

Ocean Shipping Policy Developments To Watch

By **Linda Chiem**

Law360 (April 15, 2022, 5:15 PM EDT) -- The ocean shipping industry is finding little relief in the post-pandemic economy as policymakers float new trade, competition and supply-chain measures intended to help importers, exporters, freight carriers, and port operators in a world wracked by surging inflation, fuel prices and a war in Europe.

The Biden administration in recent months has made competition-enhancing moves to help alleviate a supply-chain crunch in the face of heavy consolidation in the market, while Congress is working on rewriting decades-old laws in response to purportedly unscrupulous business practices in the ocean carrier shipping industry. At the same time, efforts to address climate change and environmental justice are also gaining steam.

Here, Law360 examines a few of the latest developments impacting the ocean shipping sector.

Ocean Shipping Reform Legislation

President Joe Biden and U.S. lawmakers have signaled a readiness to crack down on ocean container carriers' business practices that they say have contributed to the supply chain crunch and escalating costs for shippers and consumers.

After Biden issued his competition-enhancing **executive order** last July, the U.S. Department of Justice and the Federal Maritime Commission pledged to increase collaboration on enforcing competition laws in the ocean shipping industry.

At the same time, Congress is working on rewriting decades-old shipping law that would strengthen the FMC's oversight authority in response to increasing complaints of ocean carriers engaging in purportedly unscrupulous business practices, like ditching smaller U.S. exporters in favor of larger retail customers who can pay higher "spot" rates that climb with demand.

So-called fronthaul voyages importing goods to the U.S. are generally more profitable for ocean container carriers compared to so-called backhaul voyages exporting goods out of the U.S. on the return trip. As a result, U.S. exporters have been left in the lurch when they cannot pay the increasingly high prices being set by the carriers, according to lawmakers and industry stakeholders.

The Senate on March 31 **unanimously passed** the Ocean Shipping Reform Act after the House approved similar legislation in December, teeing up conferencing on a final measure that could be sent to the president's desk.

The Ocean Shipping Reform Act would, among other things, prohibit ocean container carriers from "unreasonably" declining opportunities to haul goods from U.S. exporters, and enable the FMC to draft new rules addressing the issue.

One of the goals of the Ocean Shipping Reform Act is "to grow U.S. exports and to promote reciprocal trade in foreign commerce, and fair reciprocal trade agreements have always been favored by both sides of the congressional aisle," according to Grady Hurley, co-leader of Jones Walker LLP's maritime litigation, arbitration and dispute resolution team and co-chair of its energy, environmental and natural resources industry team.

"However, questions linger as to whether additional layers of governmental bureaucracy will solve issues that the regulatory agencies have not previously resolved," Hurley said. "Whether the act

properly empowers and motivates the FMC and DOJ to further investigate and address gridlock including unfair practices is to be determined."

"The fragility of the global supply chain and unfair practices related thereto were exposed and highlighted during COVID and continue," Hurley continued. "The solution is not easy but must be collaborative. Historically, the maritime industry has been highly regulated with mixed results. There is heightened interest and determination by port authorities, shippers, brokers, consignees, labor and the maritime transportation stockholders to both identify and address the gridlock. Discussions are continuing which is part of the process to identify and then fix."

The bill also aims to promote transparency by requiring ocean common carriers to report quarterly to the FMC their total import/export tonnage and a tally of loaded or empty TEUs, or twenty-foot equivalent units, for each vessel that makes port in the U.S.

It would also authorize the FMC to self-initiate investigations of ocean common carriers' business practices and apply enforcement measures as appropriate. The FMC's hands are statutorily tied, and it generally must wait for a formal complaint to be filed before officially investigating. But complaints are rare, largely due to shippers' fears of being retaliated against or iced out completely by ocean container carriers — all of which are foreign-owned.

Experts say the legislation is not a silver bullet for unsnarling supply chain bottlenecks, but it provides the FMC with new tools to go after ocean container carriers for potentially unreasonable or anti-competitive behavior that might provide some relief to shipping customers.

John D. Padgett, managing partner of McGuireWoods LLP's Norfolk office and founding leader of the firm's transportation industry team, said the "devil will always be in the details."

"So we've got this old tool we're now trying to sharpen and use for these wide range of concerns that the current administration has," Padgett told Law360. "And maybe they'll be up for the challenge, but I don't think the regulations are going to solve the problems. They're going to kick the problems to the Federal Maritime Commission or another regulatory agency."

Harry G. Broadman, a managing director at Berkeley Research Group LLC and chair of its emerging markets and Committee on Foreign Investment in the United States practices, told Law360 that the proposed legislation "can only do so much" given the highly complicated nature of the industry.

"You have changes in behavior due to modernization and innovation and the size of containers, and you have the pandemic that set the world economies in a game of musical chairs and the world economy is still out of sync," Broadman said. "Not one of those things is dominant. We have a confluence of things."

The legislation has been embraced by scores of agricultural, retail, transportation and manufacturing groups, including the American Trucking Associations, the National Industrial Transportation League and the National Retail Federation.

