

# 2024 TLA Annual Conference & CTLA Mid-Year Meeting

**May 1 – 4, 2024**

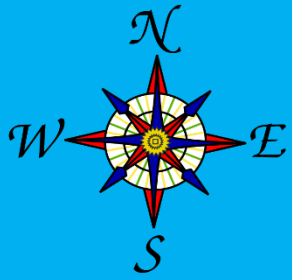
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Transportation Lawyers  
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**CTLA**





# RECENT DEMURRAGE AND DETENTION DEVELOPMENTS

OSRA 2022 and 46 C.F.R. Part 541

# The Federal Maritime Commission

- Established as an independent regulatory body in 1961.
- Responsible for administering the Shipping Act 1984 as amended by the Ocean Shipping Reform Acts of 1998 and 2022. 46 USC §40101 et. seq.
- Not quite a deregulated industry: Its self-styled mission statement is “[t]o foster a fair, efficient and reliable international ocean transportation system and to protect the public from unfair and deceptive practices”.
- Non-contiguous domestic water transportation under the jurisdiction of the Surface Transportation Board 49 USC §13502(17); 49 USC §13521 (i.e. Puerto Rico!)

## Fact Finding No. 28 and Interpretive Rule 46 C.F.R. §545.5

- **Not a new issue:** December 2016: the Coalition for Fair Port Practices petitioned for a rule making as to 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". 46 U.S.C. 41102(c)
- After the report by Commissioner Dye, who had been named Fact Finding Officer, 46 C.F.R. §545.5 was implemented.
- Not all D&D is bad: Embraced the concept of the "incentive principle" in that D&D is to promote "freight fluidity".

# 46 C.F.R. §545.5 Highlights

- Cargo availability
- Empty container return
- How availability is communicated
- Gov't (Customs) inspections effect
- Other D&D practices
- Not exhaustive list
- Attack on the concept of “once in demurrage always in demurrage”
- The FMC notes: “Ocean carrier practices, whether incorporated in the UIIA, or not, are within the Commission's purview under section 41102(c).”

# COVID-19 and FACT FINDING NO. 29

- March 31, 2020, 18 days after the COVID national emergency declared: Once again Commissioner Dye appointed as Fact Finding Officer.
- FF 29 Mandate: Identify **commercial solutions** to supply chain issues and develop commercial solutions to port congestion.

# THE SUPPLY CHAIN!

- Medical – PPE, other necessary equipment
- Consumer goods
- Construction
- Autos and parts
- Etc. etc. –
- Still feeling the effects

# LOOSE PARTS





# The FMC Becomes Proactive

- During the course of the investigation, the mandate for Fact Finding No. 29 was modified: in November 2020 a supplemental order was issued to *investigate carriers*, primarily in NY/NJ and LA/LB to determine if the carriers in those ports were employing D&D practices in violation of 46 U.S.C. §41102(c).
  - Specifically container return practices and if D&D practices complied with the incentive principle of 46 C.F.R. §545.5.
- Invited the public to provide information to the Commission.
- Shippers and motor carriers were also encouraged to contact the Commission's Bureau of Enforcement for specific actionable violations of the Act.
- Comm. Dye issued several information demands to MTOs and VOCCs demanding information on empty container returns, export cargo receiving timelines, demurrage and detention and MTO and VOCC's efforts to comply with 46 C.F.R. §545.5.
- Some carriers were not in compliance with the incentive principle.
- Encouraged public complaints.
- Good news for VOCCs? – Yes, although ocean freight rates were through the roof – increased ocean freight was a result of unique market forces – supply and demand.

