlines for importing fruits and cod in Brazil.

[44] Like Hapag-Lloyd in the ports of China.

[45] Like Maersk in the ports of Belgium.

- Maersk Spot demurrage and free time data were not collected.[46]
- For purposes of comparison, demurrage prices when provided in the currency of the country of origin have been converted to US Dollars on the exchange date of December 9th, 2020, at 5pm (Brasilia time) according to quotes provided by the Central Bank of Brazil (https://www.bcb.gov.br/conversao).
- Data were collected throughout the month of December 2020.

5.4. Type of research

The type of research is, in terms of purposes, exploratory. This type of research is carried out when there is little information previously systematized[47], and thus, does not include a priori hypotheses. (VERGARA, 2007)[48]

Typically, exploratory research uses a small sample, which makes it possible to choose appropriate techniques for collecting and processing data and verifying potential difficulties. Thus, this type of research is a survey that allows for the provision of an approximate view of a given fact, so that future research can be designed for greater understanding and precision.[49]

In this context, it is important to highlight the reduced sampling of 6 ports for this research. As an example, the conclusive study on the affordability of THC in Brazil, and even conclusive as to the THC "not constituting an impedance for Brazilian foreign trade by sea"[50], sampled 48 ports in 23 countries.

[46] About Maersk Spot consult: https://www.maersk.com/news/articles/2019/06/25/maersk-introduces-maersk-spot

[47] In this sense, "ANTAQ still does not have a methodology for compiling (demurrage) data in a systematic way (...) Therefore, it is of fundamental importance to know the values charged in other world ports so that it is possible to analyze the compliance of the values charged in Brazil." (Study and Research Execution Project SEI 1187829)

[48] Vergara, S. C. Projects and research reports in administration. São Paulo: Atlas, 2007.

[49] Exploratory research. Wikipedia. Available at: https://pt.wikipedia.org/wiki/Pesquisa_explorat%C3%B3ria. Access on December 12, 2020.

[50] "Comparative study of THC values in container terminals in Brazil and worldwide" available at: http://portal.antaq.gov.br/index.php/estudos/

Therefore, due to the reduced sampling, notably from 6 ports and 4 maritime carriers[51], this research only allows to:

- Conclude on the feasibility of comparing the data.
- Propose hypotheses to be tested in a future study.
- State that the data are, due to the small sampling:
    - insufficient to conclude about the abusiveness or compliance of demurrage prices in Brazil compared to other ports in the world; and
    - insufficient to explain possible quantitative distortions of prices and terms in relation to other foreign ports.

And it allows, at most:

- Comparing the prices and terms of 4 maritime carriers in 5 foreign ports and Santos, that is, it's good for a mere comparison of the values available there, and not new conclusions.

5.5. Demurrage fees and free stay periods

5.5.1. Import demurrage values

Table 4 – Average demurrage price per carrier on import on the 14th day (USD/day)

Maersk – Average demurrage price on import in USD (14th day)					
Country	Port	20' DC	40' DC	40' HC	20' Reefer
Brazil	Santos	$26	$49	$49	$62
Argentina	Buenos Aires	$20	$40	$40	$64
Belgium	Antwerp	$47	$62	$62	$93
Netherlands	Rotterdam	$51	$67	$67	$102
Singapore	Singapore	$23	$37	$37	$41
China	Shanghai	$7	$14	$16	$30
Average demurrage price in Maersk imports comparing domestic and foreign ports. Available at: https://www.maersk.com/local-information/. Access on: December 2020					

[51] Of the 4 shipowners, one of them, MSC provides, via its website, demurrage values only for Santos and Singapore, among the ports in the sample.

MSC – Average demurrage price on import in USD (14th day)					
Country	Port	20' DC	40' DC	40' HC	20' Reefer
Brazil	Santos	$20	$34	$34	$94
Argentina	Buenos Aires	-	-	-	-
Belgium	Antwerp	-	-	-	-
Netherlands	Rotterdam	-	-	-	-
Singapore	Singapore	$19	$32	$32	$69
China	Shanghai	-	-	-	-
Average demurrage price in MSC imports comparing domestic and foreign ports. Available at: https://www.msc.com/country-guides. Access on: December of 2020					

CMA CGM – Average demurrage price on import in USD (14th day)					
Country	Port	20' DC	40' DC	40' HC	20' Reefer
Brazil	Santos	$22	$42	$42	$80
Argentina	Buenos Aires	$24	$49	$49	$70
Belgium	Antwerp	$27	$44	$44	$103
Netherlands	Rotterdam	$27	$44	$44	$103
Singapore	Singapore	$19	$38	$38	$87
China	Shanghai	$6	$13	$15	$42
Average demurrage price in CMA CGM imports comparing domestic and foreign ports. Available at: https://www.cma-cgm.com/ebusiness/tariffs/demurrage- detention. Access on: December 2020.					

Hapag Lloyd – Average demurrage price on import in USD (14th day)					
Country	Port	20' DC	40' DC	40' HC	20' Reefer
Brazil	Santos	$20	$39	$39	$74
Argentina	Buenos Aires	$56	$61	$61	$148
Belgium	Antwerp	$45	$54	$54	$72
Netherlands	Rotterdam	$45	$54	$54	$72
Singapore	Singapore	$20	$39	$39	$34
China	Shanghai	$9	$17	$17	$39
Average demurrage price in Hapag-Lloyd imports comparing domestic and foreign ports. Available at: https://www.hapag-lloyd.com/en/online-business/tariffs/detention-demurrage.html. Access on: December 2020.					