Heightened Enforcement

The FMC in recent years has set up new auditing programs and intensified investigations into so-called detention and demurrage fees, which are the penalties that industry stakeholders can assess for any holdups in moving cargo off ocean container carriers and out of terminals.

Ocean carriers can assess their shippers and customers "detention" charges and marine terminals can assess "demurrage" fees if cargo is left sitting for too long on their vessel or on the docks and not moved or transported. They can also charge fees if the cargo containers and the trailers used to haul them, known as chassis, are not returned within a specified time. With all the gridlock, companies across the supply chain say they're being hit with unfair detention and demurrage fees for delays they have no control over.

The FMC is considering whether to draft new rules requiring common carriers and marine terminal operators to provide certain information concerning demurrage and detention billings. The agency issued an advanced notice of proposed rulemaking in February and has been collecting public

comments. Specifically, the FMC wants to know what data should be included on bills, what are reasonable time frames for billing and response, and whether other charges should be included in billing regulation.

"There are lots of things you can look at and say, 'That just doesn't smell right,' and those maybe the FMC can clean up pretty quickly and get the bad actors out of the demurrage and detention game," Padgett said. "But the real challenge is how to come up with a policy that balances the needs of the shippers, the carriers, the terminals, because there are reasons that the detention and demurrage charges were put in place and that was to make sure shippers showed up and moved their cargo off quickly."

Meanwhile, the Justice Department has also been making moves. Danish shipping giant A.P. Moller Maersk confirmed in March that it was **subpoenaed by the DOJ** as part of the DOJ's "ongoing investigation into supply chain disruption."

Experts say the ocean shipping industry grappled with fierce competition, an oversupply of vessels and thin margins for years before the COVID-19 pandemic. Now, intense demand has outstripped capacity, propelling the cost to ship a container along the Trans-Pacific trade lane, for example, to climb from \$4,000 about a year ago to roughly \$20,000 today, according to Padgett.

"That doesn't make sense to anyone that's not in the industry, so they assume there's gouging and abuse, and there might be a little bit of that, but [the ocean container carriers are] all hungry to recapture what they've lost over the years," Padgett said. "And if the market's going to allow the competitive market ... whether it's reasonable or not, who knows. The frustration is you don't have a lot of other options with the alliances and all the other arrangements that are difficult to navigate."

"So, the policymakers are saying, 'We're going after the people making the money, and we're going to get to the bottom of it,'" Padgett added. "So there will be some smoke around all of those initiatives because it provides political cover. But I don't think it's going to be a quick fix. And I do think you risk damaging a successful trend of privatization by over-regulating the industry again, which I don't think will be helpful long term for a global economy."

Green Shipping Corridors

There has also been growing momentum for so-called green shipping corridors, which are essentially trade routes between two or more major ports using low- or zero-emission fuels and vessels. At last year's United Nations Climate Change Conference, or COP26, some 24 countries, including the U.S., United Kingdom, Australia and Japan, pledged to establish at least six green shipping corridors by the middle of the decade and hopefully more by 2030 by signing on to the Clydebank Declaration.

The U.S. State Department on April 12 laid out a broad green shipping corridors plan, while acknowledging that it's still unclear what defines a green shipping corridor between U.S. ports and other parts of the world.

"Within this growing movement, however, there is not yet a shared understanding of what it means for a maritime corridor to be 'green,'" the State Department said. "This document is intended to contribute to a common vision of green shipping corridors and advance the effort to establish them across the ocean and along coasts and inland waterways, so that maritime stakeholders may act as a united front to tackle the climate crisis."

The idea is to get the ball rolling by having private stakeholders and local and state governments to start charting out how to develop alternative refueling or recharging infrastructure to support zero-emissions port and terminal equipment operations and how to support vessels and commercial harbor craft using low- or zero-emission fuels and technologies, among other things.

But some are already out front. The Port of Los Angeles, Port of Shanghai, and C40 Cities, which is a coalition of 100 mayors from cities around the globe collaborating on climate action, announced in January a partnership to create a first-of-its-kind green shipping corridor along one of the world's busiest container shipping routes. They said they'll collaborate on how to start phasing in low, ultra-low, and zero-carbon fueled ships over the next few years, with plans to have the world's first zero-carbon Trans-Pacific container ships introduced by 2030 "by qualified and willing shipping lines."

They've also pledged to develop best practices for curbing emissions and improving efficiency for all ships using this international trade corridor, to reduce supply chain emissions from port operations, and improve air quality in the ports of Shanghai and Los Angeles and adjacent communities, according to their January statement.

The parties said they've already got a few partners to sign on, including Maersk, CMA CGM, Shanghai International Ports Group, COSCO Shipping Lines, the Aspen Institute's Shipping Decarbonisation Initiative, facilitators of Cargo Owners for Zero Emission Vessels, and the Maritime Technology Cooperation Centre – Asia.

Jones Walker's Hurley said there are still questions on whether the green shipping corridors are "aspirational, realistic, or merely political in the short and long term."

"Historically, policies supporting research and technological advancements have led to sustainable improvements in propulsion and fuels," he said. "The process must be considered, deliberate and understand both cause and effect of green initiatives."

--Editing by Kelly Duncan and Emily Kokoll.