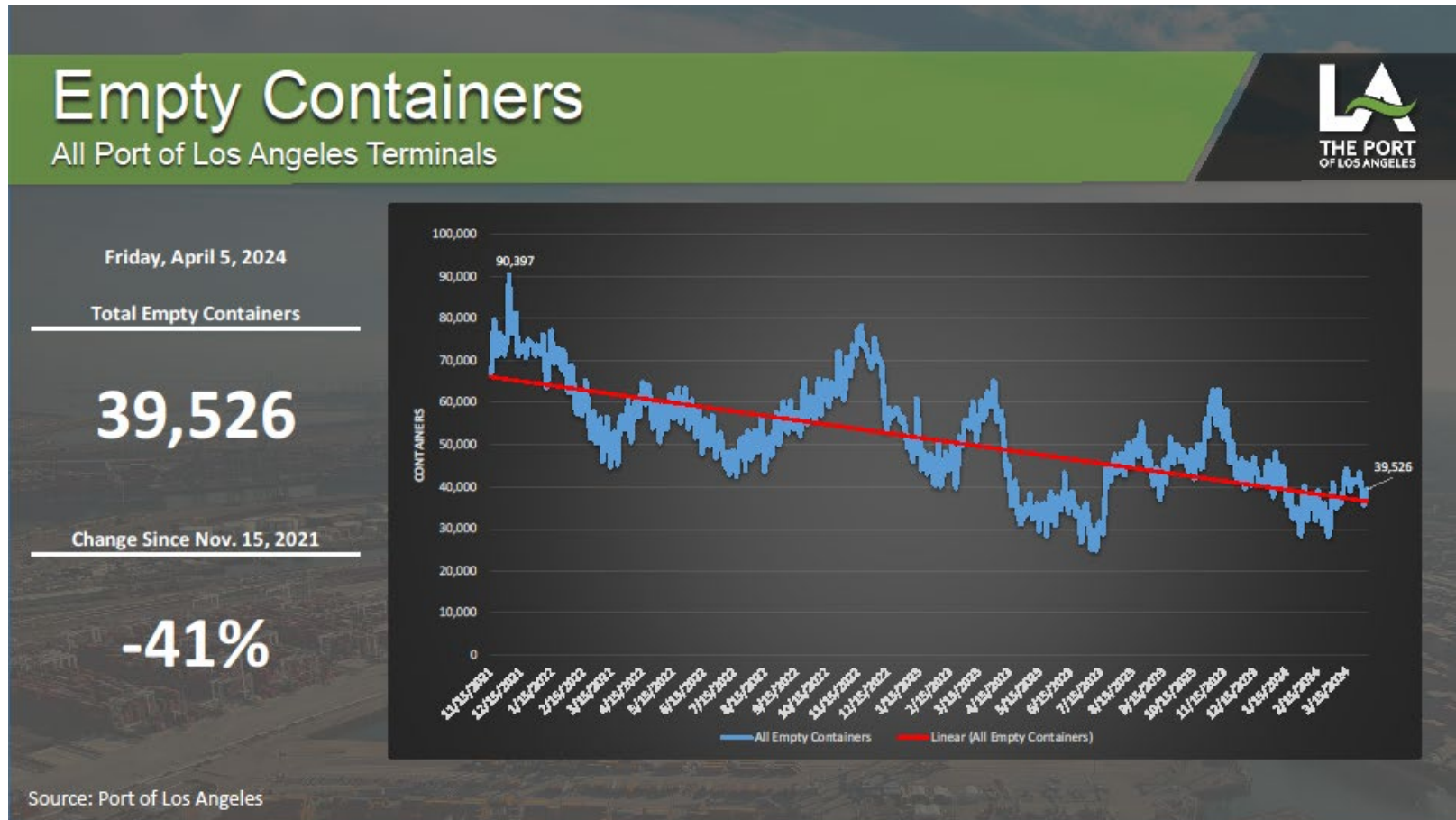
# How Bad Was the Congestion?

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- Dozens of ships at anchor
  - LB – 30-35 ships
  - Over 70?
  - Anchorage out of space
  - Slow transit times
  - Steaming in circles over the horizon
  - Anchor dragging caused oil spill



# How Bad Was the Congestion?





# How Bad Was the Congestion?

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- No place to store empty containers
- Parked anywhere
- Chassis shortage



# How Bad Was the Congestion?





# How Bad Was the Congestion?

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- From USA Today: Cargo containers sit stacked at the POLA 10-19-21 (Damian Dovarganes, AP)
- Congestion at terminals resulting in inability to pick up full containers and return empties



# Interim Solutions

- The Port of LA and LB: a penalty system for lengthy dwell times
  - Implementation was delayed while the terminals increased throughput
  - \$100 per day minimum
- Off dock equipment storage and exchange yards
- “24 hr.” operations?
- “street turns”
- Sailings to reposition empty containers (controversial)

