BENEDICT'S MARITIME BULLETIN

The Quarterly Bulletin of Benedict on Admiralty

Vol. 18, No. 3 • Third Quarter 2020

Joshua S. Force, Editor-in-Chief
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Inside This issue

Force Majeure Clauses in the Face of the COVID-19 Pandemic

By Sara B. Kuebel*

I. Origin of *Force Majeure*

A party to a contract may, under certain circumstances, be excused from performing a contractual obligation when the failure to perform is caused by a "fortuitous event"—*i.e.* a *force majeure*—that rendered performance impossible. The phrase "*force majeure,*" which loosely translates to "superior force," is taken from the French Civil Code.[1] However, the legal principle of *force majeure* dates back to the Roman Empire. In ancient Roman times, legal consequences flowed from the occurrence of a number of supervening events, including fortuitous events (*casus fortuitus*), overwhelming forces of nature (*vis major*), fatal damage (*damnum fatele*), atmospheric catastrophes (*tempestas*), and divine force (*vis divina*).[2] Likewise, Roman law acknowledged the concept of *impossibilium nulla obligatio est* ("there is no obligation to perform impossible things").[3] This

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[1] *See, e.g.*, Code Civil arts. 1148, 1348, 1631, 1730, 1733, 1754, 1755, 1784, 1929, 1934, 1954 (Fr.).

[2] *See* William W. Buckland, *Elementary Principles of Roman Private Law* 287 (1912). *See also* Reinhard Zimmerman, The Law of Obligations: Roman Foundations of the Civilian Tradition 759 (1990).

[3] *Id.*

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A NOTE ON CITATION:
The correct citation form for this publication is:
18 BENEDICT'S MAR. BULL. [103] (Third Quarter 2020)

Managing Editor's Introductory Note

We begin this edition with a very timely article by Sara Kuebel analyzing the concept of *force majeure* in light of the COVID pandemic. Sara discusses the origins of the concept, and its application in civil and common law jurisdictions. Akin to the doctrines of "impossibility" and "frustration of purpose," *force majeure* is a contractual provision and as such, each state follows basic principles of contract interpretation. Sara addresses the issue under General Maritime Law, and the laws of New York, Texas, and Louisiana, and advises that "[d]etermining whether performance has been excused under a contract is a jurisdiction-specific and, highly fact-intensive inquiry depending upon the contract and the circumstances as a whole."

We follow with an analysis by Dr. Paula Bäckdén, Esq. of the jurisdictional rules and principles applicable in the European Union. Dr. Bäckdén points out that "[t]he legal systems of the EU member states vary greatly and encompass states of diverse legal traditions. In all matters where judicial competence has not been surrendered to the EU, the EU states are very much national states and apply their own legislation." She cautions that "the outcome of a claim may vary largely depending on the forum chosen. Therefore, the choice of forum should be considered thoroughly." Her very fine article provides guidance to counsel confronted with making that choice.

The ATHOS I has had a long running voyage through the courts of the United States. JoAnne Zawitoski first addressed the issues in her article *No Safe Harbor: Terminal Operators and the "Safe Berth Warranty" under ATHOS I,* 13 Benedict's Mar. Bull. 64 (Second Quarter 2015). She now brings the voyage to an end with her analysis of the final decision of the United States Supreme Court in *CITGO Asphalt Refining Company v. Frescati Shipping Company, Ltd.*, ___ U.S. ___, 140 S. Ct. 1081, ___ L. Ed. 2d ___ (2020).

Aaron Greenbaum follows with his *Vessel and Seaman Status Update*. As he points out, "[a]lthough the Supreme Court's vessel-status test set forth in *Lozman v. City of Riviera Beach, Fla.*, and seaman-status test set forth in *Chandris, Inc. v. Latsis*, may appear straightforward, the…decisions demonstrate the often fact-intensive nature of the inquiries and address the evolving arguments by employers and employees." This article is a very helpful analysis of the issues addressed by the courts and their resolution of them.

We follow with Bryant Gardner's *Window on Washington* column. Here Bryant analyzes the final rule published by the U.S. Federal Maritime Commission governing detention and demurrage for containerized cargo. As Bryant notes, "[c]ontainer demurrage and detention charges have long rankled and divided the American shipping community." With the publication of the new rule, Bryant warns "[c]arriers and ports are now on notice and should protect their interests accordingly, including by review of their published tariffs and schedules to ensure compliance with the principles set out in the Commission's new rule."

