

Regulation and Reasonable Prices in Brazilian's Shipping and Port Sectors

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Abstract: *The economic order of the Brazilian Federal Constitution, stipulates that the State shall exercise the role of normative and regulating agent of economic activity and that the Public Power is obliged to maintain the appropriate service. The problem of research is the nonexistence of appropriate service, due to lack of appropriate regulation in the prices and tariffs of the sector of waterway transportation and ports by the National Agency for waterways and ports. The article analyses critically the regulations applied through some cases's studies and concludes that the mentioned sectorial agency should take the leadership to proportionate reasonable prices to provide an appropriate service to the shippers, including the use of price cap (limitations to the price).*

Keywords: Economic regulation. Constitutional Law. Waterway transportation. Ports. Appropriate service

1. Introduction

This article is linked to the Line of Research in *Constitutionalism and Production of Law*, of the Program of Master's Degree and Doctorate in Legal Science of the University of Itajaí Valley, especially to the Research Group in *State, Constitutionalism and Production of Law*.

The lack of appropriate regulation in the prices and tariffs of the sector of waterway transportation and ports, the duty of the Brazilian's National Waterway Transportation Agency (Antaq), by the nonexistence of limits to prices and tariffs when clearly excessive has not provided an appropriate service. This is a worldwide's problem that reduces the competitiveness of the goods, burdening specially the developing countries like Brazil.

In this respect, in order to contribute to the effectiveness of the appropriate service, especially of articles 170, V; art. 174 and 175, sole paragraph, subsection IV, of the Brazil's Federal Constitution, this article maintains that a technical discussion is required which provides the limitation of the prices collected (a price cap) by the contractors, seaport and inland port terminals, intermediary agents and maritime carriers, when such amounts are clearly excessive, i.e., infringe moderation. There is no similarity with price setting.

In waterway transportation and port activity, sector regulated by Antaq, State agency created by Law # 10.233/2001, it is no different, especially by the existing network industry and with a strong degree of transnationality, intermediary agents and verticalization (partner shipowners of port terminals), on one hand, and ineffective economic regulation, on the other hand.

For such reasons there is nonexistence of moderation, characterized by adopting prices on a fair and reasonable basis, which has allowed abuse, as the policy of the agency is not imposing a limit, but determining reports when there is abuse, heightened by the lack of a policy defending competition by the sectoral regulating agency (Antaq).

In this context, the article intends to contribute to the effectiveness of moderation in waterway transportation and port activity, bearing in mind that the agency Antaq has refused to resolve the problem through creating objective criteria to limit prices, when clearly excessive. It is sustained that moderation is the condition required, although it is not sufficient for appropriate service.

To attain its scope, the article is divided into two parts. Part 1 deals with the constitutional foundation of transportation and relevant concepts, based on standards of Antaq. Part 2 discusses moderation and appropriate service in the standards of Antaq, through analyzing two cases, when there are clearly excessive amounts. At the end there are final considerations with suggestions for providing the appropriate service with greater effectiveness.

2. Literature Survey

Few authors in Brazil have written about reasonable prices on the shipping and ports sectors (Castro Junior; Rodrigues, 2019) and Castro Junior (2015). In the comparative law, it is important mention the research of Trujillo; Nombela (2003).

2.1 Problem definition

The problem is the lack of appropriate service, specially reasonable prices on the Brazilian shipping and port sectors. As the companies in this sector operate in a network industry, with a strong degree of transnationality, intermediary agents and verticalization (ship owners are partners of the port terminals), there is nonexistence of moderation, characterized by adopting prices on a fair and reasonable basis, which has allowed abuse, as the policy of the agency is not imposing a limit, but determining reports when there is abuse, heightened by the lack of a policy defending competition by the sectoral regulating agency (Antaq).

In order to reduce this problem, the article uses a constitutional-regulatory approach through the critical analysis of the regulations of the sector and some cases and suggests price limit on the prices of the sector, as demurrage of containers and port services.

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2.2 Methods / Approach

The methodology is focused on the role of the economic regulation to increase the effectiveness of the economic constitutional order on the regulations of the shipping and port sectors.

Part 1: Relevant concepts and constitutional foundations of transportation

Transportation is a strategic element for developing the economy of any country, especially in countries of continental size such as Russia, the USA, Canada and Brazil. It is emphasized that the derived constituent listed transportation as a social right, as per art. 6. of the Federal Constitution, included by Constitutional Amendment # 90/2015:

Art. 6 Social rights are education, health, food, work, residence, transportation, leisure, security, social security, protection for maternity and infancy, assistance for the helpless, in the form of this Constitution.

Notwithstanding such category being a social right with constitutional forecast, Brazilian transportation requires greater efficacy of the appropriate service, partly caused by the nonexistence of State policies which provide the conditions of efficiency, foreseeability, moderation, regularity, sustainability and punctuality.

3. Relevant Concepts

3.1 Transport contract

To deal with moderation in transportation it is necessary to define what a transport contract is. According to art. 730 of the Brazil's Civil Code: "By the transport contract someone undertakes, through retribution, to transport, from one place to another, people or things."

Indeed, as per art. 731 of the Civil Code, transportation in Brazil can only be exercised through granting of authorization, permission or concession and is ruled by regulatory standards and that which is established in those acts, without loss of that set forth in the aforesaid Code.