# OSRA 2022

- Originally introduced as OSRA 2021
  - Concerns over carriers refusing to accept agriculture exports
  - Delays, shipping container shortages and demands on the “North American Supply Chain”
  - Congressional hearings
- OSRA Passed June 16, 2022
  - Explicit anti-retaliation protections for shippers, OTI’s and truckers
  - Set forth minimum necessary information for D&D Invoices at 46 U.S.C. §41104
  - New enforcement procedures



- Required information for D&D invoices under 46 U.S.C. §41104
  - (A) Date that container is made available.
  - (B) The port of discharge.
  - (C) The container number or numbers.
  - (D) For exported shipments, the earliest return date.
  - (E) The allowed free time in days.
  - (F) The start date of free time.
  - (G) The end date of free time.
  - (H) The applicable detention or demurrage rule on which the daily rate is based.
  - (I) The applicable rate or rates per the applicable rule.
  - (J) The total amount due.
  - (K) The email, telephone number, or other appropriate contact information for questions or requests for mitigation of fees.
  - (L) A statement that the charges are consistent with any of Federal Maritime Commission rules with respect to detention and demurrage.
  - (M) A statement that the common carrier's performance did not cause or contribute to the underlying invoiced charges.

# Failure to comply = harsh results

- [f]ailure to include the information required under subsection (d) on an invoice with any demurrage or detention charge *shall eliminate any obligation of the charged party to pay the applicable charge.*
- Any attempt to collect on an inaccurate invoice could result in penalties and a refund.
- Any person or entity which violates the Act can now be held liable for civil penalties ***or in addition to or in lieu of a civil penalty***, can be liable for a refund of the associated charges resulting from a Commission enforcement proceedings.

# Charge Complaints

- New enforcement mechanism found at 46 U.S.C. §41310.
- Who may file?: Only a shipper, consignee, trucker or third party which has been invoiced by or has paid charges to a common carrier may file a Charge Complaint.
- A Charge Complaint may only be filed against a common carrier (not MTOs).
- Charges issued by a common carrier after June 16, 2022 that are not in compliance with 46 U.S.C. §§41102 and 41104(a) – thus not limited to D&D but most common issue.

# Charge Complaints

- Why significant?
- Now the Commission takes on a case on behalf of an individual interested party.
- With new remedies – not only can the Office of Enforcement seek civil penalties it can also seek refunds for parties.
- After investigation, the Office of Enforcement could petition the Commission to issue an Order to show cause – Carrier has to justify its actions.
- Commission published interim rules and assistance on how to file a charge complaint.

# 46 CFR Part 541

- OSRA 2022 required the Commission to undertake a rulemaking further defining prohibited practices by common carriers, marine terminal operators, shippers, and ocean transportation intermediaries under § 41102(c).
- §541.6 – list of invoice requirements similar to OSRA 2022 but more specific.
- Timing limits: A VOCC must issue invoices within 30 days of the date of the last charge. If it fails to do so, the invoiced party has no obligation to pay the invoice even if an original invoice was issued to an incorrect party and needed to be reissued.
- “Billed party”: The Commission went on to establish that the universe of billed parties is now limited. Instead of motor carriers under the UIA or peripheral persons which may be captured by VOCC’s “merchant” clauses in their bills of lading, the billed parties are limited to the person for whose account the billing party provided ocean transportation and who contracted with the billing party for the transportation (the shipper) or the consignee.
- An invoice CANNOT be issued to any other person!

## 46 C.F.R. Part 541 cont.

- Timing requirements: In addition to the requirement to issue invoices within 30 days, a billed party has at least 30 days to challenge the invoice and once challenged the billing party must attempt to resolve the dispute within 30 days unless otherwise agreed among the parties, 46 C.F.R. §541.8.
  - *Different than the timing in the UllA*
- Carrier's lien rights not effected, 89 FR 14353.
- Timing: Effective May 28, 2024 except for the contents of the invoice provisions which are "delayed indefinitely" §541.6

# Results?

- Exponential increase in complaints being filed at the FMC.
- The Commission appointed an additional ALJ.
- As of September 2023 – at least \$1.7 million of D&D charges had been *voluntarily waived or refunded* as a result of charge complaints.
- Seen as a success. The FMC seeks to continue its proactive actions; looking to the continuing receipt of data on freight fluidity and investigations into new global issues which impede the transportation of cargo.

