

Ongoing disputes in an unpredictable industry

The COVID-19 pandemic has had an unprecedented impact on the global economy and has created several challenges for the shipping/logistics industry. The current global economic shock, length of recession, and trajectory of the recovery will likely determine the nature and severity of these challenges.

Even as the world gradually eases out of lockdown and deals are rekindled and services are remobilized, disruptions stemming from the COVID-19 pandemic and other political unrest will be felt for some time. The effects on the shipping industry will vary from jurisdiction to jurisdiction and are based on several factors (e.g., government action taken to mitigate financial hardships resulting from the pandemic and how businesses respond to the easing of restrictions will be important and may themselves be the source of future claims).

The unpredictable nature of the government, business and labor responses to disruptions in the industry is changing the nature of relationships and leading to higher costs for everyone involved.

Selection of ongoing issues:

- I. **Labor disputes** – ILWU contract negotiations are ongoing, possible rail workers strike
 - a. **ILWU:** The union represents more than 22,000 longshoremen in 29 ports and terminals up and down the West Coast; about 13,000 are employed at 12 ports along Southern California’s San Pedro Bay. The previous contract between the ILWU and PMA ended on July 1, 2022. Negotiations are ongoing. The biggest issue is the matter of automation of container-handling machinery, an emerging trend at ports and terminals throughout the world.
 - b. **BLET:** Threat of strike in mid-September. The Biden Administration has already been involved pursuant to the Railway Labor Act. The biggest issues have to do with working conditions. Broadly, workers feel the railroads, responding to investor demands, are exploiting their workers and customers for the sake of ever-increasing profits.
 - c. **What it means:** possible slowdowns in movement of goods across the country – possibly leading to higher consumer prices
- II. **Consumer protection issues** – People of California v. Yeezy Apparel \$1m settlement for false promises related to shipping and delivery (Cal. Sup. Ct. No. 21STCV38971).
- III. **Threats of fees/penalties** – Ports of Los Angeles and Long Beach proposed a “container excess dwell fee”
 - a. First suggested on October 25, 2021, but continuously delayed to present. The fee has never been deployed. Dwell times are down, perhaps due to the threat of this fee. From October 25, 2021 to November 15, 2021 there was a 26% drop in dwell times on the terminals. By February 2022, the dwell times had dropped 70%. The threat of the fee is a tool to reach the goal of 0 containers on the docks for 9+ days.
 - b. Fee would likely be passed from the ocean carriers to importers.
- IV. **Issues in litigation**
 - a. Specific discovery issues: Vessel inspections and experts
 - i. Vessel schedules are notoriously moving targets.
 - ii. Must ensure that such an inspection does not violate any Coast Guard, Port Authority or marine terminal rules or regulations.

- iii. Where and when to hire experts?
- iv. Special accommodations to bring the vessel alongside sooner than its queue position or permission to attend the vessel at anchor.
- b. What it means: more time spent preparing for these types of inspections than in the past, ultimately it means higher costs for those involved in the litigation.

The ongoing supply chain disruptions have and will continue to have significant and widespread economic impacts on the industry. There appears to be no way to accurately assess near or long-term effects of these problems.

- I. OSRA 2022 Implementation
 - a. Demurrage & Detention Invoicing¹
 - i. Information Transparency Requirements
 - date that container is made available
 - port of discharge
 - container number(s)
 - earliest return date
 - start of the date of free time
 - the end date of free time
 - the applicable demurrage or detention rule on which the daily rate is based
 - the applicable rate or rates per the applicable rule
 - the email, telephone number, or other appropriate contact information for questions or requests for mitigation of fees
 - a statement that the charges are consistent with any FMC rule regarding demurrage or detention
 - a statement that the carrier's performance did not cause or contribute to the charges
 - ii. Marine Terminal Invoicing
 - 1. Joint – Storage and Carrier Demurrage
 - 2. MTO Storage Only
 - iii. Railroad Invoicing – Storage
 - 1. Carrier Demurrage
- II. Looking Forward – ANPR re: Demurrage and Detention Invoicing²
 - a. Scope of Billing
 - i. Whether or not to require uniform standards for demurrage and detention billing
 - b. Minimum Billing Requirements
 - i. Whether or not to require the following information be included on all invoices:
 - bill of lading number
 - relevant container number(s)
 - billing date
 - payment due date
 - start/end of free time
 - start/end of demurrage or detention clock
 - vessel arrival date
 - container availability date
 - earliest return date
 - identification of changes to earliest return date
 - clock stopping events

¹ Pub. L. 117-146, 136 Stat. 1272 (2022).

² Federal Maritime Commission Advance Notice of Proposed Rulemaking, Demurrage and Detention Billing Requirements, Docket No. 22-04, February 4, 2022, www.fmc.gov/commission-invites-comments-on-benefits-of-new-demurrage-detention-rule/.