It is sustained that the lack of regulation of the foreign maritime transporter, especially that of container, by means of granting authorization, is one of the causes of lack of dissuasive power of Antaq and, in turn, of the infringement of moderation.

3.2 Moderation

Conceptualizing moderation in waterway transportation is relevant to establishing fair and appropriate prices for its purpose and, also, contributing to the universality of the service, as immoderate prices restrain or prevent access of the user to the service. In the maritime transportation sector, this principle is one of the most relevant ones for the competitiveness of Brazilian products.

In this respect, concerning the concept of moderation of Normative Resolution # 18/2017, enacted by Antaq, which

deals with the rights and duties of users, intermediary agents and the maritime transporter, in the terms of its art. 3, subsection VII, it is relevant, although not sufficient to impose limits:

Art. 3 The maritime transporters of long distance and coasting and the intermediary agents shall observe permanently, as relevant, the following conditions for rendering appropriate service:

(...)

VII - moderation, characterized by adopting prices, freight, rates and surcharges with a fair basis, transparent and not discriminating and which reflect the balance between the costs of rendering the services and the benefits offered to the users, allowing the improvement and expansion of the services, besides appropriate remuneration; and

The lack of a conceptual definition of moderation in prices and tariffs and the multidisciplinary of public services (dealers and authorizing bodies) and public interest (authorization), also liable to intense state regulation, lead to diversity of tariffs and prices collected privately and difficulty of state control, by sectoral regulation, aiming at balance on the composition of costs.

To avoid this problem, which allows abuse of the lessee or dealer, it is necessary to validate the readjust of tariff by act of State, *in casu*, Antaq, in the terms of art. 27, subsection VIII, of Law # 10.233/2001.

In this environment, the Brazilian doctrine has suggested solutions for effectiveness of tariff moderation, as expressed by Moreira (2010, p. 263):

Once this premise has been established, the most important action is the constant search for excellent results. Within this set of data, the tariff shall be as moderate as possible related to the service to be administered and rendered by the dealer. In the case of common concessions ruled by the General Law of Concessions, moderate is the tariff which is in the measure to make the project self-sustaining - no more or less than that strictly necessary for the service to be appropriate to the respective social requirements. Thus the need for constant attention to the economic-financial balance of the contract (for more or for less), stamped in its periodical reviews - which are one of the most efficient ways of ensuring moderation.

When dealing with moderation in the port sector, Castro Junior and Maicon Rodrigues (2019) sustain that despite the range of concepts of moderation of tariffs and prices, the subject is still little disclosed and applied in the scope of ports. Thus, a juridicity which handles an appropriate interpretation that aims at effectiveness of moderation is relevant. This ends up being little applied in the daily life of port operations, like a normative adornment, leaving the standard complete, but not efficacious.

Concerning moderation of prices in the maritime transportation sector, there is a normative forecast in Law # 10.233/2001, which sets forth about the objectives of Antaq

in regulating waterway transportation and port activity, in the following way:

Art. 20. The objectives of the National Agencies of Regulation of Land and Waterway Transportation are:(...)a) ensure the movement of people and goods, in fulfilling standards of efficiency, safety, comfort, regularity, punctuality and *moderation in freight and tariffs*;

Likewise, Law # 8.987/1995, which sets forth about the granting and permission of public services, stresses the importance of tariff moderation, including in the development of other sources arising which lead to modest tariffs for the user:

Art. 11. In handling the particularities of each public service, the granting power shall be able to foresee, in favor of the dealer, in the bid notice, the possibility of other sources arising from alternative, complementary, accessory revenues or those from associated projects, with or without exclusiveness, with a view to favoring moderate tariffs, observing that set forth in art. 17 of this Law.

Finally, it should be emphasized that the lessee needs to implement an economic activity, so that the State allows the production of riches, provided that several principles are observed, including moderate tariff and foreseeability, as Castro Junior(2015) states:

However, it should be borne in mind that the lessee, like any company of private initiative which acts or not through administrative contract, does not service for philanthropic reasons, but with the aim of profit, provided that moderation is observed. In the public sphere, in there is the right to a stable, intangible situation, created by the contract.

In this environment, moderation also applies to all the services authorized or of public interest, even though not authorized, such as the one which involve maritime transportation and its accessories, such as the use of the container,

3.3 Free initiative, Free competition and the defense of the consumer/user

The constitutional principles are the pillars of legal order, and are consecrated in the Federal Constitution of 1988 as general principles of economic activity, free initiative, free competition and defense of the consumer, which appear in art. 1, IV and art. 170.

Free initiative, consecrated as one of the foundations of the Federative Republic of Brazil by the originating constituent, covers both the freedom of exercise of any economic activity, without the interference of the State, except due to the law, and the freedom of contracting, which involves the rights of negotiation and establishing contents of the contract according to the interest and convenience of the parties.

It is stressed that such freedom is not absolute, unrestricted,

because there is an obstacle in the regulation of the State, especially the economic sectoral regulation of the regulating agencies.

In turn, free competition is related to free initiative, and is based upon the assumption that competition cannot be restrained by economic agents with greater power in the market. Thus, the establishment of goods and services must not arise from cogent acts of the administrative authority, but from the free play of forces in customer dispute or, in the case of values clearly excessive, from limitation by the State.