# On the Horizon

- OSRA 2022/46 CFR Part 541 vs the UIIA
- Will an inland rail yard be considered under the jurisdiction of the FMC as a “marine terminal” or otherwise when handling cargo on a through bill of lading (*M.E. Dey & Co v. Hapag Lloyd*, Docket no. 22-35).
- Challenges to other billing practices during the Covid crisis
  - Freight charges
  - Lack of service
  - [www.FMC.gov](http://www.FMC.gov) (proceedings/documents)





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**REGISTER NOW!**

# DEMURRAGE & DETENTION

The European perspective at the TLA anual conference  
in Puerto Rico, „ocean panel“ 3 May 2024

*Dr. Marco Remiorz, shareholder, ARNECKE SIBETH DABELSTEIN,  
Hamburg/ Germany*



## DR MARCO REMIORZ

### EXPERIENCE

- Admitted to the German Bar in 2001, joined Arnecke Sibeth Dabelstein in 2004, Managing Partner until 12/2023
- Advisor and service provider to the (transportation) industry; extensive knowledge in drafting and negotiating project-, supply- and logistics contracts for forwarders, ship owners, airlines, airports, offshore companies, the trading and the manufacturing industry; solution-oriented advice on transport liability, transport- and hull loss damage in respect of all modes of transport insurers and P&I clubs; experienced litigator, arbitrator
- Diverse professional experience with a focus on transport/commerce/insurance at Dabelstein & Passehl, Hamburg (2004–2018), Bodis, Gienapp & v. d. Decken, Hamburg (2001–2004) and with the law department of a large German automotive supplier (1998–1999)

### EDUCATION

- Legal clerkship in Hamburg, Flensburg and Fresno, California, USA (1999–2001)
- Studied in Bonn, Lausanne (1993–1998)
- PhD in law from Dresden Technical University (2005); lecturer on insurance law at Hamburg University
- Languages: German, English, French

### TRACK RECORD

- Drafting new transport and logistics contracts for a large German food manufacturer as well as a tier 1 supplier to the automotive industry
- Judicial and extrajudicial support for freight forwarders in respect of major maritime casualties (Hanjin insolvency, MOL COMFORT, UND ADIYATIK, MSC NAPOLI; GALLIPOLI SEAWAYS)
- Developing a new insurance product for a globally operating parcel service
- Ongoing advice as an external law department for various logistics and trade companies
- Conception of digital booking platform for a top 15 German logistics company

