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THE OPERATIONAL IMPACT OF COVID-19 ON THE INTERNATIONAL OCEAN SUPPLY CHAIN AND THE LEGAL ISSUES PRESENTED BY SUPPLY CHAIN CONGESTION

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The global COVID-19 pandemic that has affected all of our lives since March of 2020 has had significant operational impacts on the international ocean supply chain, including the inland components of that supply chain. Those operational impacts have potential legal implications for supply chain participants, particularly those subject to regulation by the U.S. Federal Maritime Commission ("FMC" or "Commission.") This article briefly examines the operational impacts of the pandemic, and then discusses some of the potential legal implications arising from same.

I. OPERATIONAL IMPACT OF THE PANDEMIC

The initial operational impact of the pandemic was a decline in cargo volumes being imported into the United States from other countries, particularly major trading partners in Asia. For example, in May of 2020, cargo volumes at the Port of Los Angeles were down 29.8% over May of 2019, and the cargo volume handled by Los Angeles over the first five months of 2020 was down 18.6% over the same period in 2019.[2] Other ports experienced similar declines in cargo volume, and as of May 2020, some forecasters were predicting an overall decline of 20 to 30% in cargo volumes handled by U.S. ports in the first half of 2020.[3] Ocean carriers responded to the initial drop in cargo volumes by reducing vessel capacity.[4]

Cargo volumes surged later in 2020, as U.S. consumers began spending money that would have gone to travel, dining, and other entertainment outside of the home on con-

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[2] June 10, 2020 News Briefing by Executive Director Gene Seroka: https://www.portoflosangeles.org/references/news_061020_may_cargo_volumes_drop.
[3] "NY-NJ port seeks aid amid COVID-19 volume decline," *Journal of Commerce*, May 22, 2020.
[4] "NY-NJ expects Q1 cargo drop after dozen blank sailings," *Journal of Commerce*, Mar. 2, 2020.

sumer goods designed to make the most of the "new normal" of socially distant living and working at home. Carriers were able to quickly reactivate idled vessel capacity to meet the new demand.[5]

However, increased vessel capacity alone was not enough to meet cargo demand. The surge in cargo volume that began in mid-2020 has continued unabated since that time and has combined with a number of factors to create what I will call "supply chain congestion." These other factors include:

- Vessels delayed while waiting for a berth at crowded ports;
- Congestion on marine terminals due to high cargo volumes;[6]
- Decreased labor productivity at marine terminals and inland cargo handling and storage facilities due to a combination of COVID-19 illness among workers, working conditions modified to provide a safer working environment, and the same labor shortages that are affecting many sectors of the economy;[7]
- Congestion at inland rail facilities due to higher cargo volumes;[8]
- A shortage of trucking capacity;
- An increase in the period of time a chassis is used to deliver a loaded container to its destination and then return the empty container to the designated location ("dwell time"), resulting in a shortage of chassis and further cargo delays;[9]
- A shortage of containers resulting from some or all of the above factors.

The primary legal issues raised by supply chain congestion under the U.S. Shipping Act of 1984, as amended, 46 U.S.C. §§ 40101, *et seq*. (the "Shipping Act") are discussed below.

II. THE POTENTIAL LEGAL IMPLICATIONS OF SUPPLY CHAIN CONGESTION.

The supply chain congestion with which the international ocean transportation industry has been plagued since mid- to late-2020 presents three primary categories of legal issues under the Shipping Act: (a) the reasonableness of demurrage and detention charges; (b) the sufficiency of carrier service levels (especially with respect to U.S. exporters); and (c) carrier adherence to contractual service commitments.

[5] "Container Volumes Shipped to the U.S. Surge After Coronavirus Downturn," *Wall Street Journal*, Sept. 4, 2020.
[6] "Import surge, labor shortages worsen LA-LB congestion," *Journal of Commerce*, Jan. 12, 2021.
[7] *Id*.
[8] "BNSF, UP battling growing congestion pressures in Chicago," *Journal of Commerce*, June 3, 2021.
[9] "Import surge at Southeast ports tightens chassis availability," *Journal of Commerce*, Dec. 10, 2020.container or chassis is in the possession of the cargo interest or its agent/contractor.

A. The Reasonableness of Demurrage and Detention Charges.

In order to understand the legal issues relating to demurrage and detention charges,[10] some background on the operation of the international ocean transportation industry is necessary.