This occurs so that the principle of defense of the consumer/user of the service is executed, as the principles in a system cannot be interpreted separately, but in a systematic way, always observing the public interest, which takes place in executing the appropriate service, by means of condition of moderation in prices and tariffs.

3.4 Defense of the user (shipper)

The user has public subjective right in rendering service, which must be furthered in an appropriate way. Not placed only as a mere conceptual adornment, this right can be required to be fulfilled, as the user is the essential piece for maintaining the service and the purpose of the public service is to honor the user.

In spite of the maritime transportation service not being public, because it is rendered by authorization holder, in the case of Brazilian navigation companies, which operate through granting of authorization, ironically the foreign maritime transporter operates without granting.

We know that authorized service is not public service, but is of public interest, therefore, it undergoes economic regulation, albeit at a regulatory density differing from that of granting or permission, but never less. That is why the theory of defense of the user of public service is relevant to the problem of maritime transportation which does not observe the appropriate service.

The rights of the users must be defended as well as being able to be imposed legally, and their defense is the duty of the grantor and sectoral regulating body, as the doctrine states:

Such rights of the user subject, in depending upon the will thereof, can be imposed legally on another subject (immediately, the dealer; intermediary, grantor and regulator). Finally, when the dealer relation is installed, there is constituted, when less, the *prohibition of omission* by the dealer and the *duty of guarantee* by the grantor (Moreira, 2010).

There is a problem of asymmetry of representation in the maritime transportation sector, when dealing with the organization of the user related to that of the intermediary agent and of the transporter. This problem contributes to the asymmetry of information and, in turn, production of standards which allow greater balance between user and transportation contractor.

Concerning this problem, it is important to mention the doctrine of Trujillo and Nombela (2013):

There is, by assumption, a conflict generated by the asymmetry in information, given that the private operator is encouraged to hide information relevant to the regulator. This aspect can be softened through periodic control which allows a continuous monitoring and through establishing reasonable standard service levels.

The problem of lack of economic regulation, with record and monitoring of prices collected by the private companies in the sector, in this case, by lack of appropriate regulation of Antaq, contributes to increasing the problem, with the rejection of the contractors not presenting the receipt of payments and, thus, configuring compensation.

In the case of the collection of Terminal Handling Charge (THC) made by the maritime carrier or its intermediary agent, we are faced with opportunist conduct, typical of free rider, as such companies "hitch a lift" on the right of the port terminal, which should charge the service directly. Concerning this problem, and how to overcome it, by means of confirmation of the amount effectively paid through the regulator (disclosure regulation), in the words of Anthony Ogus (2000), professor emeritus of the University of Manchester:

There is presumably a considerable consumer demand for intermediaries to provide independent, reliable comparisons on the prices and quality offered by different traders and yet, because of the 'free-rider' problem, there is likely to be, in the unregulated market, an under-supply of such intermediaries. Government may then fund a public agency, or subsidize a private agency, to provide such information. Alternatively, it can establish a system of public registration or certification of traders who satisfy certain minimum standards of quality. Such a system is to be distinguished from a licensing regime which prohibits those without a license from practicing the trade or profession. Registration or certification does not control conduct; it simply provides information. Like disclosure regulation, it preserves consumer choice.

It deals with a failure of information in the regulation, which has been allowed by Antaq since the edition of Resolution # 2.389/2012, so that in the words of Ogus (2000), regarding the duty of informing the price and controlling (and punishing) the false or erroneous information as follows:

Information regulation falls into two broad categories: mandatory disclosure, which obliges suppliers to provide information relating to price, identity, composition, quantity, or quality; and the control of false or misleading information. The discussion is divided accordingly. First, however, we must consider the theoretical justifications for information regulation.

This lack of information leads to negative externality, in this case, enriching without cause, because the contractor refuses to provide the receipt of compensation even to the regulator, even though urged to by the regulator, in order to reduce the user's loss, all to increase exponentially the profit of the one retaining the information, well above the marginal cost of the service, also in the words of professor Ogus (2000):

Mandatory disclosure regulation can generate direct welfare gains for consumers whose purchase of goods or services is affected by inadequate information. If the unregulated market does not lead to what we have referred to as the 'optimal' amount of information, that is where the marginal benefit arising from that amount of information is approximately equal to the marginal cost of producing and communicating it, consumers sustain a welfare loss: the difference between the utility derived from the transaction without the optimal amount of information and the utility they would have derived if that amount of information had been supplied.

Forcing the seller to supply that amount of information may eliminate the loss.

The subject of social regulation of information is so relevant that it has deserved specialized attention of the doctrine compared many years ago, especially regarding the duty of revealing prices and control in cases of erroneous information as can be seen in the case concerned.

This arises from the greater organization of the contractors which, in turn, causes negative externalities in normative production (the standard is edited to benefit the contractor) and in the control. This environment generates predatory prices, which require efficacious regulatory performance by Antaq, as can be seen in the port sector (Castro Junior, 2015):

Although Antaq has been created to develop waterway transportation, with the application of Law # 9.432/1997 (orders waterway transportation in the terms of art. 178 of CF/88), and port activity, of which the main standard was the Law of Ports (# 8.630/1993) and, as of June 5, 2013, by means of Law # 12.815/2013 (New Law of Ports), the users have not yet developed the consequences of Antaq, to defend their interests, as opposed to EBNs and terminals, which are better organized, generating asymmetry of representativeness between terminals and users.