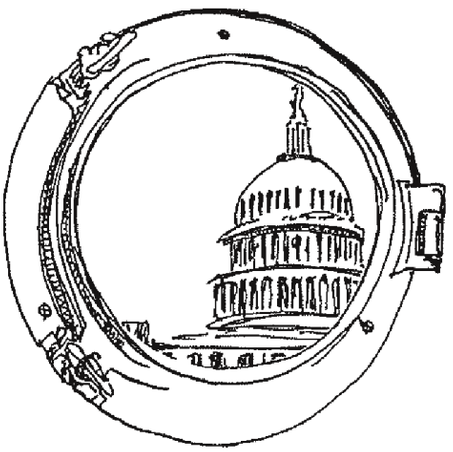
Last but not least, we conclude with the Recent Development case summaries. We are grateful to all those who take the time and effort to bring us these summaries of developments in maritime law.

We urge our readers who may have summer associates or interns from law schools working for them to encourage them to submit articles for publication in our Future Proctors section.

As always, we hope you find this edition interesting and informative, and ask you to consider contributing an article or note for publication to educate, enlighten, and entertain us.

Robert J. Zapf

Window on Washington



Demurring under Demurrage

Bryant E. Gardner*

On May 15, 2020, the U.S. Federal Maritime Commission published its final rule governing detention and demurrage for containerized cargo, after a seventeen-month fact-finding investigation led by Commissioner Rebecca Dye.[1] Although the Commission at points in the rulemaking process downplayed the significance of the rule as just interpretive guidance to navigate existing obligations under 46 USC § 41102, the new rule should change the way shippers, carriers, and ports think about demurrage and detention fees going forward.

Container demurrage and detention charges have long rankled and divided the American shipping community. On the one side, shippers, intermediaries, and truckers have regularly complained the charges unfairly penalize them for failures to remove a container or return it timely. Some contend that shipping lines, facing freight rate pressures, rely upon the crutch of demurrage and detention fees to pad bottom lines in the same way air passengers perceive the proliferation of air carrier fees for things like bags, leg room, and refreshments. On the other side of the equation, port operators and ocean carriers have historically contended that the charges facilitate the efficient flow of cargo through ports and the timely return of equipment.

In 2016, aggrieved shippers, intermediaries, and truckers took action by petitioning the Commission for relief from demurrage and detention fees which do not abate consistently where caused by events outside the control of the paying parties, alleging them to be contrary to the Shipping Act's requirements for "just and reasonable rules and practices."[2] The Commission named Commissioner Dye the Fact Finding Officer charged with developing a record on five subjects related to demurrage and detention: (a) Comparative commercial conditions and practices in the United States vis-à-vis other maritime nations; (b) tender of cargo; (c) billing practices; (d) practices regarding delays caused by intervening events; and (e) dispute resolution practices. While the fact-finding investigation concluded that demurrage and detention are valuable charges insofar as they incentivize the prompt movement of cargo, it found that international supply chain actors could benefit from more transparent, consistent, and reasonable practices. Commissioner Dye recommended transparent and standard language for demurrage and detention practices, clearer and more accessible billing practices and dispute reso-

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1 Federal Maritime Commission, Interpretive Rule on Demurrage and Detention Under the Shipping Act, 85 Fed. Reg. 29,638 (May 18, 2020) (hereinafter, "Final Rule").

2 46 USC § 41102(c).

lution processes, dispute resolution guidance, consistent notice to shippers regarding container availability, and a "Shipper Advisory Board."[3]

The Commission subsequently adopted Commissioner Dye's recommendations and issued a notice of proposed rulemaking on September 13, 2019.[4] The Commission received over 100 comments to the proposal, with large carrier and port interests opposing a new rule and shipper interests supporting a more aggressive, interventionist policy. At the end of the day, the Commission opted to issue only an "interpretive rule" which set forth factors to be used as guidance by both the industry and the Commission to determine which demurrage and detention practices will be reasonable, and which will be unreasonable enough to violate the Shipping Act. In its final rule notice, the Commission indicates that it will use the factors to adjudicate demurrage and detention complaints on a case-by-case basis. The final text of the rule follows:

> § **545.5 Interpretation of Shipping Act of 1984—Unjust and unreasonable practices with respect to demurrage and detention.**
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> (a) Purpose. The purpose of this rule is to provide guidance about how the Commission will interpret 46 U.S.C. 41102(c) and § 545.4(d) in the context of demurrage and detention.
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> (b) Applicability and scope. This rule applies to practices and regulations relating to demurrage and detention for containerized cargo. For purposes of this rule, the terms demurrage and detention encompass any charges, including "per diem," assessed by ocean common carriers, marine terminal operators, or ocean transportation intermediaries ("regulated entities") related to the use of marine terminal space (e.g., land) or shipping containers, not including freight charges.
>
> (c) Incentive principle—(1) General. In assessing the reasonableness of demurrage and detention practices and regulations, the Commission will consider the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity.
>
> (2) Particular applications of incentive principle—(i) Cargo availability. The Commission may consider in the reasonableness analysis the extent to which demurrage practices and regulations relate demurrage or free time to cargo availability for retrieval.
>
> (ii) Empty container return. Absent extenuating circumstances, practices and regulations that provide for imposition of detention when it does not serve its incentivizing purposes, such as when empty containers cannot be returned, are likely to be found unreasonable.
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> (iii) Notice of cargo availability. In assessing the reasonableness of demurrage practices and regulations, the Commission may consider whether and how regulated entities provide notice to cargo interests that cargo is available for retrieval. The Commission may consider the type of notice, to whom notice is provided, the format of notice, method of distribution of notice, the timing of notice, and the effect of the notice.
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> (iv) Government inspections. In assessing the reasonableness of demurrage and detention practices in the context of government inspections, the Commission may consider the extent to which demurrage and detention are serving their intended purposes and may also consider any extenuating circumstances.