- pass through charges
- c. Billing Practices
 - i. Whether or not to:
 - require demurrage and detention invoices be issued within sixty days
 - define a time limit for issue of refunds or return of charges after an invoice is corrected or a dispute is upheld
 - require identification of why a particular party is being billed
 - require that disputes processes be attached or made part of an invoice

III. Near-Term Impact of OSRA 2022 and the FMC's ANPR on Supply Chain Congestion

- a. While both OSRA 2022 and the FMC's ANPR improve transparency requirements of billing, the improvements do not appear to address terminal congestion
- b. However, the Commission's Fact-Finding 29 recommendation to institute a new International Ocean Shipping Supply Chain Program as well as expand the use of industry-representative Advisory Committees³, combined with OSRA 2022's mandate to review chassis pool practices and defining the duty of ocean carrier with respect to space accommodations appear to target the issues underlying the congestion crisis.
- c. It remains to be seen whether regulatory action can truly fix issues of supply and demand

³ Fact Finding Investigation No. 29 Final Report: Effects of the COVID-19 Pandemic on the U.S. International Ocean Supply Chain, www.fmc.gov/reading room/docs/FFno29/Fact%2029%20Final20Report.pdf [hereinafter, FF29 Final Report]

Selection of Recent and Potentially Upcoming developments in Supply Chain Law¹

I. RECENT STATUTES AND REGULATIONS

1. The Uyghur Forced Labor Prevention Act

The Uyghur Forced Labor Prevention Act (“UFLPA”) was signed into law on December 23, 2021 and came into effect on June 21, 2022. The primary purpose of the UFLPA is to ensure that goods made with forced labor in the Xinjiang Uyghur Autonomous Region of the People’s Republic of China (“Uyghur Region”) do not enter the United States market.²

To accomplish this goal, UFLPA establishes a rebuttable presumption that any goods produced in the Uyghur Region or by certain identified entities are prohibited from importation into the U.S. under 19 U.S.C. 1307.³ These include entities that work with the Uyghur Region government to recruit, transport, or receive alleged forced labor from the Uyghur Region, as well as entities that participate in certain activities in the Uyghur Region.⁴ Customs and Border Protection (“CBP”) has released importer guidance to assist the trade community in preparing for the implementation of the UFLPA.⁵

UFLPA also mandates the creation of enforcement strategies by the Forced Labor Enforcement Task Force (“FLETF”) and the development of a report containing such to Congress. The FLETF, is a DHS-led Task Force of interagency partners charged with monitoring the enforcement of the prohibition on importing goods made wholly or in part with forced labor into the United States. FLETF released their report to Congress on June 17, 2022.⁶

UFLPA also requires that the Secretary of State develop a diplomatic strategy to enhance international awareness of and to address forced labor in the Xinjiang Uyghur Autonomous

¹ Prepared by Benjamin Nashed. Any views expressed in this document are those personally held by the author and are in no way reflective of the Federal Maritime Commission.

² Uyghur Forced Labor Prevention Act, Pub. L. No. 117-78 (2021).

³ *Id.* at § 3(a) (2021).

⁴ *Id.* at § 2(d)(2)(B).

⁵ Uyghur Forced Labor Prevention Act - U.S. Customs and Border Protection Operational Guidance For Importers, CBP Publication No. 1793-0522 (June 13, 2022), https://www.cbp.gov/sites/default/files/assets/documents/2022-Jun/CBP_Guidance_for_Importers_for_UFLPA_13_June_2022.pdf.

⁶ Strategy to Prevent the Importation of Good Mined, Produced, or Manufactured with Forced Labor in the People's Republic of China - Report to Congress, (June 17, 2022) https://www.dhs.gov/sites/default/files/2022-06/22_0617_fletf_uflpa-strategy.pdf.

Region of the People's Republic of China and report on it to Congress.⁷ The report must also contain a plan for working with private sector entities seeking to conduct supply chain due diligence and a plan of actions taken by the United States Government to address forced labor in this region under existing authorities.⁸ The Department of State submitted the Diplomatic Strategy to Address Forced Labor in Xinjiang to Congress on April 12, 2022.

⁷ U.S. Customs & Border Prot., Fact Sheet: Uyghur Forced Labor Prevention Act of 2021 (2022), https://www.cbp.gov/sites/default/files/assets/documents/2022-Jun/UFLPA%20Fact%20Sheet_FINAL.pdf.

⁸ Pub. L. No. 117-78 at § 4.