Furthermore, it should be mentioned that the port sector was a state monopoly and, with the reform of Law # 8.630/1993, with more than 2/3 of the cargo moved in private terminals and ineffective regulation, which allows predatory prices by the terminals, as it deals with a network industry.

However, the edition of RN 18/2017, by Antaq, which sets forth about the rights and duties of users and the other contractors of the sector is emphasized, as follows:

Art. 1 The present Standard sets forth about the rights and duties of the users, the intermediary agents and the companies which operate in maritime support

navigation, port support, coasting and long distance, and establishes administrative offenses.

Sole paragraph. This standard does not apply to organized ports, port installations, terminals of private use, cargo transfer stations, public port installations of small size, port installations of tourism and installations of support for waterway transportation.

(...)

Art. 8 Basic rights of the user, without loss of others established in specific legislation and in the contract, are as follows:

- a) receive appropriate service observing the standards of regularity, continuity, efficiency, safety, updating, generality, punctuality and moderation;
- b) indicate to ANTAQ the irregularities and offenses of the law and regulations which (s)he is aware of, referring to the service rendered, operation or availability contracted;
- c) have available transparent, correct and precise information by means of accessible communication channels, with prior knowledge of all the services, operations or availability to be contracted and the risks involved, including the specification of the amounts of the prices, freight, rates and surcharges, deceitful advertising banned; and
- d) obtain and use the service with freedom of choice of contractors, coercive or unfair commercial methods banned, as well as practices and clauses in noncompliance with the law, standards, regulations or international agreements, conventions and treaties ratified by Brazil or imposed in the supply of services.

There is also mentioned the right the user has regarding defense of competition, especially related to maritime transporters and intermediary agents, which must abstain from practices harmful to the economic order, including related to arbitrary increase of profit arising from, for example, demurrage of container, in the terms of art. 5, of RN 18/2017:

Art. 5 The maritime transporters and intermediary agents shall abstain from practices harmful to the economic order by means of acts, however expressed, regardless of fault, which have as aim or that may produce effects, albeit not yet attained, of limiting, falsifying or in any way harming free competition or free initiative, increasing profit arbitrarily, or exercising a dominating position in an abusive way.

3.5 Duties of the users

When it deals with balance between the rights of the users and of the maritime transporter and/or its intermediary agent, it is relevant to handle the duties of users as set forth in art. 9 of RN 18/2017, Antaq, below:

Art. 9 The user's duties, without loss of others established in specific legislation and in the contract, and also, as relevant, to the type of navigation executed, are to:

- 1) Pay the amounts referring to the services, operations and availability contracted;
- 2) Only contract waterway transportation or operations and availability in navigation of maritime support, port support or coasting with a navigation company duly authorized by Antaq to execute the service intended and, in long-distance navigation, in compliance with Law # 9.432, of 1997, and the treaties, conventions, agreements and other international instruments ratified by Brazil;
- 3) Contribute to the duration of the good condition of public or private assets by means of which the services are rendered;
- 4) Deliver or remove the cargo at the place and term agreed upon for shipment or unloading with the correct packing, in compliance with the laws, regulations, technical requirements applicable and the treaties, conventions, agreements and other international instruments ratified by Brazil;
- 5) Provide correct, clear, precise, timely and complete information:
 - a) For the coastal and long-distance navigation operations, about the cargo to be transported, especially the requirements for compliance with the standards and regulations of the governmental bodies and the treaties, conventions, agreements and other international instruments ratified by Brazil; and
 - b) For the navigation operations of port or maritime support, concerning the procedures to be adopted, considering the specificities of the respective operations; and
- 6) Serve, in the scope of their assignments and in the term stipulated, the maritime transporter, the intermediary agent, Brazilian shipping company, port or maritime support or the relevant authorities, providing them with all the documents and information required concerning their hazardous products and services subject to specific regulations by another body.

3.6 Constitutional foundations

In this scenario it is relevant to point out that the word "transport" is mentioned more than 25 times in the Federal Constitution, it being the duty of the municipality to organize and render, directly or through a system of granting or permission, the public services of local interest, including collective transportation, which are of an essential nature, as per subsection V of art. 30.

Maritime transportation of crude oil of national origin or basic derivatives of petroleum produced in Brazil, as well as the transportation by means of conduit, of crude oil, its derivatives and natural gas of any origin, is the monopoly of the Union in the terms of art. 177, subsection IV.

In turn, art. 178 sets forth concerning the ordering of the various modes:

Art. 178. The law shall set forth concerning the ordering of air, water and land transportation, having, regarding the ordering of international transportation,

to observe the agreements signed by the Union, attending to the principle of reciprocity. (Wording given by Constitutional Amendment # 7, of 1995)

Sole paragraph. In the ordering of aquatic transportation, the law shall establish the conditions in which the transportation of goods of coasting and inland navigation shall be able to be executed by foreign ships.