When containers arriving in the United States from a foreign country are discharged from the transporting vessel and placed on the marine terminal, the consignee is given a period of time (known as "free time") to pick up the container.[11] If the consignee does not collect the container within that time, demurrage charges begin to apply. Demurrage charges create an incentive for the consignee to pick up the cargo and compensate the carrier, marine terminal operator, or both, for the cost of storing and securing the container and its contents, and for the unavailability of the container while it awaits pick-up.[12] Once the consignee picks up the container (which it normally does by hiring a motor carrier to transport the container from the marine terminal to the ultimate destination), it has a certain amount of time ("free time") to return the container and the chassis used to haul it.[13] If the equipment is not returned within the allotted free time, detention charges being to apply. These charges create an incentive for the return of the equipment and compensate the carrier for the cost/unavailability of the equipment.[14]

With this background in mind, cargo interests and motor carriers in the United States have been pursuing legal challenges to the reasonableness of demurrage and detention charges for several years. The statutory provision upon which these challenges are based is section 41102(c) of the Shipping Act, 46 U.S.C. § 41102(c), which reads:

> A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connecting with receiving, handling, storing or delivering property.

[10] The FMC uses the terms "demurrage" and "detention" to "encompass any charges, including 'per diem,' assessed by ocean common carriers, marine terminal operators, or ocean transportation intermediaries ("regulated entities") related to the use of marine terminal space (e.g., land) or shipping containers, not including freight charges. 46 C.F.R. § 545.5(b). I use the term "demurrage" to refer to charges associated with the time a container spends on a terminal or other facility and "detention" to refer to charges associated with the time a container or chassis is in the possession of the cargo interest or its agent/contractor.

[11] A common carrier is legally deemed to have delivered cargo when it has unloaded cargo on to a dock or pier, placed it at a location where it is accessible to the consignee, given notice to the consignee, and afforded the consignee a reasonable opportunity to come and get it. *See, e.g.*, *Am. President Lines, Ltd. v. Fed. Mar. Bd.*, 317 F.2d 887 (D.C. Cir. 1962). Free time fulfills the obligation to afford the consignee a reasonable opportunity to collect the cargo.

[12] *Interpretive Rule on Demurrage and Detention Under the Shipping Act*, 85 Fed. Reg. 29,638, 29,651 (May 18, 2020).

[13] This explanation of demurrage and detention charges is based on a U.S. import shipment delivered to the consignee at the port. There are a number of different potential relationships among the ocean carrier, cargo interest, and motor carrier with respect to the inland transportation of cargo and the assessment of demurrage and detention charges. While these arrangements are potentially significant in evaluating a specific claim, we need not address the different arrangements here – a single, simple example suffices to illustrate the legal issue.

[14] Because the container and chassis are in the possession of the motor carrier, detention charges are often assessed against the motor carrier rather than against the cargo interest.

The current legal challenges began in earnest following supply congestion at certain U.S. ports in late 2014 and early 2015. That supply chain congestion led to the FMC holding four regional port forums regarding congestion. While demurrage and detention were not the focus of the forums, the FMC described shipper and motor carrier discontent with free time, demurrage, and detention practices as "palpable."[15] Subsequently, in December 2016, a group of cargo interests and motor carriers calling themselves the Coalition for Fair Port Practices filed a petition asking the FMC to adopt an interpretative rule clarifying when demurrage or detention charges would be considered unreasonable under section 41102(c). The Commission sought public comments on the petition, held hearings in January 2018, and then initiated Fact-Finding Investigation No. 28 in March 2018. Following the Fact-Finding Investigation, the FMC issued a Notice of Proposed Rulemaking on September 27, 2019, and then, in May 2020, just as cargo volumes were beginning to increase following the initial COVID-19 induced decline, the Commission issued a final interpretative rule, now codified at 46 C.F.R. § 545.5.

Under 46 C.F.R. § 545.5(c)(1), the Commission's analysis of the reasonableness of demurrage or detention charges focuses heavily on whether the charges serve their intended purpose as financial incentives to promote freight fluidity. In the broadest terms, this means that if imposition of the charges does not serve as an incentive for the cargo interest to pick up the cargo or return the equipment, then imposition of the charge is likely to be considered unreasonable,[16] although the carrier or terminal can cite any additional factors, arguments and evidence it wishes to support the reasonableness of the charge.[17]

FMC Commissioners have encouraged cargo interests and truckers to bring demurrage and detention issues to the attention of the Commission's Bureau of Enforcement.[18] It appears that the universe of potential complainants has gone beyond merely reporting issues to the Bureau of Enforcement and begun to file formal complaint cases with the agency. As a result, there are at least three cases pending before the FMC or its administrative law judge that deal with the reasonableness of demurrage or detention charges.[19] These cases, which are summarized below, will give the FMC an opportunity to clarify the application of its interpretative rule.

