Competing Periods in Determining Laches in Demurrage Disputes

William P. Byrne*

A number of cases have established competing timeframes applicable to the limitations period for a demurrage claim arising out of the carriage of goods by water. Such periods have ranged from eighteen months to six years.[1] Demurrage has been defined as "remuneration to the owner of a ship for the detention of his vessel beyond the number of days allowed . . . for loading and unloading . . . ."[2] Detention of equipment

* Mr. Byrne is a partner in the litigation section of the national law firm of Holland & Knight, LLP. His practice is concentrated in multimodal transportation law.

1. Venus Lines Agency, Inc. v. CVG Int'l Am., Inc., 234 F.3d 1225, 1230 (11th Cir. 2000) (assuming a four year limitations period); TAG/ICIB Servs., Inc. v. Pan Am. Grain Co., 215 F.3d 172, 176 (1st Cir. 2000) (applying a three-year statute of limitations); SL Serv., Inc. v. Int'l Food Packers, Inc., 217 F. Supp. 2d 180, 185-86 (D. P.R. 2002) (applying a three-year statute of limitations); P.R. Marine Mgmt., Inc. v. Molac Imports, Inc., 594 F. Supp. 648, 652 (D. P.R. 1984) (determining that a six-month period of limitation is inappropriate); Asia N. Am. Eastbound Rate Agreement (*ANERA*), Soc'y of Mar. Arbitrators Award No. 2932 (1993) (Zubrod, Arb.) (applying a six-year statute of limitations period). This article only addresses the limitations periods applicable to a carrier's claim for demurrage on equipment used in water transportation. This article does not address claims against a water carrier for loss or injury to property which is determined by its bill of lading and the law applicable to water transportation. 49 U.S.C. app. §14706(c)(2) (2000); *see also* 46 U.S.C. app. §§ 190-196 (2000); 46 U.S.C. §§ 1300-1315 (2000). Nor does it address demurrage in rail and motor carrier transportation which is usually governed by 49 U.S.C. § 14705(a) or is addressed by the parties in their contract of carriage under 49 U.S.C § 10709 (rail) or 49 U.S.C § 14101(b)(1) (motor).

2. *In re* Commonwealth Oil Ref. Co. v. Commonwealth Oil Ref. Co., 734 F.2d 1079, 1081 (5th Cir. 1984) (citing BLACK'S LAW DICTIONARY 389 (5th ed. 1979)).

used in multimodal[3] transportation is also subject to demurrage upon the expiration of allowable free time.[4]

The competing limitations periods described in this article have been supported by several different policy rationales. However, an examination of relevant case law reveals that the most appropriate limitation period is that imposed by the federal statutes which regulate the tariff that gave rise to the demurrage claim, as described later in this article. Alternatively, if no such statute applies, the most appropriate limitation period may be provided by the law governing the contract giving rise to the demurrage claim.

Demurrage for the detention of equipment in the context of transportation by water can arise in either:

(A) the non-contiguous domestic trade; or

(B) the foreign commerce of the United States:

(i) under tariffs filed with the Federal Maritime Commission ("FMC") or

(ii) private charter parties and service contracts.[5]

Each of these scenarios is described below.

I. Non-Contiguous Domestic Trade

In the first category, non-contiguous domestic trade,[6] finding the ap-

3. Multimodal is used to describe transportation provided by more than one mode of transportation. *See* Black's Law Dictionary 1041(8th ed. 2004).

4. 4 Saul Sorkin, Goods in Transit § 25.01 (Matthew Bender & Co., Inc, a member of the LexisNexis Group 2005).

5. 46 U.S.C. app. § 1702(19).