### ACCOLADES

- BEST LAWYERS GERMANY 2024
- LEGAL 500 EMEA: LEADING INDIVIDUAL 2024
- WWL: THOUGH LEADER 2024
- CHAMBERS 2023



**DR MARCO REMIORZ**  
Partner

### PRACTISE AREAS

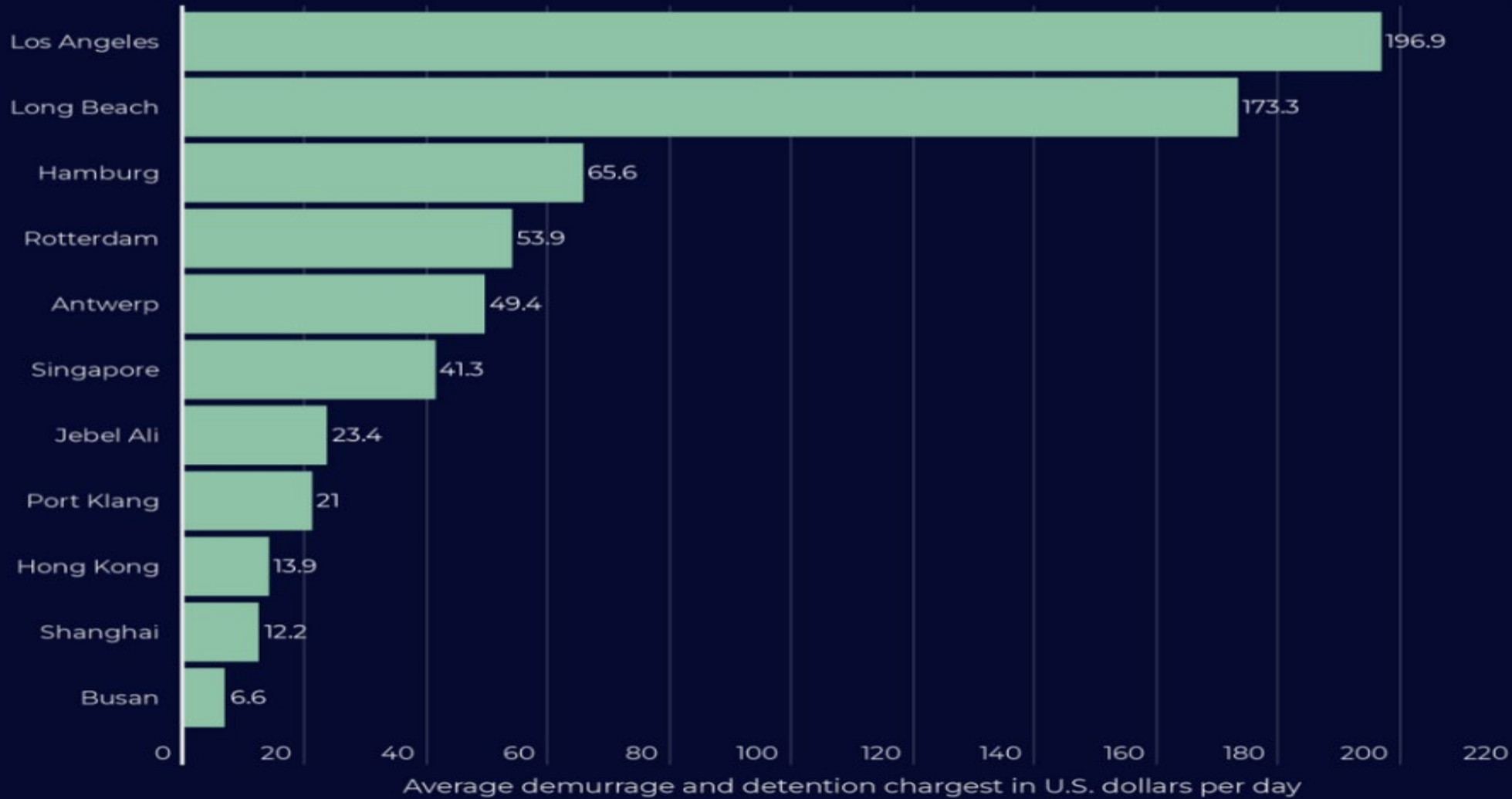
Transportation, Aviation, Logistics,  
Maritime Industry, Commercial,  
Intellectual Property

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# Average demurrage and detention charges worldwide in 2020, by port



# USA - Detention

Effective Date : October 1 , 2023  
Expiry Date: until further notice  
Publishing Date: minimum 30 days



## Freetime and Detention Charges - Hapag-Lloyd Equipment No Credit will be extended to Detention charges

WD = Working day is defined as when the relevant terminal/facility is open for interchange of respective empty and/or full containers.  
Working days can be different for each terminal. At terminals that are open on Saturday and/or Sunday, those days will be considered as WD

USA Import Carrier Haulage (DTD)														
Country	Port	Charge	Period	20' and 40' Regular (Standard)			Period	20' and 40' Special			Period	20' and 40' Temp Controlled Cntr (Reefer & Tank; Operating)		
				Working Days	Curr.	Rate per day		Working Days	Curr.	Rate per day		Working Days	Curr.	Rate per day
USA	All ports	Detention	Freetime	DOI+4WD	-		Freetime	DOI+3WD	-		Freetime	DOI+3WD	-	
			1st Period	3	USD	240/WD	1st Period	3	USD	365/WD	1st Period	3	USD	540/WD
			2nd Period	3	USD	290/WD	2nd Period	3	USD	490/WD	2nd Period	3	USD	665/WD
			Thereafter	-	USD	340/WD	Thereafter	-	USD	540/WD	Thereafter	-	USD	740/WD