5.5.2. Export demurrage values

Table 5 – Average demurrage price per carrier on import on the 14th day (USD/day)

Maersk – Average demurrage price on export in USD (14th day)					
Country	Port	20' DC	40' DC	40' HC	20' Reefer
Brazil	Santos	$0	$0	$0	$29
Argentina	Buenos Aires	$0	-	-	$30
Belgium	Antwerp	$44	$57	$57	$85
Netherlands	Rotterdam	$44	$57	$57	$85
Singapore	Singapore	$17	$30	$30	$67
China	Shanghai	$8	$13	$15	$15
Average demurrage price in MSC export comparing domestic and foreign ports. Available at: https://www.maersk.com/local-information/. Access on: December 2020					

MSC – Average demurrage price on export in USD (14th day)					
Country	Port	20' DC	40' DC	40' HC	20' Reefer
Brazil	Santos	$21	$41	$41	$83
Argentina	Buenos Aires	-	-	-	-
Belgium	Antwerp	-	-	-	-
Netherlands	Rotterdam	-	-	-	-
Singapore	Singapore	$19	$32	$32	$69
China	Shanghai	-	-	-	-
Average demurrage price in MSC export comparing domestic and foreign ports. Available at: https://www.msc.com/country-guides. Access on: December 2020					

CMA CGM – Average demurrage price on export in USD (14th day)					
Country	Port	20' DC	40' DC	40' HC	20' Reefer
Brazil	Santos	$0	$0	$0	$16
Argentina	Buenos Aires	$0	$0	$0	$0
Belgium	Antwerp	$7	$9	$9	$109
Netherlands	Rotterdam	$7	$9	$9	$109
Singapore	Singapore	$9	$19	$19	$72
China	Shanghai	$6	$13	$15	$42
Average demurrage price in CMA CGM export comparing domestic and foreign ports. Available at: https://www.cma-cgm.com/ebusiness/tariffs/demurrage-detention. Access on: December 2020.					

Hapag-Lloyd – Average demurrage price on export in USD (14th day)					
Country	Port	20' DC	40' DC	40' HC	20' Reefer
Brazil	Santos	$26	$50	$50	$109
Argentina	Buenos Aires	$11	$19	$19	$94
Belgium	Antwerp	$38	$42	$42	$78
Netherlands	Rotterdam	$41	$45	$45	$85
Singapore	Singapore	$20	$39	$39	$44
China	Shanghai	$15	$31	$31	$39
Average demurrage price in Hapag-Lloyd export comparing domestic and foreign ports. Available at: https://www.hapag-lloyd.com/en/online-business/tariffs/detention-demurrage.html. Access on: December 2020.					

5.5.3. Free time periods on import

Table 6 – Term of free stay on import, by shipowner

Maersk – Free time on import					
Country	Port	20' DC	40' DC	40' HC	20' Reefer
Brazil	Santos	5	5	5	5
Argentina	Buenos Aires	7	7	7	3
Belgium	Antwerp	4	4	4	4
Netherlands	Rotterdam	3	3	3	3
Singapore	Singapore	7	7	7	6
China	Shanghai	7	7	7	4
Free time in Maersk import comparison between national and foreign ports. Available at: https://www.maersk.com/local-information/. Access on: December 2020					

MSC – Free time on import					
Country	Port	20' DC	40' DC	40' HC	20' Reefer
Brazil	Santos	7	7	7	2
Argentina	Buenos Aires	-	-	-	-
Belgium	Antwerp	-	-	-	-
Netherlands	Rotterdam	-	-	-	-
Singapore	Singapore	7	7	7	7
China	Shanghai	-	-	-	-
Free time in MSC import comparison between national and foreign ports. Available at: https://www.msc.com/country-guides. Access on: December 2020					

CMA CGM – Free time on import					
Country	Port	20' DC	40' DC	40' HC	20' Reefer
Brazil	Santos	6	6	6	5
Argentina	Buenos Aires	7	7	7	3
Belgium	Antwerp	7	7	7	5
Netherlands	Rotterdam	7	7	7	5
Singapore	Singapore	3+3	3+3	3+3	3
China	Shanghai	7	7	7	4
Free time in CMA CGM import comparison between national and foreign ports. Available at: https://www.cma-cgm.com/ebusiness/tariffs/demurrage-detention. Access on: December 2020.					

Hapag-Lloyd – Free time on import					
Country	Port	20' DC	40' DC	40' HC	20' Reefer
Brazil	Santos	7	7	7	5
Argentina	Buenos Aires	5	5	5	3
Belgium	Antwerp	4	4	4	4
Netherlands	Rotterdam	4	4	4	4
Singapore	Singapore	3+4	3+4	3+4	3+4
China	Shanghai	10	10	10	4
Free time in Hapag-Lloyd import comparison between national and foreign ports. Available at: https://www.hapag-lloyd.com/en/online-business/tariffs/detention- demurrage.html. Access on: December 2020.					

5.5.4. Free time on export

Maersk – Free time on export					
Country	Port	20' DC	40' DC	40' HC	20' Reefer
Brazil	Santos	14	14	14	10
Argentina	Buenos Aires	14	-	-	7
Belgium	Antwerp	5	5	5	5
Netherlands	Rotterdam	5	5	5	5
Singapore	Singapore	7	7	7	7
China	Shanghai	7	7	7	7
Free time in Maersk export comparison between national and foreign ports. Available at: https://www.maersk.com/local-information/. Access on: December 2020					

MSC – Free time on export					
Country	Port	20' DC	40' DC	40' HC	20' Reefer
Brazil	Santos	7	7	7	5
Argentina	Buenos Aires	-	-	-	-
Belgium	Antwerp	-	-	-	-
Netherlands	Rotterdam	-	-	-	-
Singapore	Singapore	7	7	7	7
China	Shanghai	-	-	-	-
Free time in MSC export comparison between national and foreign ports. Available at: https://www.msc.com/country-guides. Access on: December 2020					

CMA CGM – Free time on export					
Country	Port	20' DC	40' DC	40' HC	20' Reefer
Brazil	Santos	7+7	7+7	7+7	6+6
Argentina	Buenos Aires	14	14	14	14
Belgium	Antwerp	12	12	12	5
Netherlands	Rotterdam	12	12	12	5
Singapore	Singapore	8	8	8	5
China	Shanghai	7	7	7	4
Free time in CMA CGM export comparison between national and foreign ports. Available at: https://www.cma-cgm.com/ebusiness/tariffs/demurrage-detention. Access on: December of 2020.					