6. Non-contiguous domestic trade was governed by tariffs previously filed with the Interstate Commerce Commission ("ICC"). These tariffs are currently filed with the ICC's successor, the Surface Transportation Board ("STB") pursuant to the Interstate Transportation Act ("ITA"). Originally promulgated in 1887 as the Act to Regulate Commerce, and formerly known as the Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887), the ITA has been revised and renumbered by many subsequent acts, including the ICC Termination Act of 1995 ("ICCTA"), Pub. L. No. 104-88, 109 Stat. 803 (1995), which, among other things, amended the Table of Subtitles of Title 49 of the United States Code by striking "Commerce" and inserting in lieu thereof "Transportation," thus, amending the subtitle to Interstate Transportation Act, 49 U.S.C § 11908(b). Section 103 of the ICCTA added chapter 135 to title 49 of the United States Code and established the jurisdiction of the Secretary of Transportation ("Secretary") and the STB over motor carriers and certain water carriers. 49 U.S.C. § 13501 (providing for general jurisdiction over transportation by motor carrier); 49 U.S.C. § 13521 (providing for general jurisdiction over transportation by water carrier). Non-contiguous domestic trade is defined as "transportation subject to jurisdiction under chapter 135 involving traffic originating in or destined to Alaska, Hawaii, or a territory or possession of the United States." 49 U.S.C. § 13102(17). Title 49 contains a number of limitations periods, including the eighteen month statute of limitations applicable to freight charges for motor and domestic water transportation and a three year statute of limitations applicable to rail carrier transportation. *Id.* §§ 14705(a), 11705(a). In both rail and motor transportation, a claim "accrues" on delivery or tender of delivery by the carrier. *Id.* §§ 14705(g), 11705(g).

plicable statute of limitations is straightforward. "A carrier providing transportation or service subject to jurisdiction under chapter 135 must begin a civil action to recover charges for transportation or service provided by the carrier within 18 months after the claim accrues."[7] Accordingly, where the claim for demurrage arises in non-contiguous domestic trade governed by the Interstate Transportation Act ("ITA"), as codified in title 49, the eighteen month statute of limitations applies.[8] The question of determining the proper limitations period becomes a little more complex when foreign ocean transportation governed by laws codified in title 46 is concerned.

II. Foreign Ocean Trade

Foreign ocean transportation includes transportation provided under the Shipping Act of 1984 ("the Act")[9] as amended by the Ocean Shipping Reform Act of 1998 ("OSRA"),[10] including service contracts authorized by the Act and OSRA[11] and private carriage not regulated by the Federal Maritime Commission and governed generally by charter parties.[12] Both categories are included within the admiralty and maritime jurisdiction of the United States.[13] "In an admiralty case, maritime law and the equitable doctrine of laches govern the time to sue."[14] In applying the doctrine of laches, the court looks to the most analogous statute of limitations "to

7. *Id.* § 14705(a).

8. *See id.*

9. Shipping Act of 1984, Pub. L. No. 98-237, 98 Stat. 67 (1984).

10. Ocean Shipping Reform Act of 1998, Pub. L. No. 105-258, 112 Stat. 1902 (1998). The Act, as amended by OSRA, provides in pertinent part that "each common carrier and conference shall keep open to public inspection in an automated tariff system, tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route . . . ." 46 U.S.C. app. § 1707(a)(1).

11. 46 U.S.C. app. § 1702(19) defines a service contract as

> a written contract, other than a bill of lading or a receipt, between one or more shippers and an individual ocean common carrier or an agreement between or among ocean common carriers in which the shipper or shippers makes a commitment to provide a certain volume or portion of cargo over a fixed time period, and the ocean common carrier or the agreement commits to a certain rate or rate schedule and a defined service level, such as assured space, transit time, port rotation or similar service features. *The contract may also specify provisions in the event of nonperformance on the part of any party.*

Id. § 1702(19) (emphasis added).

12. *See* Cargill Ferrous Int'l v. Sea Phoenix, 325 F.3d 695, 699 (5th Cir. 2003) (citations omitted).

13. 28 U.S.C. § 1333 (2000).

14. *TAG*, 215 F.3d at 175 (citations omitted); *see also* Czaplicki v. The Hoegh Silvercloud, 351 U.S. 525, 533 (1956) ("It is well settled . . . that laches as a defense to an admiralty suit is not to be measured by strict application of statutes of limitations; instead, the rule is that 'the delay which will defeat such a suit must in every case depend on the peculiar equitable circumstances of that case.'" (quoting The Key City, 81 U.S. 653, 653 (1871))).

establish burdens of proof and presumptions of timeliness and untimeliness."[15] If a party has filed its complaint within the analogous period, the defendant "has the burden of proving unreasonable delay and prejudice."[16] If a plaintiff has filed a complaint after the analogous period has expired, "a presumption of laches is created, and [the p]laintiff has the burden of demonstrating that there was no unreasonable delay in bringing the lawsuit and that [the defendant] was not prejudiced."[17] "The most analogous statute of limitations period may be found in state or federal law. However, courts generally favor applying a federal statute of limitations for policy reasons."[18] When the matter in dispute arises out of foreign ocean transportation, the selection of the most analogous period will be dependent upon the federal statutes, if any, governing the transportation.[19]

