

## BRIEFING & INDUSTRY RECOMMENDATIONS PAPER

### Demurrage & Detention Practices in Shipping

#### Introduction

There has lately been more and more distress in the freight forwarding industry about the shipping lines reducing the free-time periods for the pick-up/return of containers and charging unreasonable detention and demurrage (D&D)<sup>1</sup> fees, which have increased considerably in the recent years.

CLECAT has discussed this issue within its Maritime Institute and started collecting information on D&D practices, which are of concern to freight forwarders in different parts of Europe as well as on a global level. On the basis of these discussions and the exchange of practices among its members, CLECAT has drafted a number of industry recommendations.

Although there is no binding regulation controlling the business practices in relation to D&D, several initiatives are taking place at the global level, aiming to provide guidance and best practices in the industry. In Europe, the D&D-related issues are increasingly addressed via the precedent-setting court cases. Accordingly, this paper provides a summary of the recent developments with regards to D&D practises in Europe and globally, with a view to creating awareness on the issue from the freight forwarders' perspective.

#### Recent initiatives at global level

##### FIATA: best practice guidelines on detention & demurrage

Aiming to examine the current situation on D&D and to outline best practices that could be implemented voluntarily by all parties moving cargo through ports, the International Federation of Freight Forwarders Associations (FIATA) released a [Best Practice Guide on Demurrage and Detention in Container Shipping](#) in October 2018. The guide identified the legitimate reasons why D&D charges can be incurred and further explored situations where these charges could be minimised or avoided.

FIATA acknowledged that D&D charges are a valid tool for shipping lines to ensure that their equipment is being returned as fast as possible, while those users that exceed the contractual duration of container use should be charged accordingly. However, FIATA argued against merchants being subjected to unjust and unreasonable charges of this nature given that delays often occur due to no fault of the forwarder/shipper.

FIATA suggested that commercial partners review a series of issues related to D&D charges and negotiate agreements, which include provisions to:

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<sup>1</sup> Demurrage fees are charged when a container is not picked up from port/terminal during the free time period, whereas detention fees apply when empty containers are not returned to the nominated depot within the allotted free time.

- Limit the charges accrued to a maximum amount that represent a reasonable compensation for the shipping lines in relation to the value of the container.
- Extend the free time period in case the terminal is unable to release or receive a container by the period that is equal to the duration of the inability.
- Ensure a level playing field for containers in merchant haulage and negotiate terms to reduce unfair differentiation.
- Change the calculation of export demurrage to transfer the responsibility for the vessel departure delays to the shipping line.
- Ensure that D&D charges on import shipments are charged much faster, ideally within a week.
- Help relieve terminal congestion as well as land side concentration of pickups and deliveries due to bigger vessels and higher peaks and allow merchants more flexibility by increasing demurrage-free periods.
- Support the modal shift towards more environmentally friendly modes of transport by increasing the detention-free period.

FIATA specified that the commercial partners could use these guidelines to argue their case in commercial disputes.

#### *International Transport Forum: maritime logistics performance KPIs*

CLECAT's members agree that the most effective way to improve the situation may be by agreeing on best industry practices and tools in support of better planning in the container supply chain, which would reduce the risk of encountering unnecessary D&D charges.

CLECAT brought the concerns with regards to D&D to the attention of the International Transport Forum (ITF) in the end of 2018. This has encouraged the ITF to start working on an initiative, seeking to establish a set of key performance indicators (KPIs) for the maritime logistics chain. Most of the KPIs that exist focus on part of the maritime logistics chain (e.g. on liner shipping connectivity, schedule reliability, terminal productivity), but they are only helpful to a limited extent as they generally do not result in exchanges between stakeholders on where collaboration could help improve maritime logistics chains. Therefore, this work is particularly important, as meaningful KPIs could provide possibilities for improved communication and reliability between the different actors in the shipping sector, leading to a better performance of the whole maritime logistics chain.

CLECAT has been an integral part of the work undertaken in the dedicated ITF working group, aiming to define a selection of commonly accepted maritime logistics KPIs, collect the data for these indicators and release them at the aggregation level of maritime trade lanes. These indicators – and the comparison of indicators between trade lanes – should help the stakeholders to engage in constructive dialogue to improve maritime logistics along these trade lanes. The selection of maritime logistics performance indicators would be done in a phased approach, starting with what is feasible and already available.