Hapag-Lloyd – Free time on export					
Country	Port	20' DC	40' DC	40' HC	20' Reefer
Brazil	Santos	6	6	6	3
Argentina	Buenos Aires	10	10	10	7
Belgium	Antwerp	4	4	4	4
Netherlands	Rotterdam	4	4	4	4
Singapore	Singapore	3+7	3+7	3+7	3+5
China	Shanghai	7	7	7	4
Free time in Hapag-Lloyd export comparison between national and foreign ports. Available at: https://www.hapag-lloyd.com/en/online-business/tariffs/detention-demurrage.html. Access on: December 2020.					

5.6. Comparative analysis of demurrage values and free time periods

This topic compares the demurrage prices and free time periods shown in the tables above. Due to the exploratory nature of the research, and due to the small sample, notably of ports and maritime carriers, the data are insufficient to conclude about the abusiveness or compliance of demurrage prices in Brazil compared to other ports in the world. Thus, it should be clarified that the conclusive inference, if it occurred, would imply a high margin of error.

Continuing, for the data analysis, a new tabulation of the same prices and periods of demurrage and free time set out in the previous tables was carried out, this time tabulating them by type of container for better comparability between the different maritime carriers in each port on import and export.

5.6.1. Average demurrage on import

20'DC Containers: Average demurrage price on import in USD (14th day)						
20'DC	Santos	Buenos Aires	Antwerp	Rotterdam	Singapore	Shanghai
MAERSK	$26	$20	$47	$51	$23	$7
CMA CGM	$22	$24	$27	$27	$19	$6
MSC	$20	-	-	-	$19	-
HAPAG-LLOYD	$20	$56	$45	$45	$20	$9

Average import demurrage price for 20-feet dry containers, comparative between ports.

Looking at the data in the table above, one can see the reduced standard deviation of the sample of average demurrage prices at the port of Santos for 20-feet dry containers among maritime carriers, with an average of $22.

Maersk and CMA CGM present, respectively, approximate prices in the ports of Santos and Buenos Aires, for 20'DC containers.

Prices in Santos are close to prices in Singapore, for all shipowners in the sample transporting 20' DC containers on import, with averages of $21 in Santos and $19 in Singapore. It is worth noting, however, that the tabulated values refer to the 14th day of average demurrage, even though the dwell time[52] at import in Singapore is only 1.46 days, compared to 12.7 days in Santos.[53]

Prices in Santos are markedly higher than prices in Shanghai, averaging respectively $21 and $7 for 20' DC containers.

Other comparisons are impaired due to the reduced sample and high data dispersion for the same port, expressed through the following relative standard deviations (RSD)[54]: 58% Buenos Aires; 29% Antwerp; 31% Rotterdam.

[52] Dwell time is the average storage permanence time of full containers at import.

[53] Dwell time in Santos Brazil (2018): http://ri.santosbrasil.com.br/wp-content/uploads/sites/36/2018/03/SBPar_ERelease-4T17_final.pdf. Dwell time in Singapore (2018): https://www.customs.gov.sg/news-and-media/publications/Time%20Release%20Study%20for%20Singapore%20(2018).pdf

[54] Relative Standard Deviation (RSD), also called Coefficient of Variation (CV), is a standardized measure of data dispersion expressed as a percentage (%). The RSD is defined as the ratio of the Sample Standard Deviation(s) to the Simple Arithmetic Average. The use of RSD has the advantage of

The high Standard Deviation in a tiny sample causes a considerable standard error, which affects the confidence interval (normal distribution hypothesis) necessary to infer that the sample average represents the whole average (population). Thus, in cases of high standard deviation[55] it would be likely that the sample average price at a given port would be an unrealistic representation of the true average price at that port.

Similar behavior to that described occurs for 40 feet dry and 40 feet high cube containers, according to the following tables.

40'DC Containers: Average demurrage price on import in USD (14th day)

40'DC	Santos	Buenos Aires	Antwerp	Rotterdam	Singapore	Shanghai
MAERSK	$49	$40	$62	$67	$37	$14
CMA CGM	$42	$49	$44	$44	$38	$13
MSC	$34	-	-	-	$32	-
HAPAG-LLOYD	$39	$61	$54	$54	$39	$17

Average import demurrage price for 40-feet dry containers, comparative between ports.

40'HC Containers: Average demurrage price on import in USD (14th day)

40'HC	Santos	Buenos Aires	Antwerp	Rotterdam	Singapore	Shanghai
MAERSK	$49	$40	$62	$67	$37	$16
CMA CGM	$42	$49	$44	$44	$38	$15
MSC	$34	-	-	-	$32	-
HAPAG-LLOYD	$39	$61	$54	$54	$39	$17

Average import demurrage price for 40-feet dry high cube containers, comparative between ports.

Note that the averages in Santos and Singapore are close, respectively $40 and $38 (for 40'DC and 40'HC containers). Here, the same observation regarding dwell time is inserted for this methodology that adopted the average demurrage on the 14th day,

eliminating the effect of expressing the Standard Deviation (SD) in different orders of magnitude (e.g., Reefer containers, with average demurrage of $100, and dry containers with average demurrage of $10) or different units of measurement (e.g., days of free time and dollars of demurrage).