A. FMC Filed Tariffs

In *TAG/ICIB Services, Inc. v. Pan America Grain Co.*, the court was faced with a dispute arising out of ocean transportation between the United States and Puerto Rico.[20] The court stated, "we are satisfied that the most analogous statutes are the federal statutes regulating the very tariffs under which the alleged demurrage arose"[21] and applied the eighteen month period found in 49 U.S.C. § 14705(a).[22]

Some have interpreted *TAG* to mean that the eighteen month limitations period in 49 U.S.C. § 14705(a) should be applied to demurrage disputes arising out of the common carriage of goods by water generally.[23] The author respectfully disagrees. *TAG* should not be read to embrace ocean transportation not included within the definition of the non-contiguous domestic trade. *TAG* did not involve foreign ocean transportation subject to title 46, but involved transportation in the non-contiguous do-

15. *TAG*, 215 F.3d at 175.

16. *SL Serv.*, 217 F. Supp. 2d at 184 (citing TAG/ICIB Servs., Inc. v. Pan Am. Grain Co., 215 F.3d 172, 175 (1st Cir. 2000)).

17. *Id.*

18. *Id.* (citing TAG/ICIB Servs., Inc. v. Pan Am. Grain Co., 215 F.3d 172, 176 (1st Cir. 2000) ("explaining that applying a federal statute of limitations undermines uniformity in admiralty law and enervates the policy against discriminatory rates, especially in a forum with a short limitations period"); and Barrois v. Nelda Faye, Inc., 597 F.2d 881, 884 (5th Cir. 1979)).

19. *See id.* at 185 ("Since the Shipping Act appears to regulate the tariffs giving rise to the demurrage, we find that the Shipping Act provides the most analogous statute of limitations.").

20. *Id.* at 174.

21. *Id.* at 176.

22. *Id.* at 178.

23. Paul W. Stewart & Christine H. Scheinberg, *Time and Demurrage and the Case for Uniformity*, 29 Transp. L.J. 235, 246 (2002) [hereinafter *the TAG Article*] ("Thus, the *TAG* case settles for all time the appropriate analogous statute to be used as a benchmark for laches analysis in demurrage claims not brought directly under the ICCTA.").

mestic trade of the United States subject to title 49.[24] As discussed above, the court could have applied 49 U.S.C. § 14705(a) *ex proprio vigori,* but elected not to, stating,

> we confine our review to *TAG/ICB's* argument based on general maritime law and the doctrine of laches. In doing so, we do not mean to necessarily rule out the possibility that a demurrage claim such as this could be pursued under separate § 1337(a) jurisdiction, *in which event the same statutes of limitation found herein to be most analogous for laches purposes might control directly.*[25]

In the author's opinion, *TAG* stands for the proposition that the most analogous statute of limitations in a claim arising in connection with the non-contiguous domestic trade of the United States may be found in the statute Congress legislated to apply to cases of that kind. There is no reason, however, to extend *TAG*'s applicability by analogy to foreign ocean transportation, a subject that Congress has elected to distinguish and treat independently from domestic water transportation in title 46 of the United States Code.[26]

Although the reasoning in *TAG* does not support an across the board application of the eighteen month period of limitations to all demurrage disputes, the *TAG* decision does support the concept that the most analogous statute is the federal statute under which the demurrage arose. Thus, in cases arising under the Act as amended by OSRA and involving tariffs filed with the FMC, the *TAG* decision actually points towards the three year limitations period in 46 U.S.C. app. § 1710(g).[27] In *SL Service,*

---

24. *See* 49 U.S.C. § 13102(17) ("The term 'noncontiguous domestic trade' means transportation subject to jurisdiction under chapter 135 involving traffic originating in or destined to Alaska, Hawaii, or a territory or possession of the United States.").

25. *TAG,* 215 F.3d at 175 (emphasis added). For a detailed discussion of trade with Puerto Rico see 1 SAUL SORKIN, GOODS IN TRANSIT § 1.12, concluding "[c]onsequently, such carriers engaged in the 'offshore trade' between Puerto Rico and the mainland United States are required to file tariffs with the STB. Jurisdiction over such trade formerly exercised by the [Interstate Commerce Commission] and the FMC has been transferred under ICCTA to the STB." 1 SAUL SORKIN, GOODS IN TRANSIT § 1.12 (Matthew Bender & Co., Inc. a member of the LexisNexis Group 2005) (citing Ocean Logistics Mgmt., Inc. v. NPR, Inc., 38 F. Supp. 2d 77 (D. P.R. 1999) and TAG/ICIB Servs., Inc. v. Pan Am. Grain Co., 215 F.3d 172, 174 (1st Cir. 2000)).