#### *US FMC: fact finding investigation into demurrage & detention practices*

In the US, the excessive detention and demurrage charging has attracted the attention of regulators. In early 2017, the US Federal Maritime Commission (FMC) launched an investigation into D&D practices referred to as the Fact Finding 28 (FF28), following a petition and testimony by the Coalition for Fair Port Practices, comprising shippers, intermediaries and other container transport interests.

Published in December 2018, a [final FF28 report](#) found that the international ocean freight delivery system would benefit from transparent, standardised language for D&D practices, as well as clear, simplified and accessible D&D billing practices and dispute resolution processes. Explicit guidance regarding the types of evidence relevant to resolving D&D disputes would also be beneficial, as well as consistent industry notice for container availability and equipment.

Overall, the investigation found that D&D fees remain necessary to incentivise good behaviour on the part of shippers and forwarders in how they collect cargo at the terminals in an efficient manner and promptly return the equipment. However, these fees should not be imposed on those shippers and forwarders, who have taken the necessary care to provide the proper documentation, expeditiously collect their cargo and return equipment on time, but are shut out due to service breakdowns among ocean carriers and marine terminal operations, as well as unexpected factors outside their control, such as the Customs and Border Protection cargo holds for inspection.

The FF28 investigation paved way for the US FMC's proposal for an [Interpretive Rule on Demurrage and Detention under the Shipping Act](#), which is designed to clarify how the FMC will assess the reasonableness of demurrage and detention practices. The rule specifies that the purpose of D&D charges is to act as financial incentives to cargo interests to retrieve cargo and return equipment. These financial incentives operate to ensure that cargo interests do everything customarily required to retrieve cargo and return equipment within the time allotted. Absent extenuating circumstances, however, when incentives no longer function because shippers are prevented from picking up cargo or returning containers within time allotted, the rule holds that the charges should be suspended.

The Interpretive Rule also considers the extent to which D&D are fit for purpose as financial incentives to promote freight fluidity, particularly with respect to cargo availability for retrieval, empty container return, notice of cargo availability and government inspections. Albeit bound to US rulemaking, the Interpretive Rule is expected to have a significant impact on D&D practices worldwide.

## **European court cases and judgements**

### *The Belgian Commercial Court: congested terminal and merchant haulage abuse*

On 28 August 2018, the Belgian Commercial Court in Antwerp decided against a shipping line which had levied demurrage charges on a forwarder. It was established that a terminal was suffering from congestion and that the forwarder could not be held responsible for a situation that was under the control of the terminal, which was acting as a sub-contractor to the shipping line and gave priority to containers under carrier haulage.

The court established that the forwarder had done all that was necessary to arrange for the pick-up of the container in a timely manner, but the congestion in the terminal led to the inability of the terminal to release the container. Furthermore, it was established that the terminal (acting as sub-contractor of the shipping line) gave priority to a barge with containers purely under the control of the shipping line. In other words, the container under merchant haulage (which was booked by the forwarder well in advance) was cancelled in favour of containers controlled by the shipping line.

In this case, the shipping line tried to collect demurrage charges from the forwarder for a container in merchant haulage, even though the very same shipping line was responsible for the demurrage charges that had been incurred, on account of having cancelled the pickup of forwarder's container and having given priority to a barge with containers under its own control (carrier haulage).

The Commercial Court's judgement against this practice is highly relevant to fair competition in Europe and the ability of forwarders to move containers under merchant haulage. Discriminating against merchant haulage, as organised by shippers or forwarders, vis-à-vis carrier haulage, organised by the carrier, may be considered as anti-competitive behaviour with regards to EU competition rules.

*The Court of Appeal of Antwerp: period of charging demurrage/detention cannot be infinite*

In a judgment, which came out on 18 March 2019, the Antwerp Court of Appeal ruled that the period of charging detention and demurrage costs cannot be infinite.

In this particular case, the shipping line referred to the tariffs of D&D costs in the booking conditions. As no reservation was made by the freight forwarder at the moment of booking, the Court decided that the tariffs were clear and therefore enforceable to the freight forwarder. However, the Court also decided that the situation changes when the D&D costs are charged for a particularly long period. *In casu*, the D&D costs were claimed for a period longer than one year after the expiration of free time.

In this case, the Court of Appeal judged that, when a container is not returned within a year after the end of free time, the container should be considered "lost." Therefore, it was ruled that the shipping line could only claim the replacement value of the container and the detention costs for the past year.