USA Import Merchant Haulage (MHD)														
Country	Port	Charge	Period	20' & 40' Regular (Standard and Non-Operative Reefer)			Period	20' and 40' Special			Period	20' & 40' Temp Controlled Cntr (Reefer & Tank; Operating)		
				Working Days	Curr.	Rate per day		Working Days	Curr.	Rate per day		Working Days	Curr.	Rate per day
USA	All ports	Detention	Freetime	DOI+4WD	-		Freetime	DOI+3WD	-		Freetime	DOI+3WD	-	
			1st Period	3	USD	200/WD	1st Period	3	USD	325/WD	1st Period	3	USD	500/WD
			2nd Period	3	USD	250/WD	2nd Period	3	USD	450/WD	2nd Period	3	USD	625/WD
			Thereafter	-	USD	300/WD	Thereafter	-	USD	500/WD	Thereafter	-	USD	700/WD

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1. means of transport
2. basic risk distribution/ context
3. assumption of costs in the event of damage, loss
4. costs for late return, container demurrage charge
5. conclusion

MEANS OF  
TRANSPORT





## 1. CARRIER OWNED CONTAINERS (COC)

- Container, 20 and 40 feet
  - Flat Racks
  - “Mafi” trailer
  - Tank container
  - Reefer Container
- 
- No relevance for demurrage & detention if “Shipper Owned Container” (SOC)
- 
- Highly relevant in chartering business re. the vessel as such; no single relevance in container business only



## RISK DISTRIBUTION



## 2. BASIC RISK DISTRIBUTION/ CONTEXT

- Means of transport: ownership / economic responsibility of the carrier
- Likely financing involved: leasing, etc.
- Carrier: Provision and safe operating condition
- Shipper: contractual use, timely return



COST ASSESSMENT  
LOSS  
DAMAGE



### 3. ASSUMPTION OF COSTS IN THE EVENT OF DAMAGE, LOSS

- In whose area of control did the damage or loss of the container occur?
- Was the shipper or the carrier responsible for stowing the container?
- Did the specified load correspond to the actual load?

### 3. ASSUMPTION OF COSTS IN THE EVENT OF DAMAGE, LOSS

- Was the container, the means of transport suitable in terms of type and condition?
- Does the freight contract provide for specific handling or cleaning obligations?
- What is the current / market value of the container?

### 3. ASSUMPTION OF COSTS IN THE EVENT OF DAMAGE, LOSS

- Example: contaminated tank container
  - Suitability of the tank container for the load (e.g. acid resistance)
  - Correct declaration of the load
  - Cleaning the tank container
  - Claims of subsequent cargo owners



# COST ASSIGNMENT RETURN, CONTAINER STAND MONEY



## 4. COSTS FOR LATE RETURN, CONTAINER DEMURRAGE CHARGE

Legal regulations in Germany:

- None!!!
- Section 17 (1) AdSp, (German Freight Forwarders Terms and Conditions) "Demurrage":

“The Freight Forwarder is, if not caused by his fault, entitled to ask for refund of expenses properly incurred, in particular those relating to average contributions, detention or demurrage charges, including additional packaging for protecting the goods”



Publish date: March 1, 2024

Effective date: April 1, 2024

## Detention and Demurrage Tariff Guide for the United States

For reference, all tariffs can be viewed at the following section of our website: **Detention & Demurrage**. If you should require additional information, please contact our customer service team at your **location**, who will guide you based on your individual situation.

### A) Port Demurrage Under Carrier Haulage

Hapag-Lloyd will not charge Line Demurrage or Marine Terminal Storage fees for any import truck Carrier Haulage containers moving through US ports provided the following conditions are met:

- Five days before the arrival of the vessel at the discharge port, you ensure:
  - Timely submission of the Delivery Order. You can do this conveniently through this **link**
- Five days before the expiration of the free time at the discharge port, you ensure:
  - You've received customs clearance with no regulatory restrictions unless for documented reasons beyond your control.
  - Hapag-Lloyd has received the credit or freight payment.
  - Hapag-Lloyd has received the Original Bill of Lading (if applicable).
- The merchant facility is available to receive the container when the trucker calls within the port terminal free time, providing an appointment no later than 48 hours after our Motor Carrier has contacted you



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# What is Detention and Demurrage?

Demurrage and detention

Freetime

Container

Share

Detention and demurrage is an extra charge that arises when customers keep containers for longer than the time agreed. It's designed as liquidated damages for breach of freetime contract.