26. Section 1701(g) of the Shipping Act of 1984 indicates that one purpose of the Act is "to establish a nondiscriminatory regulatory process for the common carriage of goods by water in the *foreign* commerce of the United States . . . ." 46 U.S.C. app. § 1701(1) (emphasis added).

27. 46 U.S.C. app. § 1710(g) provides in part:

> Reparations - For any complaint filed within 3 years after the cause of action accrued, the Commission shall, upon petition of the complainant and after notice and hearing, direct payment of reparations to the complainant for actual injury (which, for purposes of this subsection, also includes the loss of interest at commercial rates compounded from the date of injury) caused by a violation of this chapter plus reasonable attorney's fees.

Id. § 1701(g).

Inc. v. International Food Packers, Inc., which involved a demurrage dispute involving the transportation of goods from Latin America to Puerto Rico by water, the court discussed *TAG*, but declined to apply the eighteen month statute in ITA and instead found the three year limitation period in § 1710(g) of the Act to be the most analogous statute.[28] The court stated, "Since the Shipping Act appears to regulate the tariffs giving rise to the demurrage, we find that the Shipping Act provides the most analogous statute of limitations."[29] Similarly, in *Puerto Rico Marine Management, Inc. v. Molac Imports, Inc.*, the court considered the application of either the three year limitation period in the former ITA[30] or the two year limitation period on administrative actions brought before the FMC in the Act[31] in effect at that time.[32] Since both periods exceeded the actual delay, the court declined to choose between the two; however, the court's analysis of the issue is directly on point.[33] In *Puerto Rico Marine*, the court stated, "If Congress deemed two years the adequate period within which to file complaints before the [FMC], we *must* allow at least as much for the filing of a civil action before a federal court."[34]

A different result was reached in *Venus Lines Agency, Inc. v. CVG International America, Inc.*[35] This result is well described in the *TAG Article* as an "aberration."[36] *Venus* involved foreign ocean transportation between Venezuela and the United States.[37] Initially the transportation was performed under a tariff filed with the FMC and was governed by the Act and OSRA.[38] Thereafter, a dispute arose involving whether the parties entered into an oral contract.[39] The opinion indicates that the parties continued to charge and pay the tariff rates and the court concluded that no new agreement or modification to the old agreement was reached.[40] The court then addressed the demurrage claim, held that it was governed

28. *SL Serv.*, 217 F. Supp. 2d at 185.

29. *Id. Contra ANERA*, Soc'y of Mar. Arbitrators Award No. 2932 (applying the six-year statute of limitations as prescribed by state law because the Shipping Act does not prescribe a statute of limitations for a breach of contract actions).

30. The three year limitation period is now an eighteen month limitation period. 49 U.S.C. § 14705(a).

31. The two year limitation period on administrative actions is now a three year limitation period. 46 U.S.C. app. § 1710(g).

32. *P.R. Marine*, 594 F. Supp. at 651.

33. *Id.* at 652.

34. *Id.* (emphasis added).

35. *Venus*, 234 F.3d at 1230 (assuming a four year limitations period).

36. Stewart, *supra* note 23, at 246.

37. *Venus*, 234 F.3d at 1227.

38. *Id.* at 1227-28.

39. *Id.* at 1228.

40. *Id.* at 1229.

by laches, and *assumed* that the Florida four year statute of limitations for claims arising under an oral contract applied.[41] The court did not discuss either the eighteen month limitation period in the ITA or the three year limitation period in the Act.[42]

B. Charter Parties and Service Contracts

As discussed above, in addition to tariffs, ocean carriers are permitted to engage in private charter parties not governed by the Act or in service contracts that are governed by the Act as amended by OSRA. 46 U.S.C. app. § 1707(c) provides:

> Service Contracts:
>
> (1) In general – An individual ocean common carrier or an agreement between or among ocean common carriers may enter into a service contract with one or more shippers subject to the requirements of this Act. The exclusive remedy for a breach of a contract entered into under this subsection shall be an action in an appropriate court, *unless the parties otherwise agree.*[43]