The Court decided that claiming detention costs for a particularly long period (*in casu*, longer than one year) could be considered as "manifest exceeded." The nature of this consideration is based upon the fact that the costs were disproportionate to the subject of the contract and the actual disadvantage accrued by the shipping line (in relation to the value of a new container).

This is in line with the 2016 judgement in the UK, where the Court of Appeal judged that it was "wholly unreasonable" for a shipping line to claim demurrage fees with no limit in time, given that the merchant was unable, rather than choosing not to, perform its obligation to return the containers. The Court found that charges were unreasonable "because the carrier has not been keeping the contracts alive in order to invoke the demurrage clause for a proper purpose but in order, in effect, to seek to generate an unending stream of free income."

*The Court of Commerce of Antwerp: claim for demurrage by the shipping line – custody by customs*

On 20 March 2019, the Court of Commerce of Antwerp ruled on a continued claim for demurrage by the shipping line following the seizure of containers by customs.

In this case, the shipping line charged demurrage and storage costs over a period of more than 4 years. Since the containers were never picked up by the customer/consignee, no detention costs were charged. 2 months after the containers arrived at the port of destination, they were seized by the customs authorities. Since the containers were transferred to customs, they were no longer under custody of the terminal or the shipping line. However, the shipping line kept claiming demurrage.

The Court of Commerce of Antwerp defined 'demurrage costs' as costs that are charged by the shipping line to the customer for keeping the container within the terminal for a period longer than the agreed free period. According to this definition, no demurrage costs may be charged for containers that left the terminal. The Court of Commerce decided that, as of the moment the customs authorities took possession of the goods, charging of demurrage and storage costs by the shipping line was no longer justified as the containers were no longer under control/custody of the carrier/shipping line.

According to the shipping line in this case, demurrage and storage costs should be considered as part of the freight (accessorium of the freight). The Court decided that, even if these costs were considered an accessorium of the freight, the shipping line was no longer allowed to charge demurrage costs when the duties of the shipping line under the contract of carriage came to an end. As of the moment customs authorities took custody over the containers, the shipping line could no longer fulfil its contractual obligation under the contract of sea transport to deliver the goods. Therefore, any continuation of the contract for the sole purpose of collecting additional duties was an abuse of rights.

In its verdict, the Court judged that the claimed demurrage/detention costs constitute a compensation clause rather than an accessorium of the freight. As a compensation clause is eligible for moderation by the Court, the Court can even mitigate the claim to zero if no actual damage was done.

For the assessment of the actual damage, the Court took into account the specific circumstances. In this case, the Court ruled that charging demurrage for more than 4 years was excessive, especially because the shipping line only kept the containers for a very short period of time. Furthermore, the shipping line did not prove in any way the actual damage it suffered.

Given the deliberate attempt of the shipping line to mislead the Court about the reality of the services it performed as well as the short period during which the containers were kept by the shipping line, the Court reduced the claimed costs of demurrage to zero. According to the Court, the shipping line would be allowed to claim the replacement value of the container, subject to submitting the supporting documents that prove the value of the container.

*The High Court of Genoa: forwarder cannot be held liable when not indicated as 'shipper' in Bol*

In the legal dispute culminating on 27 June 2019, a shipping company pursued before the Genoa High Court jointly and severally an Italian freight forwarder and its principals, claiming €130.000 ca., plus interest and costs, as demurrage accrued as the consequence of the stay of 5 containers at the destination port of Durres (Albania) due to consignee's refusal to receive them.

As a matter of fact, the freight forwarder concluded the booking acting as a 'forwarding agent' and stating that its principals were to be indicated as 'shippers' in the Bill of Lading to be issued. Accordingly, the Bill of Lading issued by the shipping company indicated the principals as 'shippers'.

As regards the claim pursued by the shipping company against the freight forwarder, the High Court of Genoa held in its judgment that the shipping line lacked the legal grounds to sue the forwarder. In particular, the judge considered that, pursuant to two recent judgments of the Italian Court of Cassation, when the Bill of Lading indicates the principals as 'shippers', then the forwarder is not liable for containers' demurrage accrued at the port of destination, even though the booking was concluded by the same forwarder. Therefore, since the 'shipper' was to be considered the only liable party, the Court entirely rejected the shipping company's claim against the forwarder.