[55] In this research, a high Standard Deviation was considered whenever the Relative Standard Deviation (RPR) ≥ 15%.

given the time of only 1.46 days in Singapore versus 12.7 days in Santos for the average storage stay of full containers on import.

Prices in Santos are markedly higher than prices in Shanghai, averaging respectively $40 and $15, for 40'DC and 40'HC containers.

Regarding 20' Reefer containers, the following table summarizes the average demurrage data:

20' Reefer Containers: Average demurrage price on import in USD (14th day)						
20'Reefer	Santos	Buenos Aires	Antwerp	Rotterdam	Singapore	Shanghai
MAERSK	$62	$64	$93	$102	$41	$30
CMA CGM	$80	$70	$103	$103	$87	$42
MSC	$94	-	-	-	$69	-
HAPAG-LLOYD	$74	$148	$72	$72	$34	$39
Average import demurrage price for 20-feet Reefer containers, comparative between ports.						

Maersk presents close prices in the ports of Santos and Buenos Aires.

Other comparisons are impaired due to the reduced sample and high data dispersion for the same port, expressed through relative standard deviations (RSD) of up to 50% (Buenos Aires).

5.6.2. Average demurrage on export

The average export demurrage prices in the surveyed sample have an even more dispersed distribution:

20'DC Containers: Average demurrage price on export in USD (14th day)						
20'DC	Santos	Buenos Aires	Antwerp	Rotterdam	Singapore	Shanghai
MAERSK	$0	$0	$44	$44	$17	$8
CMA CGM	$0	$0	$7	$7	$9	$6
MSC	$21	-	-	-	$19	-
HAPAG-LLOYD	$26	$11	$38	$41	$20	$15
Average export demurrage price for 20-feet dry containers, comparative between ports.						

40'DC Containers: Average demurrage price on export in USD (14th day)						
40'DC	Santos	Buenos Aires	Antwerp	Rotterdam	Singapore	Shanghai
MAERSK	$0	-	$57	$57	$30	$13
CMA CGM	$0	$0	$9	$9	$19	$13
MSC	$41	-	-	-	$32	-
HAPAG-LLOYD	$50	$19	$42	$45	$39	$31
Average export demurrage price for 40-feet dry containers, comparative between ports.						

40'HC Containers: Average demurrage price on export in USD (14th day)						
40'HC	Santos	Buenos Aires	Antwerp	Rotterdam	Singapore	Shanghai
MAERSK	$0	-	$57	$57	$30	$15
CMA CGM	$0	$0	$9	$9	$19	$15
MSC	$41	-	-	-	$32	-
HAPAG-LLOYD	$50	$19	$42	$45	$39	$31
Average export demurrage price for 40-feet dry high cube containers, comparative between ports.						

20' Reefer Containers: Average demurrage price on export in USD (14th day)						
20'Reefer	Santos	Buenos Aires	Antwerp	Rotterdam	Singapore	Shanghai
MAERSK	$29	$30	$85	$85	$67	$15
CMA CGM	$16	$0	$109	$109	$72	$42
MSC	$83	-	-	-	$69	-
HAPAG-LLOYD	$109	$94	$78	$85	$44	$39
Average export demurrage price for 20-feet Reefer containers, comparative between ports.						

From the simple observation of the data, Maersk and CMA CGM present the average demurrage price of $0 for the 14th day, in the ports of Santos and Buenos Aires, for 20-feet dry containers. The same occurred in the CMA CGM, this time for 40'DC and 40'HC containers. For 20' Reefer containers, Maersk has average demurrage prices of $29 in Santos and $30 in Buenos Aires. On the other hand, Hapag-Lloyd presents high prices for dry containers on export in Santos when compared to Buenos Aires.

Other comparisons remain hampered due to the reduced sample and high data dispersion for the same port. The following relative standard deviations (RSD) are observed: 117% (dry containers) and 75% (refrigerated containers) in Santos; in the other ports, ranging from 27% to 173% (dry containers) and 18% to 116% (refrigerated containers).

5.6.3. Free time on import

The following tables summarize the free time periods on import of dry containers in the sample, by type of container.

20'DC Containers: Free time on import						
20'DC	Santos	Buenos Aires	Antwerp	Rotterdam	Singapore	Shanghai
MAERSK	5	7	4	3	7	7
CMA CGM	6	7	7	7	6	7
MSC	7	-	-	-	7	-
HAPAG-LLOYD	7	5	4	4	7	10
Free time on import for 20 feet dry containers, comparative between ports.						

40'DC Containers: Free time on import						
40'DC	Santos	Buenos Aires	Antwerp	Rotterdam	Singapore	Shanghai
MAERSK	5	7	4	3	7	7
CMA CGM	6	7	7	7	6	7
MSC	7	-	-	-	7	-
HAPAG-LLOYD	7	5	4	4	7	10
Free time on import for 40 feet dry containers, comparative between ports.						

40'HC Containers: Free time on import						
40'HC	Santos	Buenos Aires	Antwerp	Rotterdam	Singapore	Shanghai
MAERSK	5	7	4	3	7	7
CMA CGM	6	7	7	7	6	7
MSC	7	-	-	-	7	-
HAPAG-LLOYD	7	5	4	4	7	10
Free time on import for 40 feet high cube dry containers, comparative between ports.						

The free time periods for dry containers in the tables above, in descending order of averages, are Singapore and Shanghai (7 days); Santos and Buenos Aires (6.5 and 7 days, respectively); Antwerp and Rotterdam (4 days).

Despite the averages comparison, Antwerp and Rotterdam have a relative standard deviation (RSD) for the free time of dry containers of 35% and 45%, respectively. This implies that the increase in the sample will probably affect the result described in the previous paragraph for these ports.

