DEFENDING DEMURRAGE CLAIMS

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Carriers have recently escalated their efforts to recover demurrage claims against shippers and non-vessel operating common carriers (NVOCCs). This places NVOCCs in a very difficult position as often NVOCCs are not able to prevent such demurrage and detention charges from continuing to accrue. For example, if Customs officials in China, India or elsewhere hold cargo for extended periods of time (weeks, months or even years), carriers may seek to collect demurrage charges against the shipper or the NVOCC that far outweigh the value of the containers, or even of the cargo itself.

Our experience has been that while some carriers remain willing to discount such demurrage claims, other carriers have become more aggressive in pursuing them. Although there are no magic bullets in regard to defending against such claims, we have defended a large number of such claims and have identified a number of potential defenses.

First, we recommend that early on, before the free period expires, the NVOCC contact the consignee and determine why cargo is not being picked up. If it is clear that the consignee does not intend to retrieve the cargo, or if the consignee does not respond to such inquiries, the NVOCC immediately should notify the carrier that the cargo is being abandoned. While the carrier may take the position that such notification does not terminate the NVOCC's obligation in regard to storage and disposal costs, it will possibly cut off the accrual of additional demurrage and, should help bolster the defense, as set forth more fully below, that the carrier failed to mitigate its alleged damages.

In terms of substantive defenses to demurrage claims, we explore whether the NVOCC is identified as a party responsible for such claims based upon the bills of lading under which the cargo moved, and the terms and conditions of those bills of lading. Further, we analyze whether the size of the claim is disproportionate to the harm purportedly suffered by the carrier. For example, it is not uncommon for carrier to seek to recover damages for loss of use of containers that far exceed the value of the containers themselves. This runs afoul of the well-established principle that parties have a duty to mitigate damages resulting from a breach of contract. To the extent that carriers fail to make reasonable efforts to recover containers, but instead sit idly by while demurrage charges accrue, they fail to satisfy their duty in this regard. Further, any damages recoverable should be limited to the replacement cost of the container, *i.e.*, a carrier should not be entitled to recover $50,000 for the loss of use of a container having a value of less than $5,000. Finally, one should consider whether demurrage

charges constitute an unfair penalty, rather than a valid liquidated damages clause, when the tariff allows the carrier, for example, to recover $100 a day for the loss of use of a container that the carrier itself may be leasing for $1 a day.

Defense of demurrage claims often turn upon the individual facts presented. It has been our experience, however, that vigorous defenses of such claims provide a basis for defeating, or at least minimizing, large demurrage claims that can be disastrous to NVOCCs' bottom lines. Please feel free to contact us if you want to discuss how best to protect against demurrage claims and/or to minimize the size of such claims.

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