In cases involving foreign ocean transportation provided under either a service contract or a private charter party, it would be a rare exception if the parties had not "otherwise agreed" to a forum selection and choice of law clause.[44] In light of the permissive language of 46 U.S.C. app. § 1707(c)(1), there should be no impediment to the enforcement of a forum selection and choice of law clause such that the chosen state's statute of limitations for breach of contract would be applied. For instance, in the *Asia North America Eastbound Rate Agreement* arbitration decision, decided prior to the enactment of the Interstate Commerce Commission Termination Act ("ICCTA"), an aggrieved party under a service contract governed by New York law and filed with the FMC was confronted with the respondent's argument that the three year limitation on administrative actions filed with the FMC was the applicable limitations period for claims brought to enforce the service contract.[45] The arbitrator, in reliance upon an affidavit of a former Chief Administrative Law Judge ("ALJ") of the FMC, and the affidavit of a former judge of the United States Court of Appeals for the Third Circuit, held that the three

41. *Id.* at 1230-31. "The limitations period in Florida's Statute of Limitations for oral contracts is four years." *Id.* at 1230 (citing Fla. Stat. § 95.11(k)).

42. As mentioned, the *TAG Article* described the *Venus* case as an aberration. Stewart, *supra* note 23, at 246. Unless the parties have expressly adopted state law to govern the limitations period the better view is to look to the federal statute governing the transportation, if any.

43. 46 U.S.C. app. §1707(c) (emphasis added).

44. In practice, most charter parties contain an arbitration and choice of law clause and most service contracts contain a choice of law and forum selection clause.

45. *ANERA*, Soc'y of Mar. Arbitrators Award No. 2932.

year period only concerned administrative actions filed with the FMC and did not concern arbitration proceedings brought to enforce the terms of the service contract.[46] Instead, the arbitrator held that the New York six year statute of limitations was the applicable period to consider in determining the issue of time bar with respect to the enforcement of a service contract.[47]

A contrary result had been reached in *Sea Land Service v. Trans-Senko Corp.*[48] In the affidavit of the former ALJ of the FMC, submitted by the petitioner in the *ANERA* case, the *Trans-Senko* case was described by the ALJ as follows:

> In my twenty-seven years with the [FMC] . . . the [*Trans-Senko*] case stands in magnificent isolation. I am aware of no other case in which the provisions of either Section 22 of the Shipping Act of 1916 (predecessor statute of the 1984 Act) or subsection 11(g) of the Shipping Act of 1984 have been applied to *bar* a suit brought to enforce a provision of a contract either by arbitration or by suit in court, either state or federal.[49]

Similarly, the affidavit of the former judge from the Third Circuit Court of Appeals, also submitted by the petitioner in the *ANERA* case, described the *Trans-Senko* case as standing "in isolation" and further stated, "In my opinion, *ANERA*'s claim is not time-barred and the arbitration should go forward on the merits."[50]

III. Conclusion

The announced policy considerations behind the applicable statutes supports the holding in *TAG* that the most analogous statute of limitations to a demurrage claim is the statute governing the tariff, if any, under which the claim for demurrage arose. *TAG* should not be interpreted to hold that the only statute to be considered is title 49. Furthermore, in

46. *Id.* ("My review of the Act and the FMC regulations leads me to a finding that neither the Act nor regulatory guidelines impose a time bar for a breach of contract claim under an FMC recorded Service Contract. In my view, the FMC regulations which [respondent] is relying upon in its contention of a three year limitation are intended to assist the enforcement by FMC of the Act provisions, and not to shorten the period contracted parties have to bring action in breach of contract disputes, not even mentioned in the Act or FMC regulations. Such finding is consistent with the testimony given by affidavits of Judges John E. Cograve and Arlin M. Adams . . . .").

47. *Id.*

48. Sea Land Serv., Inc. v. Trans-Senko Corp., 735 F. Supp. 900, 901(N.D. Ill. 1990).

49. *ANERA*, Soc'y of Mar. Arbitrators Award No. 2932 (emphasis added). As discussed above, the court in *Puerto Rico Marine* considered the federal statutory limitations periods, including the one applicable to administrative actions as analogous limitations periods, but did not bar the plaintiff's suit as it was timely under both limitations periods considered. *P.R.* Marine, 594 F. Supp. at 652.

50. *ANERA*, Soc'y of Mar. Arbitrators Award No. 2932.

those cases in which the parties have taken advantage of an allowance in the statute to enter into private contracts that contain a governing law clause, the parties' choice should be honored and the analogous state statute, the statute governing breach of contract actions, should apply.