For 20ft refrigerated containers, the following table:

20’ Reefer Containers: Free time on import						
20'Reefer	Santos	Buenos Aires	Antwerp	Rotterdam	Singapore	Shanghai
MAERSK	5	3	4	3	6	4
CMA CGM	5	3	5	5	3	4
MSC	2	-	-	-	7	-
HAPAG-LLOYD	5	3	4	4	7	4

Free time on import for 20 feet reefer containers, comparative between ports.

The free time periods for reefer containers in the table above, in descending order of averages, are Singapore (6.5 days); Santos (5 days); Shanghai, Antwerp, Rotterdam (4 days); and Buenos Aires (3 days).

Despite the averages comparison, Santos, Singapore, and Rotterdam have relative standard deviation (RSD) for reefer containers of 35%, 33% and 25%, respectively. This implies that the increase in the sample will probably affect the result described in the previous paragraph for these ports.

5.6.4. Free time on export

Below, the tables consolidate the free time periods on export of the sample.

20'DC Containers: Free time on export						
20'DC	Santos	Buenos Aires	Antwerp	Rotterdam	Singapore	Shanghai
MAERSK	14	14	5	5	7	7
CMA CGM	14	14	12	12	8	7
MSC	7	-	-	-	7	-
HAPAG-LLOYD	6	10	4	4	10	7
Free time on export for 20 feet dry containers, comparative between ports.						

40'DC Containers: Free time on export						
40'DC	Santos	Buenos Aires	Antwerp	Rotterdam	Singapore	Shanghai
MAERSK	14	-	5	5	7	7
CMA CGM	14	14	12	12	8	7
MSC	7	-	-	-	7	-
HAPAG-LLOYD	6	10	4	4	10	7
Free time on export for 40 feet dry containers, comparative between ports.						

40'HC Containers: Free time on export						
40'HC	Santos	Buenos Aires	Antwerp	Rotterdam	Singapore	Shanghai
MAERSK	14	-	5	5	7	7
CMA CGM	14	14	12	12	8	7
MSC	7	-	-	-	7	-
HAPAG-LLOYD	6	10	4	4	10	7
Free time on export for 40 feet high cube dry containers, comparative between ports.						

20' Reefer Containers: Free time on export						
20'Reefer	Santos	Buenos Aires	Antwerp	Rotterdam	Singapore	Shanghai
MAERSK	10	7	5	5	7	7
CMA CGM	12	14	5	5	5	4
MSC	5	-	-	-	7	-
HAPAG-LLOYD	3	7	4	4	8	4
Free time on export for 20 feet reefer containers, comparative between ports.						

It is possible to notice that the data dispersion is considerable. The relative standard deviation (RSD) for free time in Santos is 42% for dry containers and 56% for reefer containers. Thus, the increase in the sample will likely have a substantial impact on average comparisons, which is why the comparison of measures of central tendency is not carried out.

6. CONCLUSIONS

The charge for demurrage of containers emerged with the objective of raising awareness about the timely return of containers but resulted in a significant increase in logistical costs for waterway transportation contractors.

Although arising from the transportation contract and not from the charter contract, as it does not have an express provision in Brazilian legislation at the level of ordinary law, container demurrage was initially interpreted in analogy to the rules for demurrage of ships provided for in the Commercial Code of 1850.

However, the maturing of the debate demonstrated the impossibility of accepting this interpretation, since the commercial, contractual, and legal treatment for demurrage in cases of chartering ships, as well as its consequences, fundamentally differs from the treatment to be given to container demurrage. Given the inapplicability of the Commercial Code, it is with the Civil Code that the debate on the issue is intensified.

Regarding the doctrinal understanding to define the legal regime applicable to container demurrage, it was presented that part of the doctrine defends the indemnity nature of the institute, without limitation of values, based on the principle of *Pacta Sunt Servanda,* which would privilege the sea carrier. On the other hand,

part of the specialized doctrine understands that the demurrage of a container must be interpreted under the legal regime of a penalty clause.

In view of the arguments brought up, it was found that, in the national legal system, the institute of indemnity is necessarily restricted to effective losses and lost profits arising from the action or inaction of the debtor, that is, the obligation of the creditor to prove the losses, and the collection cannot go beyond what was effectively lost or what reasonably was failed to profit.

On the other hand, if container demurrage is understood as a penalty clause, it would be an accessory obligation, derived from the Maritime Bill of Lading, which main purpose is to transport the cargo from one point to another upon payment of the freight. Its character as a penalty clause would arise from the prefixation of an amount already paid to compensate for any damage in the face of non-compliance with the accessory obligation, that is, the non-timely return of the container. In these terms, the demurrage value could not, a priori, be higher than the freight value.

Currently, the prevailing jurisprudence understands that demurrage collection or container demurrage has a legal nature of pre-fixed indemnity for breach of contract, to compensate the owner for the retention of the safe for a period longer than the agreed upon period, regardless of the demonstration of guilt or injury.

To analyze how other countries regulate the amounts charged for container demurrage, the "Interpretive Rules" of the FMC and the recommendations of FIATA were examined.

In this context, it should be noted that the FMC recognizes that demurrage has penal elements that were established to encourage the prompt movement of cargo off the pier, but also includes a compensatory element.

In addition, the FMC understands that demurrage charges serve to speed up the movement of cargo at the terminals, as they are an incentive for the various actors working in the logistics chain to seek to move with agility to provide fluidity to transportation. Considering this, the interpretive rule of the FMC premises that the more the demurrage practices are aligned with

the search for agility and fluidity of transportation, the less they should be considered unreasonable.

However, the rules make it clear that it is up to the Commission to analyze the reasonableness of the charge in cases of disagreement. To this end, it will consider the extent to which regulated entities have defined demurrage terms, accessibility to definitions, and how much the definitions differ from terms used in other contexts. The FMC understands transparency as a basic principle of demurrage practices.