1. TCW, Inc. v. Evergreen Shipping Agency (America) Corporation & Evergreen Line Joint Service Agreement (FMC Docket No. 1966(I)).

In this case, Evergreen provided a chassis to TCW, a motor carrier, to deliver a container to TCW's customer (the consignee of an import container). The free time for the chassis expired on May 4, 2020, and the chassis was returned on Tuesday, May 26, 2020. Because the chassis was returned after the expiration of free time, Evergreen assessed detention charges. TCW filed a complaint under the FMC's informal, small claims proce-

[15] 85 Fed. Reg. at 29,639.
[16] 85 Fed. Reg. 29,638.
[17] 46 C.F.R. § 545.5(f).
[18] *See, e.g.*, Remarks of Commissioner Daniel B. Maffei before the Transportation Club of Tacoma Luncheon Meeting, Jan. 12, 2021.
[19] This is a significant number, given that a total of 15 complaint cases were filed with the FMC between January 1, 2020 and August 31, 2021.

dure, alleging that it was unreasonable and a violation of the Shipping Act for Evergreen to charge per diem on the chassis for the period from Saturday, May 23 through Monday, May 25 because the port was closed on those days. TCW argued that charging per diem on weekends, a holiday, and during a temporary port closure[20] was inconsistent with 46 U.S.C. § 41102(c) and the FMC's interpretative rules relating to the application of same to detention charges. Evergreen argued that the port closure was not temporary, that it was reasonable to charge per diem on the chassis because the closures had occurred after free time had already expired, and that the per diem charges were therefore consistent with FMC precedent suggesting that closures which result after free time has expired are at the risk of the cargo interest or equipment user.

The FMC settlement officer found in favor of TCW, concluding that the closure of the port on Saturdays was "temporary," despite the fact that the port had been closed on Saturdays since March. The settlement officer also ruled that it was unreasonable for Evergreen to charge detention when the port was closed on Sunday and a federal holiday. Under the FMC's informal, small claims procedure, the parties are not able to appeal the decision of the settlement officer. However, the Commission can review a decision on its own motion, which the FMC has chosen to do in this case. There are several important issues that the Commission will need to address on appeal, some of which were identified in the Commission April 26, 2021, order for supplemental briefing.

One of the issues on which the Commission requested supplemental briefing is what constitutes a "practice" for purposes of section 41102(c). While the FMC's interpretative rule on detention and demurrage (46 C.F.R. § 545.5) has received a great deal of attention, far less attention has been paid to a previously adopted and equally important interpretative rule relating to section 41102(c), which interpretative rule can be found at 46 C.F.R. § 545.4. In that rule, the Commission made clear that, in order to constitute an unreasonable practice in violation of section 41102(c), conduct must occur on a "normal, customary, and continuous basis." 46 C.F.R. § 545.4(b).[21] Logically, one need not consider the reasonableness of conduct under section 41102(c) if the conduct does not rise to the level of a "practice" within the meaning of that statutory provision. It is not clear that the assessment of detention on a single chassis constitutes a "practice" within the meaning of the Shipping Act. It will be interesting to see how the Commission addresses the interplay of its two interpretative rules relating to section 41102(c), and if the interpretation of "practice" will limit the number of cases in which it is necessary to determine the reasonableness of demurrage or detention charges on the grounds that no "practice" is involved.

Another key issue in this case, which will likely be the first Commission decision to apply the interpretative rule on demurrage and detention, is how the Commission applies the incentive principle in practice. Many shippers and motor carriers, including TCW in this case, appear to believe that the FMC's incentive principle means that one cannot assess demurrage or detention any time a terminal is closed. Briefs filed by *amici* in support of Evergreen argue that when cargo interests and truckers know of a closure well in advance,

[20] May 23, 2020 was a Saturday, May 24 a Sunday, and Monday, May 25 was Memorial Day.
[21] This interpretative rule reflects long-standing Commission precedent, from which the Commission had deviated in recent years. *See Interpretive Rule, Shipping Act of 1984*, 83 Fed. Reg. 64,480 (Dec. 17, 2018).

assessment of demurrage or detention still serves an incentive purpose by encouraging the prompt pick-up of cargo or return of equipment. There is some appeal to the argument that, if free time expires on a Friday, assessing detention charges for equipment which remains out over the weekend incentivizes the motor carrier to return the equipment prior to the expiration of free time. Conversely, not assessing charges over the weekend in such a case effectively extends the free time until Monday, provides no incentive, and does not promote the efficient use of equipment and movement of cargo. It remains to be seen if the Commission will adopt a bright-line rule in this regard or assess these situations on a case-by-case basis as suggested in the interpretative rule.