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[3] Separately, Senator Roger Wicker (R-MN), Chairman of the Senate Committee on Commerce, Science, and Transportation, has introduced S. 2894 to establish the National Shipper Advisory Committee. The Committee would be composed of twenty-four members split between importer and exporter representatives with three-year terms. The Committee would submit recommendations to the Commission.

[4] Federal Maritime Commission, Interpretive Rule on Demurrage and Detention Under the Shipping Act, 84 Fed. Reg. 48850-01 (Sept. 17, 2019).

> (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 resolution policies and practices and regulations regarding demurrage and detention billing. In assessing dispute resolution policies, the Commission may further consider the extent to which they contain information about points of contact, timeframes, and corroboration requirements.
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> (e) Transparent terminology. The Commission may consider in the reasonableness analysis the extent to which regulated entities have clearly defined the terms used in demurrage and detention practices and regulations, the accessibility of definitions, and the extent to which the definitions differ from how the terms are used in other contexts.
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> (f) Non-Preclusion. Nothing in this rule precludes the Commission from considering factors, arguments, and evidence in addition to those specifically listed in this rule.

The Commission's rulemaking discussion makes clear that the "incentive principle"—that demurrage and detention will be found reasonable to the extent such fees incentivize cargo movement—will be the lodestar. Practices imposing fees for events outside of cargo interests' control risk being found in violation of the Shipping Act. Under Section 41102, a regulation or practice must be tailored to meet its intended purpose, i.e., "fit and appropriate for the end in view" to pass muster. More specifically, the Commission explained, "imposing demurrage and detention when such charges are incapable of incentivizing cargo movement, such as when a trucker arrives at a marine terminal to retrieve a container but cannot do so because it is in a closed area or the port is shutdown, might not be reasonable" and "absent extenuating circumstances, demurrage and detention practices and regulations that do not provide for a suspension of charges when circumstances are such that demurrage and detention are not serving their purpose would likely be found unreasonable."[5] Running along this gunwale, the Commission expressly rejects the proposition that "once in demurrage, always in demurrage" practice will survive scrutiny in all cases.[6]

However, the Commission repeatedly emphasizes that the application of this principle will "vary depending upon the facts of a given case." A key driver of the Commission's flexible approach stems from acknowledgement that facts and circumstances will differ widely in ports throughout the country, such that there is no "one size fits all" rule that will work, and a desire to leave sufficient room to commercial industry to innovate creative solutions to the Gordian knot of demurrage and detention. Therefore, the Commission rejected calls by cargo interests to prescribe rigid black-line rules. Furthermore, the Commission emphasizes that the factors set forth in the final rule are only illustrative, not exclusive.

Carrier and marine terminal operator interests raised numerous objections to the rule. A volley of objections anchored in the Administrative Procedures Act (APA), alleging that the rule is not an interpretive rule as represented, but a legislative rule requiring compliance with APA rulemaking strictures; that the rule represents a departure from Commission precedent; and that the rule shifts the burden of proof under Section 41102(c). Many of the same commenters alleged the rule represents "extreme government intrusion into the market" and discriminates against ocean carriers and marine terminal operators by placing all of the risk upon them. Additionally, stakeholders alleged the Commission lacks the authority to issue the rule and warned that it will result in an "explosion of time-consuming and expensive litigation" as well as increased container dwell time and chassis shortages. The Commission rejected each of these arguments in turn, carefully presenting the guidance as merely interpretive factors to be used by the Commission in applying existing authority under Section 41102.

Among the many thorny scenarios tackled by the Commission during the rulemaking process were those delays caused by government inspections. Ocean carriers and marine terminal operators asserted that affording relief from delays associated with government inspections will disincentivize shippers to properly submit paperwork and obtain timely clearance. Furthermore, they asserted that the costs associated with such delays—such as for use of scarce port property and equip-

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[5] Final Rule at 29,651.

[6] *Id.* at 29,653.

ment—are more properly allocated to shippers as the parties with the most control over how they proceed. Acknowledging that marine terminal operators and carriers have no control over such delays but still suffer the associated costs, the Commission nevertheless declined to treat government-inspection-caused delays differently from other delays with respect to demurrage and detention charge tolling, noting that delays from such inspections may also be out of the control of shippers and as such the incentive principle will be applied.