Furthermore, article 21 deals with the competences of the Union regarding transportation, in the following way:

Art. 21. It is the duty of the Union: (...) XII - to develop, directly or through authorization, granting or permission: (...) c) air and aerospace navigation and the airport infrastructure; d) the services of railroad and waterway transportation between Brazilian ports and national frontiers, or which transpose the limits of State or Territory; e) the services of interstate and international road transportation of passengers;

It should be pointed out that art. 175 deals with public services, as well as the necessity of preserving users' rights, the tariff policy and the obligation of maintaining an appropriate service, in the following way:

Art. 175. It is the duty of the Public Power, pursuant to the law, directly or through authorization granting or permission, always through bidding, to render public services. Sole paragraph. The law shall set forth concerning: I - the system of companies with granting and permission for public services, the special nature of the contract and its extension, as well as the conditions of lapse, control and termination of the granting or permission; II - the users' rights; III - tariff policy; IV - the obligation of maintaining an appropriate service.

Despite this constitutional framework which deals with transportation, there is a lack of effectiveness related to waterway transportation and the port activity, especially regarding abusive prices, which infringe moderation, where the Law of Antaq, (Law # 10.233/2001) sets forth the objectives of regulation in the sector of waterway transportation and ports, in the terms of subparagraph a, subsection II, art. 20, transcribed above.

After the presentation of relevant concepts and constitutional foundations of transportation, the theme of appropriate service, emphasizing moderation, will be dealt with in the next part.

3.7 Moderation as a condition of appropriate service in waterway transportation and port activity

3.7.1 Introduction to the standards which regulate appropriate service

The two main standards which deal with users' rights in waterway transportation and port activity are RN 18/2017, of Antaq, aforementioned and Resolution # 3.274, of February 6, de 2014, amended by Normative Resolution # 02-Antaq, of February 13, 2015 and Rectified by Normative Resolution # 15-Antaq, of December 26, 2016), which approves the standard that sets forth concerning the control

of rendering of a port services and establishes administrative offenses.

3.7.2 In waterway transportation

As already mentioned, Normative Resolution # 18-Antaq is the one which deals with the concept of appropriate service, including moderation. It approves the standard which sets forth concerning rights and duties of users, intermediary agents and companies which operate in navigation of maritime and port support, coasting and long-distance, and establishes administrative offenses.

In this scenario, in Chapter III, it deals with appropriate service and in subsection VII of art. 3, it establishes moderation as one of the conditions of maritime transporters of long-distance and coasting and the intermediary agents as follows:

Art. 3 The maritime transporters of long-distance and coasting and the intermediary agents shall observe permanently, as relevant, the following conditions for rendering an appropriate service: (...) VII - moderation, characterized by adopting prices, freight, rates and surcharges on as fair, transparent and non-discriminatory basis which reflects the balance between the costs of rendering services and the benefits offered to the users, allowing the improvement and expansion of the services, besides appropriate remuneration; and

Also, being relevant to costs in waterway transportation, it should be noted that, besides the aforesaid condition of moderation, the concept of appropriate service set forth in RN 18/2017, applied to maritime transporters and intermediary agents, stipulated several other conditions, beginning with regularity, in the aforesaid articles, as follows:

Art. 3 The maritime transporters of long-distance and coasting and the intermediary agents shall observe permanently, as relevant, the following conditions for rendering an appropriate service:

I - regularity, by means of execution of frequency and scales offered to the users;

III - efficiency, by means of:

a) fulfillment of the parameters of performance established contractually, seeking the best result possible and continuous improvement of quality and productivity;

b) adopting operational procedures which avoid loss, damage, misplacement of cargos or waste of any nature, due to lack of method or rationalization in their performance, minimizing costs to be borne by users; and

c) diligent execution of their operational activities, so as not to interfere and minimize possible damage or delays in the activities executed by third parties;

IV - safety, characterized by fulfillment of practices recommended of safety of waterway traffic, aiming at conserving the environment and the physical and proprietary integrity of the users, the cargo and the port installations used, as well as any other resolutions, standards and regulations related to safety issued by competent authorities or by international

agreements, treaties, conventions and treaties, of maritime transportation ratified by Brazil;

(...)

VI - generality, ensuring the offer of services, in an isonomic and non-discriminatory way to all the users, as widely as possible;

(...)

VIII - punctuality, through fulfillment of terms, established or estimated, for rendering services, established in contract, formally scheduled between the parties involved or reasonably demanded, taking into consideration the circumstances of the case.

The aforesaid concept of moderation is almost the same as that which must be observed by Brazilian navigation companies which operate in maritime support (off-shore industry) and port support (tugs and launches), as per subsection VII of art. 6:

Art. 6 Brazilian's shipping company and port support shall observe permanently, as relevant, the following conditions for rendering service, operation or availability contracted, in an appropriate way: (...) VII - moderation, characterized by adopting prices, freight, rates and surcharges on as fair, transparent and non-discriminatory basis which reflects the balance between the costs of rendering services and the benefits offered to the users, allowing the improvement and expansion of the services, besides appropriate remuneration; and

It is also stressed that appropriate service, which includes the standard of moderation is one of the user's basic rights, in the terms of subsection I, of art. 8, which is:

Art. 8 Basic rights of the user, without loss of others established in specific legislation and the contract, are to:

I - receive appropriate service observing the standards of regularity, continuity, efficiency, safety, updating, generality, punctuality and moderation;

It is relevant to mention that, at the same time that there is a standard which includes as administrative offense noncompliance with the criteria of appropriate service described in RN 18/2017, Antaq is incapable of limiting, for example, the price of demurrage of container, as well as port storing, when it is abusive. Let us see article 27, subsection II, which deals with the aforesaid sanction:

Art. 27. Administrative offenses of a medium nature are constituted of:

(...)