In turn, the Best Practices Guide published by FIATA recognizes that demurrage and detention rates are valid instruments for shipowners to ensure the return of their equipment as quickly as possible. However, FIATA does not believe that shippers should be subject to unfair or unreasonable charges of this nature, especially when the delay is due to the owner's fault.

FIATA suggests that a series of issues related to demurrage be analyzed and that the negotiation seeks to:

- Limit accumulated demurrage to a maximum amount.
- Extend the free period if the terminal is unable to release / receive a container within a period equal to the duration of the inability.
- Ensure a level playing field for containers in port-to-port transport and negotiate terms to reduce unfair differentiation.
- Support the modal shift to more environmentally friendly modes of transport, increasing the period of freedom from detention.
- Amend the calculation of export demurrage to transfer responsibility for ship delays to the shipping company.
- Make sure that demurrage charges on import shipments are collected faster, preferably within a week.
- Contribute to relieving congestion at the terminal, as well as the concentration on land of pickups and deliveries due to larger ships and higher peaks and allowing cargo holders more flexibility, increasing demurrage-free periods.

- Encourage greater data sharing in the maritime logistics chain, which would lead to greater transparency of information related to these fees.

Finally, exploratory research was carried out using a small sample of four maritime carriers in five foreign ports (Buenos Aires, Antwerp, Rotterdam, Singapore and Shanghai) and Santos. This research served to compare the values displayed there, as a form of probing that allows for an approximate view of the facts, so that future research can be designed for greater understanding and precision.

Therefore, due to the small sample, notably of ports and maritime carriers, the data are insufficient to conclude about the abusiveness or compliance of demurrage prices and free time terms in Brazil compared to other ports in the world.

Despite the limitations pointed out, the comparison of over-the-counter values of average demurrage for the 14th day, points to the following research findings.

For all types of containers on import, prices in Santos are markedly higher than prices in Shanghai, averaging respectively $21 and $7 for 20'DC containers, and $40 and $15 for 40-feet dry containers.

- For all types of containers on import, prices in Santos are close to prices in Singapore, averaging $21 in Santos and $19 in Singapore for 20' DC containers, and $40 and $38 for 40' DC and 40'HC containers. However, it should be noted that the methodology adopts the 14th day of demurrage for all ports, even though the dwell time (average time of storage of full containers) for imports in Singapore is only of 1.46 compared to 12.7 days in Santos.
- For all types of dry containers (20’ DC, 40’ DC and 40’ HC) upon import, the free time periods have the following averages: Santos,6.5 days; Singapore, 7 days; Shanghai, 7 days; and Buenos Aires,7 days.

Other comparisons were jeopardized due to the reduced sample and the high dispersion of data for the same port, under penalty of incurring an unrealistic representation of the reality of prices in each port.

Still regarding data dispersion, there is a greater dispersion in exports, both in terms of demurrage and free time periods, among maritime carriers in the port of Santos. As the specialist in regulation of waterway transportation services Arthur Felipe de Menezes Il Pak observed, in FOB exports, exporters do not choose the maritime carrier. This may raise the possibility of a need for greater regulatory monitoring in imports, given that in CIF imports (usually practiced in Brazil), the user does not have any interference in the choice of the shipowner who will serve him.

Thus, this study brought factual elements on container demurrage, with a focus on international benchmarking, in order to provide the Agency with facts and evidence that can support ANTAQ's regulatory options on such an important topic in the Brazilian national logistics chain.

7. REFERENCES

ANTAQ. Statistical Yearbook (2018). Available at: www.web.ANTAQ.gov.br/anuario. Access on: August 2019.

ANTAQ. Comparative study of THC values in container terminals in Brazil and worldwide. Available at: http://portal.antaq.gov.br/index.php/estudos/. Access on 11/13/2020.

ALPHALINER. Public top 100. Market share. Available at: https://alphaliner.axsmarine.com/PublicTop100/. Access on: 11/13/2020.

BAZANI, Camila Lima; PEREIRA, Janser Moura; LEAL, Edvalda Araújo. Brazil's logistics performance in the international market: analysis of the LPI index. In: BRAZILIAN COSTS CONGRESS, 24., 2017, Florianópolis, 2017. pp. 1-16.

CECAFÉ. Brazilian Coffee Exporters Council – CECAFÉ. In: ANTAQ. Subsidy Collection 03/2020/SRG-ANTAQ. Brasília: Process Nº 50300.010899/2020-14, 2020. pp. 40-43. (nº SEI 1198641).

CENTRONAVE. National Center for Transatlantic Navigation – CENTRONAVE/ KINCAID I Mendes Vianna Advogados Associados. In: ANTAQ. Taking Grants 03/2020/SRG-ANTAQ. Brasília: Process Nº 50300.010899/2020-14, 2020. pp. 139-142. (nº SEI 1198641).

CMA CGM. Demurrage & Detention. Available at: https://www.cma-cgm.com/ebusiness/tariffs/demurrage-detention Access on: December 7, 2020.

COALITION FOR FAIR PORT PRACTICES. Petition for Rulemaking. Washington, December 7, 2016. Available at: https://www2.fmc.gov/readingroom/docs/P4- 16/P4-16 petition.pdf/. Access on: 12/29/2020.

COLLYER, Wesley. Demurrage of ships: the "once on demurrage, always on demurrage" rule. In: CASTRO JÚNIOR, Oswaldo Agripino de (org.). Maritime Law Made in Brazil. São Paulo: Lex, 2007. pp. 214 and 215.

CREMONEZE, Paulo Henrique. Maritime Law Practice: the maritime transportation contract and the carrier's civil liability. 2. ed. São Paulo: Quartier Latim do Brasil, 2012. p. 454.

