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**Current Developments in Regulation and Litigation of
Demurrage and Detention Practices and Charges**

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Contents

I.	Introduction; U.S. Regulation of Ocean Shipping	1
A.	Overview	1
B.	A Brief History of Shipping Regulation	1
C.	Shipping Act Overview – Emerging Issues with Demurrage and Detention.....	2
II.	Demurrage and Detention in the Pandemic	6
III.	The Ocean Shipping Reform Act of 2022.....	6
A.	Demurrage and Detention Invoicing.....	7
B.	New “Charge Complaint” Process	8
C.	New/Expanded Prohibited Acts	9
1.	Retaliation	9
2.	Demurrage and Detention	10
3.	Service Contracts	10
4.	Cargo and Vessel Space Accommodations.....	11
5.	Other Matters	11
D.	OSRA Rulemakings.....	12
IV.	FMC Actions to Implement OSRA.....	13
V.	Decisions/Enforcement Action	14
A.	Generally.....	14
B.	Relevant Adjudications	14

I. Introduction; U.S. Regulation of Ocean Shipping

A. Overview

The Shipping Act of 1984 (the “Shipping Act”) establishes the Federal Maritime Commission (“FMC” or “Commission”) as the federal regulator of competition matters involving ocean and ocean/intermodal liner shipping in U.S.-foreign commerce. (Because of the focus on U.S.-foreign commerce, and “liner” trades, some segments of ocean shipping are not subject to the Shipping Act, such as purely domestic shipping regulated by the Surface Transportation Board (“STB”), private, non-liner ocean shipping, and a small list of exempted commodities).

FMC jurisdiction supersedes Department of Justice antitrust jurisdiction in regulated U.S.-foreign ocean shipping. FMC jurisdiction supersedes federal court antitrust jurisdiction regarding any matter that would violate the Shipping Act, even if the same conduct would violate the antitrust laws (Sherman Act, Clayton Act, state antitrust and unfair competition laws). The antitrust exemption is in exchange for a special framework of competition regulation, including specific prohibitions in connection with “unreasonable practices,” undue discrimination and undue preference and prejudices, and other prohibitions tailored to ocean shipping.

B. A Brief History of Shipping Regulation

Shipping regulation has long roots in federal law and regulation of transportation and trade. The U.S. Interstate Commerce Act (1887) regulated anticompetitive practices of U.S. railroads. The 1890 Sherman Antitrust Act prohibited agreements in restraint of trade and attempts to monopolize. In the 1898 Alexander Report, Congress recognized that due to unrestricted entry or departure of vessels to and from U.S. trade lanes, there are obstacles to capital formation in ocean shipping, and special competition rules were necessary.

The Shipping Act 1916 (the “1916 Act”) created a separate competition regulation system for ocean shipping, allowing pricing cartels (conferences) among steamship lines, created the FMC predecessor U.S. Shipping Board to approve and regulate conference pricing and capacity agreements and marine terminals agreements, required ocean carriers to file tariffs, and gave the Shipping Board jurisdiction over shipping competition in lieu of antitrust regulation by courts and the Department of Justice. The 1916 Act also prohibited carrier boycotts or refusals to deal, unreasonable discrimination against shippers or ports, rebates and charging rates not in a tariff, and created separate remedies for parties injured by 1916 Act violations in place of antitrust remedies.

The Reorganization Act of 1961 created the FMC in its present form, which was followed by the substantial deregulation and other changes in the Shipping Act of 1984 (referred to in this discussion as the “1984 Act”). The 1984 Act eliminated requirements for prior approval of ocean carrier and marine terminal agreements by the FMC, and allowed agreements to become effective in 45 days unless the FMC obtained an injunction; it eliminated tariff filing, allowing ocean carriers to publish rates instead of filing with the FMC, it allowed Vessel

Operating Common Carriers (“VOCCs”) to use confidential service contracts, filed with FMC, that included “Essential Terms” (cargo commodities covered, origins, destinations, length of agreement period, and minimum quantity requirements, or “MQCs”). VOCCs had to publish service contract rates and Essential Terms in their ocean tariffs (without naming the shipper or disclosing the rates). The 1984 Act also allowed Non-Vessel Operating Common Carriers (“NVOCCs”) to operate as common carrier resellers of capacity in liner trades, but only with published NVOCC ocean tariff rates, not with service contracts.

The Ocean Shipping Reform Act of 1998 (“OSRA 1998”) furthered the deregulation trend of the 1984 Act. One of the core changes allowed VOCCs to eliminate publication of service contract rates, though it did not allow NVOCCs to use service contracts. However, the FMC later granted NVOCCs regulatory relief and permitted use of confidential shipper service contracts, following NVOCC petitions to the FMC. NVOCCs were permitted to file service contracts, known as NVOCC Service Arrangements, or “NSAs” with FMC, and publish Essential Terms (but not rates). In 2013, an FMC rulemaking allowed NVOCCs to use more informal limited scope Negotiated Rate Agreements (“NRAs”) with shippers, without filing the NRA with FMC, provided the NVOCC maintained copies. In 2018, the FMC eliminated the requirement for NVOCCs to file NSAs, and publish Essential Terms, but retained the requirement for VOCCs to file ocean service contracts and amendments. In 2021, the FMC further expanded ocean carrier flexibility in meeting service contract advance filing requirements so that ocean carriers will be able to file original service contracts with the Commission up to 30-days after they go into effect.

C. Shipping Act Overview – Emerging Issues with Demurrage and Detention

As highlighted in the foregoing, the general trend of Shipping Act legislation and regulation since the enactment of the 1984 Act has been reducing federal regulation of U.S.-international ocean shipping. However, in response to growing shipper and industry complaints, largely in connection with demurrage and detention charges and practices, in recent years the FMC began investigating and ultimately taking action to increase regulation of demurrage and detention practices.

Some terminology is useful. As explained by the FMC, “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.” Demurrage is generally assessed on a loaded container for time remaining on a terminal facility after the expiration of free time before it is picked up (e.g., a container on a marine terminal between the time of discharge from a vessel to the time of out-gating from the terminal). Detention (sometimes referred to by other names, such as per diem) is generally assessed on equipment after the time of pick-up or out-gating from a terminal, for the period of time after the expiration of free time, before return of the equipment (e.g., for an import container, from the time of out-gating from a terminal until the return of the empty container to a designated return location).

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