II - not fulfilling the criteria of appropriate service described in this Standard, except when the offending conduct fit in the specific type handled in this Standard: fine of up to R\$ 100,000.00 (one hundred thousand reals);

2.2.1. Case study: the collection of demurrage in immoderate amount

If there is collection of amount of demurrage of up to eighty times the value of the freight and thirty times the value of

the cargo, obviously there is infringement of moderation and, therefore, of appropriate service condition. In this case it is indispensable to establish limits for immoderate tariffs or prices, under penalty of making appropriate service unfeasible.

In this scenario, it is relevant to mention the case in which Antaq decided not to face the problem of da effective moderation for demurrage of container, because urging the creation of criteria to limit such collection would have entailed technical studies discussed in public hearing to define objectives, and Antaq, in the report of the Director Francisval Mendes, resolved to reject the request for amendment of RN # 18/2017 to impose such criteria.

The case refers to a judicial proceeding of collection of demurrage of three dry containers, in the amount of R\$ 1,113,446.73 (one million, one hundred and thirteen thousand, four hundred and forty-six Brazilian reais and seventy-three cents), on January 31, 2018, including fees of winner's legal costs of eleven percent, judged by the Court of Justice of São Paulo. The amount of demurrage is almost eighty times the amount of the freight of the three containers (R\$ 14,000) and thirty times the amount of the cargo transported (R\$ 39,000), and the cause of the delay was due to a Customs error which demanded an Import License, although 288 days later, Environmental Agency (IBAMA) indicated that the Import License was not necessary.

With the argument that moderation (art. 20, II, a, of the Law of Antaq) only encompasses freight and tariffs and that demurrage has a legal nature of pre-established indemnification, it is understood that the "limitation is mere rhetoric". The report of the rapporteur Director of Antaq, Francisval Mendes, understood that:

Moreover, that in the long proceedings of the appellant it mistakes moderation of prices for collection for demurrage. The relationship that is imposed in its allegations between the sum owed and for transportation and the amounts collected for demurrage is improper. The moderation shall be determined related to the amount collected for the transportation itself and not related to the time elapsed which led to the collection of demurrage.

Clearly, assessing amount of transportation as indemnification for long period of absence of return of box, surely gives large figures and it seems to be disproportional. But, for purposes of price moderation, it is no more than rhetoric. (BRASIL, Agência Nacional de Transportes Aquaviários. Antaq, 2018).

Well, one can only agree with such argument of the vote of the rapporteur, approved unanimously by the Executive Board, which will mean that appropriate service can never exist bearing in mind the negative externality arising from surcharges and other prices besides freight, such as demurrage, allowed in the case reported, of eighty times the amount of the freight. It is seen that Antaq did not analyze the case in the light of the condition of moderation of art. 3, VII, of Normative Resolution # 18/2017, as the price of

demurrage is pre-fixed indemnification or penal clause. On the contrary, it sought to make the argumentation of limitation in the light of moderateness of the Law of Antaq, without observing RN # 18/2017.

Antaq in the aforesaid decision expressly infringes the condition of moderation, gives a “blank check” so that the transportation or its intermediary agent can charge an amount without limit, and contributes to the logistical costs in Brazil, especially in maritime transportation, are the highest in the world.

It is Crystal clear that the decision of Antaq was not appropriate, because it is indispensable to establish objective criteria to limit the price of waterway transportation services, under penalty of there not being effective appropriate service, bearing in mind that moderation is a condition of the aforesaid service. The decision, therefore is in disagreement with the spirit of the Law of Antaq and with the sense of Law # 10.233/2001 and RN # 18/2017, which was edited and approved, by the same executive board. The same regulatory problem occurs in the port sector, as will be shown further on.

3.8 In the port sector

In the same way that there is a resolution which sets forth concerning the rights and duties of users, maritime transportation and the intermediary agent in waterway transportation (RN 18/2017, of Antaq), in 2014 Resolution # 3.274, Port Regulation, was edited, being intended for the administration of organized ports/lessees of port installations and areas, port operators and those authorized of port installations.

The standard intends to establish obligations for rendering appropriate service, as well as defining the respective administrative infringements, in the terms of Law# 10.233, of June 5, 2001, and Law # 12.815, of June 5, 2013. (Wording given by Normative Resolution # 02-ANTAQ, of 2015)

Appropriate service is a basic right of the user of the aforesaid services, including the standard of moderation, in the terms of subsection I, of art. 2, namely:

Art. 2 Basic rights and duties of the User are, without loss of others established in specific legislation and contractually: I - to receive appropriate service: a) observing the standards of regularity, continuity, efficiency, safety, updating, generality, courtesy, moderation, respect for the environment and other requirements defined by ANTAQ;

It is emphasized that there is punishment for the Port Authority which fails to control port operation regarding the rendering of appropriate service, including with fine, in the terms of subsection XXX, of art. 33, *in verbis*:

Art. 33. Administrative infringements of the Port Authority, subjecting it to punishment by the respective sanctions, are constituted of:
(...)