A third issue that the Commission may need to address in its decision relates to the burden of proof or persuasion. As noted above, the interpretative rule on demurrage and detention specifically contemplates respondents introducing evidence to support the reasonableness of their actions. 46 C.F.R. § 545.5(f). Here, there were somewhat atypical contractual arrangements in place among Evergreen, TCW, and the cargo interest which hired TCW. Evergreen argued that these agreements supported the reasonableness of its actions, an argument that was dismissed by the settlement officer in favor of the "incentive principle." If the Commission finds that this case involves a "practice" and reaches the issue of reasonableness, the weight (if any) it gives to these contractual arrangements could impact the outcome of the proceeding.

Another proof problem in this proceeding is that TCW alleged that the equipment was returned late because its customer's plant was closed. However, there does not appear to have been any proof of this in the record, nor is there any discussion of the reason for or the length of the closure. Presumably a complainant which bears the burden of proof in a complaint proceeding needs to show evidence of allegations of this type. In addition, information about the closure of the consignee's plant and the reason for its closure could be relevant to the reasonableness of the carrier's charges. For example, a plant closure within the control of the consignee would arguably support holding the consignee responsible for any delay in returning equipment, while a plant closure due to a force majeure-type circumstance would arguably support the opposite conclusion.

The Commission's decision in this case will provide important guidance to the industry on how the Commission intends to interpret and apply its rules interpreting section 41102(c).

2. Greatway Logistics Group, LLC v. Ocean Network Express PTE LTD (FMC Docket No. 21-04).

According to the complaint in this case, Greatway was engaged to arrange for Customs clearance for U.S. import cargo moving under two separate Ocean Network Express ("ONE") bills of lading, one of which named Greatway as notify party and the other of which did not name Greatway in any capacity. The cargo in question incurred significant demurrage charges for reasons that are not entirely clear. ONE filed suit against Greatway and other parties involved in the shipments in federal court, seeking to collect demurrage of approximately $211,000. Some defendants settled with ONE, and others were dismissed

from the lawsuit.

Greatway did not settle and was not dismissed, and has chosen to defend itself in part by filing a complaint with the FMC alleging that ONE's attempt to collect demurrage from Greatway constitutes an unreasonable practice under section 41102(c) because (i) Greatway was not party to the bill of lading; (ii) assessment of the charges does not further the incentive principle because Greatway was not the cargo interest responsible for picking up the cargo; and (iii) pursuing Greatway is an unjustly discriminatory practice in the settlement of claims in violation of section 41104(4)(E) of the Shipping Act.

Greatway's first two arguments present interesting and related issues for the FMC when it comes to the interpretative rule on detention and demurrage. In the case of the argument based on the fact that Greatway was not party to the bill of lading, the FMC issued a Notice of Inquiry on October 7, 2020, seeking input on whether the definition of "Merchant" in carrier bills of lading subjects third-parties that are not in privity with the carrier or who have not consented to be bound by the bill of lading, to liability for freight or charges. Comments were submitted confidentially in November 2020, but the FMC has not yet taken any action (such as initiating a rulemaking) based on the information obtained in response to the Notice of Inquiry. It is possible that the Greatway case may provide the Commission with a vehicle to address this issue without the need to initiate a rulemaking.

The other issue relates once again to the application of the incentive principle. Does or should the incentive principle preclude assessment of charges against entities such as Greatway, which are not the consignee? If not, where does one draw the line? This may be an issue which is best left for decision on a case-by-case basis, because there may be circumstances where prompt retrieval of the cargo and/or return of the equipment is dependent on the agent or contractor of the party named on the bill of lading. In such circumstances, it would arguably be consistent with the incentive principle to seek to hold such parties liable for charges. However, because this would depend on the role the entity in question plays in the specific transaction at issue, it may not be possible to adopt a bright-line rule in this regard.