**ASD** | MARITIME  
INDUSTRY

## 4. CONTAINER DEMURRAGE CHARGE: THE PROBLEM

- Example: Seizure customs India
  - Industrial plant, 50 containers, 4 months overdue, container demurrage USD 120.00 per container / day
  - $120 \text{ days} \times 50 \text{ containers} \times \text{USD } 120.00 = \text{USD } 720,000.00$
  - Fair value of container:  $50 \times \text{USD } 2,500.00 = \text{USD } 125,000.00$
- Alternative: Sale FOB: Seller - Shipper; Buyer – Consignee; sales price paid but cargo never picked up at port of discharge!

## 4. COSTS FOR LATE RETURN, CONTAINER DEMURRAGE CHARGE

- Carrier interest: availability of empty containers, additional source of income
- Shipper's interest: calculability of risk, no unlimited liability
- What's the right balance of interest?
- **Way out:** Qualification as contractual obligation on reimbursement of expenses (Germany); rent; contractual penalty/ liquidated damages (UK)

## 4. COSTS FOR LATE RETURN, CONTAINER DEMURRAGE CHARGE

Hapag Lloyd B/L:

### **25. Law and Jurisdiction**

Except as otherwise provided specifically herein any claim or dispute arising under this Bill of Lading shall be governed by the law of the Federal Republic of Germany and determined in the Hamburg courts to the exclusion of the jurisdiction of the courts of any other place. In case the Carrier intends to sue the Merchant the Carrier has also the option to file a suit at the Merchant's place of business. In the event this clause is inapplicable under local law then jurisdiction and choice of law shall lie in either the port of loading or port of discharge at Carrier's option.

No supreme court case law:

- No violation of general terms and conditions (§ 305 ff. BGB)
- No frustration of contract (Section 313 BGB)
- No usury (§ 138 BGB)
- No reduction of the contractual penalty (Section 343 BGB)

## 4. COSTS FOR LATE RETURN, CONTAINER DEMURRAGE CHARGE

- Good faith (§ 242 BGB), duty to minimise damages (§ 254 BGB):
  - The shipper offers to buy the containers from the carrier at the current / market value and, if applicable, a handling fee, if he recognises that the container demurrage threatens to exceed the current / market value of the containers.
  - The carrier must ask itself when it can reasonably be expected to procure a replacement container. The purpose of the container demurrage charge, to ensure the availability of the containers, cannot otherwise be fulfilled.
  - Individual facts decisive

## 4. COSTS FOR LATE RETURN, CONTAINER DEMURRAGE CHARGE

- Recent Hamburg Regional Court case law (15 June 2023, file ref. 407 HKO 20/22)
  - No demurrage claim from freight forwarder against shipper in case
    - Missing slot to move container out of terminal- risk of forwarder himself
    - No truck available to transport container to destination- risk of forwarder as well
  - Demurrage claim ok, if consignee does not take acceptance of container
- Recent Hamburg Court of Appeals case law (16 December 2021, file re. 6 U21/21)
  - One year time bar for demurrage claim of freight forwarder against shipper

## 4. COSTS FOR LATE RETURN, CONTAINER DEMURRAGE CHARGE

- Good faith (English Law): "MSC vs Cottonex Anstalt" (Court of Appeal, 3 October 2016, EWCA Civ. 789)
  - MSC could only demand demurrage up to the time of the purchase offer by Cottonex Anstalt and thereafter only the current value of the containers. At this point, further fulfilment of the contract of carriage had become economically pointless.
  - Even if the non-return of the containers could have prevented MSC from fulfilling future orders, any reasonable freight forwarder would have bought replacement containers.
  - Frustration of contract after 6 month



CONCLUSION



## CONCLUSION

- Carrier Owned Containers (COC) are indispensable, but entail a cost risk that is usually ignored.
- In the absence of a statutory regulation, demurrage regulations in particular should be passed back-to-back in the chain.
- If containers get stuck at customs, for example, it is advisable not only to concentrate on the cargo, but also to take care of the containers at an early stage in order to avoid excessive costs.
- Make sure you monitor container and cargo to avoid unpleasant surprises
- Early offer to buy COC advisable



*Thank you for  
your attention*

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