FARIAS, Diogo. In: ANTAQ. Subsidy Collection 03/2020/SRG-ANTAQ. Brasília: Process Nº 50300.010899/2020-14, 2020. pp. 105-107. (nº SEI 1198641).

FEDERAL MARITIME COMMISSION (FMC). Fact-Finding Investigation nº 2828 – Conditions and Practices Relating to Detention, Demurrage, and Free Time in International Ocean-borne Commerce. Order of Investigation. March 5, 2018. Available at: https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/ff-28 ord2.pdf/. Access on: 12/29/2020.

FEDERAL MARITIME COMMISSION (FMC). Fact-Finding Investigation nº 28 – Conditions and Practices Relating to Detention, Demurrage, and Free Time in International Ocean-borne Commerce. Interim Report. September 4, 2018. 19 p.

FEDERAL MARITIME COMMISSION (FMC). Fact-Finding Investigation nº 28 – Conditions and Practices Relating to Detention, Demurrage, and Free Time in International Ocean-borne Commerce. Final Report. December 3, 2018. p. 35.

Available at: https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF-28_FR.pdf/. Access on: Dec 11, 2020.

FEDERAL MARITIME COMMISSION (FMC). Fact-Finding Investigation nº 28. Final Recommendation to the Commission. August 27, 2019. Available at: https://www.fmc.gov/wp-content/uploads/2019/09/FF28FinalReportLetter.pdf. Access on: 12/29/2020.

FEDERAL MARITIME COMMISSION (FMC). Interpretive Rule on Demurrage And Detention Under The Shipping Act. Washington: Federal Register, May 18, 2020. v. 85, n. 96. Available at: https://www2.fmc.gov/readingroom/docs/19-05/19-05_fnl_rul_fr.pdf/. Access on: Dec 11, 2020.

FEDERAL MARITIME COMMISSION (FMC). Rules, Rates, and Practices Relating to Detention, Demurrage, and Free Time for Containerized Import. Washington: Federal Maritime Commission, 2015. 64 p. Available at: https://www.fmc.gov/wp-content/uploads/2019/04/reportdemurrage.pdf. Access on: Dec 11, 2020.

FIATA. Demurrage and Detention in Container Shipping: best practices as proposed by FIATA. Geneva: FIATA, 2018. 10 p. Available at: https://fiata.com/fileadmin/user_upload/documents/recent_views/MTI/FIATA_World_Congress_2018_-_Presentation_New_Working_Group_Sea_-Best_Practice_Guide_on_demurrage_and_detention-.pdf. Access on: Dec 11, 2020.

GAZETA MERCANTIL. Lack of containers and legal exits. São Paulo, Aug 19, 2004.

HAPAG-LLOYD. Demurrage & Detention. Available at: https://www.hapag-lloyd.com/en/online-business/tariffs/detention-demurrage.html Access on: December 7, 2020

MAERSK. Demurrage & Detention. Available at: https://www.maersk.com/local-information/ Access on: December 7, 2020.

MARCHIOLI, Rodrigo. In: ANTAQ. Subsidy Collection 03/2020/SRG-ANTAQ. Brasília: Process Nº 50300.010899/2020-14, 2020. pp. 13-16. (nº SEI 1198641).

MSC. Demurrage & Detention. Available at: https://www.msc.com/country-guides Access on: December 7, 2020.

LEGAL NATURE OF CONTAINER DEMURRAGE CHARGE, IN LIGHT
OF RFB CONSULTATION SOLUTION N°108-2017. Rio de Janeiro: Biblioteca Almirante Adalberto Nunes – Maritime Court, n. 38, 2017. Bimonthly. May-Jun / Special Section – Commented Jurisprudence.

PARREIRAS, Fábio Ataíde Silva. Container logistics and demurrage payment: a case study. 2012. 49 f. Monograph (Specialization) - Course in Strategic Logistics and Transport Systems, School of Engineering, Federal University of Minas Gerais, Belo Horizonte, 2012. Available at: https://repositorio.ufmg.br/bitstream/1843/BUOS-9C5GFG/1/monografia_f_bio_parreiras.pdf. Access on: Dec 03, 2020.

PRESIDENCY OF THE REPUBLIC. SUB-CHIEF OF ANALYSIS AND MONITORING OF GOVERNMENT POLICIES [ET AL.]. General guidelines and guidance for preparing a Regulatory Impact Analysis – AIR. Brasília: Casa Civil, 2018. 108 p. Available at: https://www.gov.br/casacivil/pt-br/centrais-de-conteudo/downloads/diretrizes-gerais-e-guia-orientati. Access on: Dec 17, 2020.

OCTAVIANO MARTINS, Eliane M. Course on Maritime Law: volume iii: contracts and processes. Barueri - SP: Manole, 2015. 810 p.

ROEMER, Jens. Demurrage and detention charges in container shipping. Unctad Transport and Trade Facilitation Newsletter, Geneva, n. 80, p. 1-2, 12 Dec. 2018. Quarterly. Available at: https://unctad.org/news/demurrage-and-detention- charges-container-shipping. Access on: Dec 10, 2020.

ROSSI, Catiani; CASTRO JUNIOR, Oswaldo Agripino de. The legal nature of container demurrage. 2019. 37 f. Monograph (Specialization) – Legal Science Course, No Prelo, Florianópolis, 2019.

SILVEIRA, Eliana Aló da. 20 years of the judicialization of container collection and demurrage: what is and what has changed in demurrage. Belo Horizonte: Arraes Editores Ltda., 2018. 165 p. (Pantalassa Collection).