In the May 2020 final rule, the Commission clarified the scope of the rule as applicable to container shipments only, albeit all shipments in U.S.-foreign import and export trades. The rule's application will be co-extensive with the reach of the Shipping Act and the Commission's authority. As such, it will not be limited to activities occurring at ports or marine terminals. As the Commission notes, not everything an ocean carrier or marine terminal operator does is within the Commission's purview, but "the further one gets away from the terminal, the more complicated the inquiry may become, and it is not a question that can always be answered in the abstract."[7]

The rule also pushes forcefully for transparency in a number of areas related to detention and demurrage generally, in billing, and dispute resolution, "disfavoring demurrage and detention policies buried in scattered sections in tariffs and favoring policies in easily accessible websites."[8] Such postings would be in addition to required inclusion in mandated tariffs. The Commission reasons that shippers, truckers, and intermediaries should easily be able to understand when the fees will start, timeframes for billing and accrual of charges, and how to commence a dispute when disagreement does occur. At bottom the Commission expects port and carrier interests to clearly define their rules and how to challenge them—but stops short of saying what those rules should be. For example, the Commission declined calls to establish specified timeframes for the issuance of invoices for demurrage and detention invoices in order to combat invisible accruals of five- or even six-digit demurrage bills, and declined calls to help define when a container becomes available to a consignee for purposes of triggering the demurrage clock. Although the Commission prescribed "consistent notice that cargo is actually available" for retrieval, it declined calls to require specific types of notice such as "push notifications" in lieu of passive notices like website postings.

After the Commission unanimously voted to approve the new rule, several of the Commissioners issued statements reflecting views on how it may be applied. Chairman Khouri indicated that "future actions may include Notices of Inquiry (NOIs) into various focused fact scenarios."[9] Commissioner Maffei indicated that the rule "will help restore a sense of fairness for shippers and intermediaries, and make sure the incentive structure properly works for all stakeholders."[10] Commissioner Bentzel opined that the incentive principle needs to consider the obligation of the shipper to retrieve cargo from the terminal, and that the guidance "should have outlined the obligation of shippers to retrieve cargo in parallel to the obligations of carriers and marine terminal operators."[11] Additionally, he expressed concern that the guidance on government inspections missed the mark, stating that government inspections are akin to force majeure events, and as such are not particularly appropriate for application of the incentive principle. Commissioner Sola signaled an interest in using the rule to combat carrier and port reliance upon demurrage and detention fees as a profit center amid pandemic-induced financial stresses placing downward pressure on freight rates and volumes.[12]

Industry observers have hailed the Commission's final rule as a timely antidote to coronavirus-aggravated port delays and supply chain interruptions providing fertile ground for demurrage and detention claims. However, change is likely to be gradual, not overnight. Despite shippers' long-simmering hatred of demurrage and detention charges, there have been relatively few formal complaints filed with the Commission. On a case-by-

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7 *Id.* at 29,649.

8 *Id.* at 29,660.

9 Chairman Michael A. Khouri Statement on Demurrage and Detention Interpretive Rule (Apr. 29, 2020).

10 Commissioner Daniel B. Maffei Statement \on Detention and Demurrage Interpretive Rule (Apr. 29, 2020).

11 Statement of Commissioner Bentzel to Accompany Vote on Notation No. 20-20, Interpretive Rule on Detention and Demurrage (Apr. 30, 2020).

12 Statement of Commissioner Sola to Accompany Vole on Notation No. 20-20, Interpretive Rule on Detention and Demurrage (April 30, 2020) ("Originally, fees for demurrage and detention were assessed for the purpose of encouraging the timely pickup and return of cargo and equipment. Over time, they slowly morphed into revenue generators albeit a very small part of the calculation to profitability. Recently, however, these fees appear to be a means of sustainability in some cases, transferring the pain of the current economic crisis to those who are ill-suited to subsidize others. While fees for demurrage and detention are valuable tools to ensure the timely use and return of equipment, they should never be used as a profit center. The recently adopted interpretive rule will make this quite clear.").

case basis, demurrage charges are more of an annoyance for fragmented cargo interests than something arising to the level of taking formal legal action. Yet, the Commission has made clear that the rule will only be enforced on a case-by-case basis according to the specific facts for each demurrage charge. Therefore, it bears watching to see if the Commission's Bureau of Enforcement takes up the torch to challenge demurrage and detention practices under the new interpretive rule and Section 41102 and whether the Commission issues NOIs as suggested by Chairman Khouri. Carriers and ports are now on notice and should protect their interests accordingly, including by review of their published tariffs and schedules to ensure compliance with the principles set out in the Commission's new rule.