2. Ocean Shipping Reform Act of 2022

On June 16, 2022, President Biden signed the Ocean Shipping Reform Act of 2022 (“OSRA”).⁹ Through OSRA, Congress amended various statutory provisions contained in Part A of Subtitle IV of Title 46, U.S. Code. OSRA also instructs the Federal Maritime Commission (“Commission”) to initiate a series of rulemakings and created some new requirements that went into effect immediately. The Commission’s General Counsel issued guidance on the self-executing portions of OSRA in June 2022.¹⁰

One self-executing portion of OSRA prohibits ocean common carriers from issuing an invoice for demurrage or detention charges unless the invoice includes specific information to demonstrate compliance with part 545 of title 46, Code of Federal Regulations and applicable provisions and regulations and lists information that ocean common carriers must include in a demurrage or detention invoice.¹¹ Failure to include the required information on a demurrage or detention invoices eliminates any obligation of the billed party to pay the applicable charge.¹²

OSRA also authorizes the Commission to revise the list of information that ocean common carriers must include on demurrage or detention invoices in future rulemakings.¹³ OSRA additionally instructs the Commission to initiate a rulemaking further defining prohibited practices by common carriers, marine terminal operators, shippers and ocean transportation intermediaries regarding the assessment of demurrage or detention charges.¹⁴

Another self-executing portion of OSRA allows shippers to submit information about complaints of "charges" assessed by a common carrier to the Commission.¹⁵ When the Commission receives sufficient information, it will promptly investigate the charge for 41102 and 41104 compliance, which could ultimately result in a civil penalty and order for a refund of

⁹ Pub. L. 117-146, 136 Stat. 1272 (2022).

¹⁰ Timing of certain provisions of the Ocean Shipping Reform Act Of 2022, (June 24, 2022) <https://www.fmc.gov/wp-content/uploads/2022/06/FMCGCOpiniononOSRA22.pdf>.

¹¹ Pub. L. 117-146 at § 7(a)(1).

¹² *Id.* at § 7(a)(2).

¹³ *Id.*

¹⁴ *Id.* at § 7(b)

¹⁵ *Id.* at § 10.

charges paid. OSRA shifts burden of proof to establish reasonableness of a demurrage or detention charge to the common carrier.¹⁶

Additionally, OSRA temporarily authorizes the Commission to issue an emergency order requiring any common carrier or marine terminal operator to share certain information with shippers and other specified entities when the Commission determines that congestion has created an emergency situation.¹⁷ An emergency order issued under OSRA would remain in effect for a period of no more than 60 days but could be renewed by a unanimous vote of the Commission.¹⁸ On August 15, 2022 the Commission published a request for information as to whether an emergency situation exists in the federal register.¹⁹

Among other things, OSRA also instructs the Commission to issue a rulemaking on unreasonable refusal to deal or negotiate vessel space, prioritize enforcement activity, and enhance the resources and capabilities of the Commission's Office of Consumer Affairs and Dispute Resolution Services. To further monitor the Commission's action on OSRA the Commission created a webpage to catalog Commission actions taken to comply with requirements established by OSRA.²⁰

¹⁶ *Id.*

¹⁷ *Id.* at § 18.

¹⁸ *Id.* at § 18(f)(1)-(2).

¹⁹ 87 Fed. Reg. 50085.

²⁰ Ocean Shipping Reform Act of 2022 Implementation (Aug. 12, 2022) <https://www.fmc.gov/osra-2022-implementation/>.

3. Louisiana Act 551

Act 551 was signed into law and became effective on June 17, 2022. Act 551 creates temporary exceptions that will allow trucks in Louisiana to carry two 20-foot containers in tandem to and from ports utilizing certain defined roads.²¹ According to a Louisiana Department of Transportation and Development (“DOTD”) spokesperson, this may be a first of its kind allowance.²²

The Act grants the DOTD the authority to issue special permits through Aug. 1, 2026, which would allow “combination vehicles” or “tandem loads” to haul divisible and non-divisible containers to and from any Louisiana port facility.²³ In addition to issuing permits, the DOTD will also issue route information designating which roads can be used for these purposes.²⁴ The routes will indicate which state and federal roadways can be used but will exclude interstate highways.²⁵

Act 551 also creates several requirements for permits with respect to weight and height. Vehicles cannot exceed 83 feet in length, cannot exceed 140,000 pounds gross weight and cannot not exceed 40,000 pounds per tandem axle spread and sixty thousand pounds per tridem axle spread.²⁶ Vehicles must also be equipped with a dual-axle dolly and a dolly safety system with tilt sensors attached to the dolly that provide feedback on tilt information to the driver of the vehicle to ensure safe operations.²⁷

²¹ LA. Rev. Stat. § 32:387.2 (2022).

²² Transportation Topics, Louisiana Starts Pilot With Two-Container Trucks at Ports (July 7, 2022), <https://www.ttnews.com/articles/louisiana-starts-pilot-two-container-trucks-ports>. (“we are not aware of any divisible loads at this weight being permitted by other states”).