XXX - failing to control port operation regarding the rendering of appropriate service: fine of up to R\$ 500,000.00 (five hundred thousand reais); and (Wording given by Normative Resolution # 02-ANTAQ, of 2015)

It is also mentioned that the Port Regulation, as it sets forth about moderation as a basic right of the user and minimum condition of appropriate service, we see:

Art. 2 Basic rights and duties of the User are, without loss of others established in specific legislation and contractually: I - to receive appropriate service:

I - to receive appropriate service: a) observing the standards of regularity, continuity, efficiency, safety, updating, generality, courtesy, moderation, respect for the environment and other requirements defined by ANTAQ;

Art. 3 The Port Authority, the lessee, the authorized entity and the port operator shall observe permanently, without loss of other obligations appearing in the applicable regulations and respective contracts, the following minimum conditions: (...)

VII - moderation, adopting tariffs or prices in a fair, transparent and non- discriminatory basis for users and which reflect the complexity and costs of the activities, observing the ceiling prices or tariffs, provided that they are established by ANTAQ;

3.8.1 Case study: the collection of port storage

It deals with a case involving judicial collection against importer filed by terminal of private use, in the amount of R\$ 479,535.87 (four hundred and seventy-nine thousand, five hundred and thirty-five Brazilian reais and eighty-seven cents), referring to storage of two containers, in the period of 311 and 307 days.

The cargo was declared destroyed and auctioned for R\$ 53,493.53 (fifty-three thousand, four hundred and ninety-three Brazilian reais and fifty-three centavos). It is emphasized that the port terminal is verticalized and the storage price is approximately three times that of the nearest port terminals, que which do not have a ship owner shareholder.

Urged by the user to impose limits on price freedom, in the case of abusive prices, Antaq, through instruction of the Superintendent of Port Regulation, decided as follows:

To Control Superintendency

Subject: Supposed abusive collection of storage
Regarding Instruction SFC 0322409, I return the records with the expression of this Superintendency indicating that the standards edited by this Agency already foresee appropriately the regulation concerning collection of the prices practiced by the authorized private terminals; for which reason I understand that for now it there is no need for any additional regulation concerning the matter.

Sincerely,

Flávia Morais Lopes Takafashi - Superintendent of Regulation (BRASIL, Agência Nacional de Transportes Aquaviários. Antaq, 2017).

Similar to the decision uttered in the claim of economic regulation in maritime transportation, the port service, according to the aforesaid decision, continues being interpreted in a way not appropriate with that determined by the regulatory milestone, especially concerning the condition of appropriate service.

As in the decision involving the user's request for adjustment in RN 18/2017, concerning the price limitation of port storage, without any founded technical study, Antaq opted for the preponderance of price freedom, even though in oligopoly oriented environment and without defense of competition, related to moderation.

3.9 Moderation as assumption for appropriate service

Although moderation is in the standards of Antaq and is one of the most relevant conditions of appropriate service, contradictorily, without any deep study, based upon the rhetoric of free initiative, free market and free price, Antaq has allowed prices of maritime transportation and port services without any limit imposed by the State.

3.9.1 The infringement of isonomy regarding the limitation of civil liability

There is also stressed the requirement of isonomic treatment between the right of the maritime transporter to limit its civil liability and that of the user to limit payment for the use of the container.

The maritime transporter in freighting its ship to a third party has the institute of demurrage to reduce the risk of its operation, configured in excess time arising from port operation of loading and unloading, beyond the term agreed. The same occurs related to the use of the container.

Thus, it is relevant that there is a fair Division of risk between the parties, i.e., between the maritime transporter and the user, so that if there is not such forecast at a legislative level or a balanced contract, it is the duty of the arbitrator to interpret and apply the principle of moderation in the case concerned. Acting thus, it will fill in the gap in the case concerned, resolving the case in the most efficient economic way and maintaining the relationship so that such decision is useful for formatting future contracts.

Upon dealing with this problem of division of risks in demurrage in freightage contract, always seeking the balance of interest between the parties, Hugo Tiberg (2013) states the following:

In some legal systems this division is provided for by the written law. It is then important that the legislator should frame the rules in awareness of the economic issues. In other systems it is the courts that work out the principles, and even in the legislative systems courts have an important function on filling out the lacunae of the written law and providing detailed solutions. In all such decision-making, courts develop instruments for future contractors, to be used by them in shaping their

relationship. "This formula", says the court, "gives the result. That formula gives that result." And no formula at all gives such-and-such a result. However the courts choose to divide time risks between ship and charterer, it is desirable that they should do it in such a way *as to provide future contractors with suitable instruments for shaping their relationship in an economically efficient manner.*

Furthermore there is no limit to demurrage of container, so that to make moderation in price effective, such limitation is relevant regarding the lack of isonomic treatment between the transporter (it has its risk limited) and the user (without limitation to the risk thereof).