As regards the claim pursued by the shipping company against the principals, the High Court of Genoa considered two main defensive arguments put forward by the latter. Firstly, the judge held that, since sums related to claims for containers' demurrage can be considered as 'penalties' (i.e. liquidated damages) under Italian law, then in principle the defendants were right in invoking the applicability of the Article 1384 of the Italian Civil Code. This provision does allow the judge, upon the party's application, to reduce 'penalties' on an equitable basis if deemed exaggeratedly onerous. However, in this case, the Court did not apply this provision, arguing that the principals could not merely contend

that the claimed ‘penalties’ were exaggeratedly onerous, without giving proper evidence of it, for instance by proving the actual value of containers and/or the disproportion between the value of goods and the sums claimed by the shipping company in that respect.

Secondly, the Court upheld in part the further defensive argument raised by principals, stating that the shipping company omitted to take due action in order to minimise the damages in compliance with the Article 1227 (2) of the Italian Civil Code. Therefore, the judge awarded the shipping company a total sum of €68.000, thus substantially reducing its original claim of €130.000 ca.

### **Conclusions and industry recommendations**

- While demurrage and detention charges are an important tool for the shipping lines to ensure the efficient use of their containers, the merchants should not be subjected to such charges if the pickup or return of a container is delayed due to factors beyond their control. In these cases, the opinion prevails that shipping lines may try to abuse D&D charges in order to increase income as well as profits. As such, CLECAT underlines that charging unreasonable amounts of D&D should not constitute a revenue model for the shipping lines.
- CLECAT fully supports the US FMC guidance, arguing that demurrage and detention charges are only valuable when they work, i.e. when they are applied in ways that incentivise the merchant to move cargo promptly from ports and marine terminals. For instance, the long-running series of strikes at French ports have created serious obstacles for many forwarders to pick up their cargo within the free time simply because the containers were not available to be picked up. Therefore, in line with the US FMC, CLECAT maintains that charging demurrage during a strike should be considered as “not serving its purpose to incentivise cargo interest to move containers”.
- CLECAT members have expressed suspicions that carriers are using their positions within integrated logistics groups to undercut forwarders by charging D&D to merchants who arrange the transport in merchant haulage but waive the charge for merchants for which they arrange the transport in carrier haulage. In doing so, the shipping lines are discouraging merchant haulage, thereby reducing competition and choice. The European Commission should be aware of these practices and consider them in the future revision of the Consortia Block Exemption Review (CBER).
- Although the modal shift to more environmentally transport modes is supported in most EU member states, CLECAT feels that the regulators have to become aware of the fact that demurrage and detention fees can have a seriously negative impact on the modal shift in view of the risks for costs increases. When containers are picked up and returned by barge or rail, rather than by road, the round trip of those containers takes more time, leading to the risk of accruing detention charges. Therefore, the shipping lines should be incentivised to increase the detention-free period, as this would support the shift towards rail transport and barging.
- Whereas the legal cases can help avoid unreasonable D&D charges in the future, as the examples discussed in this paper have highlighted, freight forwarders would rather seek to avoid going to court as this is both timely and costly. Industry best practices and tools in support of better planning in the container supply chain therefore offer a more effective way to improve the situation. For instance, a possibility to obtain a reliable advanced notification of the vessel arrival, communicated by the shipping line or terminal operator well before the

actual arrival of the vessel,<sup>2</sup> would allow forwarders to organise the rest of the transport services in advance (including picking up the containers in a demurrage-free period and returning them without incurring detention). The ability to rely on projected arrival data would be a real improvement, reducing the risk of encountering unnecessary D&D charges.

- It has been observed that in Europe the vessel cut-off times for the export delivery of loaded containers to the terminal has increased from 2 days (prior to vessel departure) some 10 years ago to 4 days and more. The increase in cut-off times has led to longer dwelling times of containers inside the terminal. Meanwhile, for the merchant, the demurrage-free time has decreased dramatically, leaving a very tight window for the delivery of export containers to the terminal in time for vessel cut-off and free demurrage, leading to congestion and a ‘rat race’ on land side. Accordingly, CLECAT believes that extending demurrage-free times could contribute to relieving such situation.

CLECAT remains at the disposal of interested parties for any further information.

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<sup>2</sup> One forwarder in the Netherlands noted that “...they [the shipping lines] cannot inform us when containers will be available, we need to check the website of the terminal. [...] This is putting an enormous pressure on the whole supply chain.”