²³ LA. Rev. Stat. § 32:387.2 (2022).

²⁴ *Id.* at § 32:387.2(b).

²⁵ *Id.*

²⁶ *Id.* at § 32:387.2(a).

²⁷ *Id.* at § 32:387.2(b).

II. PENDING OR POTENTIALLY UPCOMING STATUES AND REGULATIONS

1. Federal Maritime Commission Rule on Demurrage and Detention Billing Requirements

On February 15, 2022, the Federal Maritime Commission (“Commission”) issued an Advance Notice of Proposed Rulemaking (“ANPRM”) seeking comment on whether a new rule governing demurrage and detention billing practices would benefit the trade.²⁸ Specifically, the ANPRM sought comments on whether the Commission require certain minimum information on demurrage and detention invoices, whether it should require common carriers and marine terminal operators to adhere to certain practices regarding the timing of demurrage and detention invoices, and whether these potential regulations should apply to marine terminal operators and non-vessel operating common carriers in addition to vessel operating common carriers.²⁹

This ANPRM was an interim recommendation of the Commission’s Fact-Finding 29 investigation wherein the Fact-Finding Officer recommended that the Commission “[i]ssue an ANPRM seeking industry views on whether the Commission should require common carriers and marine terminal operators to include certain minimum information on or with demurrage and detention billings and adhere to certain practices regarding the timing of demurrage and detention billings.”³⁰ The Commission received approximately eighty comments.

As a preliminary matter, Commission’s ANPRM sought information on who should be included in any potential regulation. Specifically, the Commission sought questions on comments regarding the applicability of potential demurrage and detention billing requirements to parties such as non-vessel operating common carriers and marine terminal operators.³¹ The Commission also requested information on what specific information it should require on demurrage and detention bills. The Commission asked about the possibility of mandatory inclusion of information such as: demurrage/detention rate schedule, vessel arrival date,

²⁸ In June 2022 after the Commission’s issuance of its ANPRM, the Ocean Shipping Reform Act put into effect several billing requirements but authorizes the Commission to revise the list of information that ocean common carriers must include on demurrage or detention invoices in future rulemakings. Pub. L. 117-146 at § 7(a)(2).

²⁹ Demurrage and Detention Billing Requirements, 87 Fed. Reg. 805 (Feb. 15, 2022).

³⁰ Fact Finding Investigation No. 29, Interim Recommendations at 6 (July 28, 2021), <https://www2.fmc.gov/ReadingRoom/docs/FFno29/FF29%20Interim%20Recommendations.pdf/>

³¹ 87 Fed. Reg. at 8508.

container availability date, earliest return date, and other information that could potentially be usefully in identifying the source of a charge and determining its accuracy.³²

Finally, the Commission also sought comments on practices related to invoicing demurrage and detention. For example, whether it should require billing parties to issue demurrage or detention invoices within a certain number of days after the charges stopped accruing.³³ The Commission also sought information on whether invoices are typically sent to multiple parties and if the Commission should require that to be identified on an invoice.³⁴

³² *Id.* at 8508-8509.

³³ *Id.* at 8509.

³⁴ *Id.*

2. Clean Shipping Act of 2022

On July 12, 2022, Congressmen Lowenthal and Congresswoman Barragán, introduced the Clean Shipping Act of 2022 (CSA). The CSA would amend the Clean Air Act to create standards to limit the carbon intensity of the fuel used by certain vessels. Specifically, the CSA would apply to any vessel of 400 gross tonnage or more and on a voyage transporting passengers or cargo for commercial purposes that is between any ports of call under United States jurisdiction or between a port of call under the jurisdiction of the United States and a port of call under the jurisdiction of a foreign country.³⁵

These new standards would require lifecycle carbon dioxide-equivalent reductions of 20% from January 1, 2027, 45% from January 1, 2030, 80% from January 1, 2035, and 100% from January 1, 2040, relative to the 2024 emissions baseline.³⁶ The act would also make it mandatory for these vessels to eliminate in-port ship emissions by 2030.³⁷

The CSA also gives the Administrator discretion in the event they determine that any of the standards are not technologically or economically feasible by the applicable deadline.³⁸ If such a determination is made, the EPA Administrator can instead promulgate a different standard that will achieve the maximum reduction in the carbon intensity of the fuel used by vessels on covered voyages while still being technologically and economically feasible.³⁹

³⁵Clean Shipping Act of 2022, H.R.8336, 117th Cong. §2 (2022).

³⁶*Id.* at §2(a)(1).

³⁷*Id.* at §3(e)(1).

³⁸*Id.* at §2(a)(3)(B).

³⁹*Id.*