This occurs because it has at least four legal provisions to limit its civil liability related to the service rendered to the user (main obligation: transportation and accessory obligation: use of container), however, there is no limitation to the user's risk related to the service rendered by the transporter.

The maritime transporter upon chartering its ship to a third party has the institute of demurrage to reduce the risk of its operation, configured in the excess time arising from the port operation of loading and unloading, beyond the term established. The same occurs related to the use of the container.

Thus, why can the adherent to the waybill (user) not have its civil liability limited, with the reduction of the amount in the container demurrage amount?

Indeed, the transporter when there is mention of the cargo amount in the maritime waybill, has its liability limited to the damage caused to the user, as per art. 750 of the Civil Code:

Art. 750. The liability of the transporter, limited to the amount appearing in the waybill, begins at the moment it, or its workers, receives the item; it ends when it is delivered to the addressee, or deposited in court, if it is not found.

The same occurs when there is not such mention, the amount being limited to that set forth in art. 17 to 19 of Law # 9.611/1998 and art. 16, § 1, 2 and 3 of Decree # 3.411/2000. Furthermore, art. 19 of the aforesaid law is crystal clear about the limitation of the responsibility of the maritime transporter:

Art. 19. The accrued liability of the Multimodal Transportation Operator shall not exceed the limits of liability for total loss of the goods.

The limitation of the International Convention concerning Civil liability caused by Pollution by oil (CLC 69), ratified by Brazil through Decree # 79.437, of March 28, 1977, is also emphasized.

Now, if the legislation which regulates the activity of the maritime transporter protects it, why can it not protect by means of limitation the activity of the users of the services,

regarding a collection action by the one that is exposed to the same risk as the maritime carrier?

4. Conclusion

The appropriate service so disclosed by Antaq is far from existing if it continues to allow, based upon the rhetoric of free initiative and price freedom, the collection of prices, tariffs and surcharges without objective criteria to limit their amount, when clearly excessive, such as the demurrage of container and port storage of terminal of private use.

It can be concluded that moderation is a relevant condition for balancing the costs in maritime transportation. As seen, although there are many arguments for their execution, they do not in themselves ensure moderation.

Thus, to improve the regulatory milestone, it is expected that Antaq, a State agency, in its normative production, seeks effectiveness of the Federal Constitution, by means of balance in the maritime transportation environment and the port sector, through adding certain measures, including:

- 1) Isonomy in the risk treatment of the activity of the maritime transporter and the activity of the user, especially because the former has express legal provision through several standards.
- 2) Prohibition of collection by port service arising from fact that the user did not cause, especially when dealing with expenses arising from storage by omission of port and
- 3) Identification of objective criteria for limitation of price of demurrage of container and port services, especially storage

There are more than two hundred thousand users in the sector regulated by the agency, most of them importers and exporters, which undergo problems of unpredictability and immoderation, which can be resolved with the principles of RN 18/2017.

It is believed that the aforesaid suggestions can, in some way, contribute to adjustments in RN 18/2017, and the employees of Antaq can tackle technically and focusing on public interest the aforementioned problems, and thereby contribute to making effective the aforesaid constitutional provisions (art. 170, V; art. 174, head provision and art. 175, sole paragraph, subsection IV) and providing the user with appropriate service.

Furthermore, it is necessary to seek effectiveness of the defense of competition, by means of a standard which can identify and punish conduct that infringes the Antitrust Law in the scope of this agency, a necessary condition so that the principles of defense of the user and economic order can really be executed, and contribute to improving the quality of the service rendered in maritime transportation and port activity.

References

- [1] Brasil (2018), Agência Nacional de Transportes Aquaviários. Antaq, Voto do Diretor Francisval Mendes. Fls. 4/6 SEI 051404, Proc. n. 50.300.005313/2018-01. Data do voto: 03 de agosto de 2018. Disponível

em:<www.antaq.gov.br>. Acesso em: 10 abr. 2019.

- [2] Brasil (2017), Agência Nacional de Transportes Aquaviários. Antaq, Despacho da Superintendente de Regulação. Flavia Takafaschi. SEI 0331551, Proc. n. 50.300.004255/2017-91. Data do despacho: 16 de agosto de 2017. Disponível em:<www.antaq.gov.br>. Acesso em: 10 abr. 2019.
- [3] Moreira (2010). *Direito das Concessões de Serviço Público - Inteligência da Lei n. 8.987/1995 (Parte Geral)*. São Paulo: Malheiros.
- [4] Castro Junior; Rodrigues (2019). *Direito Portuário: Modicidade, Previsibilidade e Defesa da Concorrência*. Florianópolis: Conceito.
- [5] Castro Junior (2015). *Direito Portuário e a Nova Regulação*. São Paulo: Aduaneiras.
- [6] Ogus (2000). *Regulation – Legal Form and Economic Theory*. Oxford, Oregon: Hart.
- [7] Tiberg (2013). *The Law of Demurrage*. Fifth Edition. London: Thomson Reuters, Sweet & Maxwell.
- [8] Trujillo; Nombela (2003). In: ESTACHE, Antonio; DE RUS, Ginés (eds.). *Privatización y Regulación de Infraestructuras de Transportes – Una Guía para reguladores*. Washington: Banco Mundial, Alfaomega.

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