WINTER, James. The charge of container demurrage in the importation by international maritime transport: the Brazilian case. 2019. 83 f. Thesis (master's degree)
– Professional master's Course, São Paulo Law School, Fundação Getúlio Vargas, São Paulo, 2019. Available at: http://bibliotecadigital.fgv.br/dspace/handle/10438/28491. Access on: Nov 24, 2020.

8. ATTACHMENTS

1 - Interpretive Rule of Demurrage and Detention under the Maritime Navigation Act – United States Federal Maritime Commission

§ 545.5 Interpretation of the Sea Transport Act 1984 – Unfair and Unreasonable Practices Regarding Demurrage and Detention.

(a) Purpose. The purpose of this rule is to provide guidance on how the Commission will interpret 46 U.S.C. 41102 (c) and § 545.4 (d) in a detention and demurrage context.

(b) Applicability and scope. This rule applies to practices and regulations concerning demurrage and detention of cargo in containers. For the purposes of this regulation, the terms demurrage and detention include any charges, including "per diem," determined by common maritime carriers, maritime terminal operators or maritime transport intermediaries ("regulated entities") related to the use of maritime terminal space (e.g., land) or containers, not including freight charges,

(c) Incentive Principle — (1) General. When analyzing the reasonableness of demurrage and detention practices and regulations, the Commission will consider the extent to which demurrage and detention are serving the primary purposes as financial incentives to promote the fluidity of transport. (2) Particular applications of the incentive principle:

(i) Cargo availability. The Commission may consider in the reasonableness analysis the extent to which practices and regulations relate demurrage or free period to the availability of cargo for removal.

(ii) Empty container return. Absence of mitigating circumstances, practices and regulations that mandate detention when it does not serve the purposes of incentive, such as when empty containers cannot be returned, are likely to be considered unreasonable.

(iii) Cargo availability notice. When analyzing the reasonableness of demurrage practices and regulations, the Commission may consider whether and how the regulated entities provide information to those responsible for the cargo that it is available for removal. The

Commission may consider the type of information, what the information is provided for, the format of the information, the method of distributing the information, the timing of the information and the effect of the information.

(iv) Government inspections. When assessing the reasonableness of demurrage and detention practices in the context of government oversights, the Commission may consider the extent to which demurrage and detention are serving their intended purpose and may also consider mitigating circumstances.

(d) Demurrage and detention policies. The Commission may consider in the reasonableness analysis the existence, accessibility, content, and clarity of policies implementing demurrage and detention practices and regulations, including dispute settlement policies and practices and regulations with respect to charging demurrage and detention. When reviewing dispute settlement policies, the Commission may also consider the extent to which it contains information on points of contact, deadlines, and substantiation requirements.

(e) Transparent terminology. The Commission may consider in the reasonableness analysis the extent to which regulated entities have clearly defined terms used in demurrage and detention practices and rules, definitions of accessibility and the extent to which definitions differ from terms used in other contexts.

(f) No preclusion. Nothing in this rule prevents the Commission from considering factors, arguments, and evidence in addition to those specifically listed in this rule.

2 - Quantitative and Summary of Contributions in Subsidy Collection Nº 03/2020

Contributor	Legal Nature	Adhesion Agreement?	In favor of any Regulation?
Fábio Diez (Itapoá Port)	Indemnity	No	No
Alvaro Oliveira (Itaoca Offshore)	Penalty clause	Yes	Yes (transparency)
Fabrício da Silveira (Martarello Advogados)	Indemnity	Yes	Yes (value limit)
Rodrigo Marchioli (Marchioli & Minas Advogados)	Indemnity	Yes	Yes (value limit)
Douglas Brito (Ônix Assessoria Aduaneira)	Indemnity	Yes	Yes (value limit)
Daniel Rodrigues (Metropolitan Transportes)	Indemnity	Yes	Yes (transparency)
Paulo Germano (RJM serviços aduaneiros)	Penalty clause	Yes	Yes (value limit)
Emerson Noronha (Transportes Bertolini)	Indemnity	No	Yes (value limit)
Daniella (Revoredo Advocacia)	Indemnity	No	Yes (transparency)
Osvaldo Agripino (CECAFÉ)	Penalty clause	N/R	Yes (value limit)
André de Seixas (Logística Brasil)	Indemnity	Yes	Yes (value limit)
John Butler (World Shipping Council)	Indemnity	N/R	No
Simone Assenheimer (Log in S/A)	Indemnity	No	No
Marcelo Sammarco (OAB Santos)	Indemnity	No	No
André Zanin (FENAMAR)	Indemnity	N/R	No
Grupo A. P. Moller Maersk	Indemnity	No	No
Priscila Fabretti (Ass. Bras. Distr. Prods. Químicos e Petroquímicos)	Indemnity	Yes	Yes (transparency)
Marcelo Sammarco (Sammarco e Associados Advocacia)	Indemnity	No	No
Cristina Wadner (Unimar Agenciamentos Marítimos LTDA)	Indemnity	No	No
Luciana Rodrigues (MSC do Brasil)	Indemnity	No	No
Pedro Neiva (Centronave e Kincaid)	Indemnity	No	No
Usuport - BA	Indemnity	Yes	Yes (value limit)
Foreign Trade Companies Union of SC – SINDITRADE	Penalty clause	Yes	Yes (value limit)
Bruno Tussi (Tussi & Platcheck Advogados)	Indemnity	No	No
Luiz Oliveira (Asia Shipping Ltda)	Indemnity	Yes	Yes (transparency)
Gisely Horsth (Hapag-Lloyd)	Indemnity	No	No
Luiz Oliveira (V3 Shipping do Brasil)	Indemnity	Yes	Yes (value limit)
Marie-Lorraine (CMA-CGM)	Indemnity	N/R	No
João Braun (Reis, Braun e Regueira Advogados)	Indemnity	No	No
Diogo Farias	Penalty clause	Yes	Yes (value limit)