This case, like the others discussed in this portion of the article, also raises the question of whether the assessment of charges under these circumstances constitutes a "practice" within the meaning of section 41102(c) as interpreted by 46 C.F.R. § 545.4.[22]

The *Greatway* case is still in the early stages of the proceeding, and absent a settlement or dismissal on purely legal grounds, it is likely to be some time before a decision is issued by the administrative law judge, after which the decision could be appealed to the Commission.

[22] The FMC's Bureau of Enforcement has sought and been granted leave to intervene in this proceeding to address certain issues; the question of what constitutes a "practice" is one of them.

3. Marie Carew d/b/a Holiday Shipping v. Maersk Line A/S, (FMC Docket No. 20-17).

This is another case that arises out of a carrier's attempt to collect demurrage charges in court. After being named as a defendant in a collection suit by Maersk in federal court, Marie Carew filed a complaint with the FMC, alleging that Maersk's efforts to collect demurrage were unreasonable because those demurrage charges were assessed with respect to a time period during which the cargo was purportedly being held for government inspection.

I say "purportedly" because the complaint in this case is not a model of clarity and certain factual allegations appear to have evolved over time. What is clear is that this case involves the movement of used vehicles from the United States to Nigeria. The vehicles were apparently held for inspection by U.S. Customs and Border Protection ("CBP") prior to export. The complainant originally appeared to allege that demurrage was wrongfully charged for the period when the vehicles were detained by CBP. Based on subsequent pleadings, it appears that demurrage was not assessed at origin, and that the vehicles were transported to Nigeria and discharged there. However, the vehicles have not been picked up by the consignee, and Maersk's federal lawsuit was an attempt to collect demurrage charges at destination.[23] Moreover, Maersk claims that it is no longer seeking to collect demurrage on the cargo which is the subject of the FMC proceeding and that the FMC action therefore is moot. However, that argument that was rejected by the administrative law judge in denying Maersk's motion to dismiss the complaint.

A significant issue that could be presented in this case (depending on the reason the demurrage was incurred) is how to deal with demurrage when the charges are incurred as the result of a government inspection. 46 C.F.R. § 545.5(c)(2)(iv) states:

> In assessing the reasonableness of demurrage and detention practices in the context of government inspections, the Commission may consider the extent to which demurrage and detention are serving their intended purposes and may also consider any extenuating circumstances.

Based on the commentary contained in the supplementary information accompanying the adoption of the interpretative rule, the foregoing means that the Commission is likely to consider it unreasonable to assess demurrage with respect to cargo being held for a government inspection.[24] This represents a departure from past FMC precedent, which held that government inspections and the consequences thereof were the risk of the cargo interest.[25] This case may provide the Commission with an opportunity to begin defining just how far it will go in requiring ocean carriers or terminal operators to absorb the cost of equipment or terminal space tied up as the result of a government inspection, rather than allowing this cost to be passed on to the cargo interest, which is responsible for compliance

[23] The parties disagree on why the cargo has not been picked up at destination, with each alleging it is the fault of the other.
[24] 85 Fed. Reg. at 29,659.
[25] *Free Time & Demurrage Charges at New York*, 3 FMB 89, 96, 99, and 101 (1948).

with import requirements.

Another potential issue presented by this case is just how far the FMC might go in asserting jurisdiction over demurrage charges incurred on cargo located outside of the United States. Typically, when the subject of a government inspection or hold is raised in the context of demurrage or detention, it deals with a hold or inspection of an import shipment by CBP or another U.S. government agency. Here, the cargo is being held at a foreign port for reasons that are not entirely clear from the record as developed to date. While cargo moving from the United States to another country is subject to the Shipping Act, this case shows how difficult it can be to ascertain precisely what is happening with respect to cargo discharged in a foreign port. The interaction of local legal requirements and delivery customs with the FMC's regulations could make determination of these types of cases more complex. Moreover, demurrage charges incurred in a foreign country would most often be payable by the consignee in that country. Will the FMC expend resources to protect foreign importers from allegedly unreasonable conduct by ocean carriers when their own countries do not do so? Should it? These questions remain to be answered.

In addition to the foregoing issues, the *Marie Carew* case also raises the question of whether the assessment of charges under these circumstances constitutes a "practice" within the meaning of Section 41102(c) as interpreted by 46 C.F.R. § 545.4.

This case has been briefed and is before the administrative law judge for decision.

4. Eucatex of North America, Inc. v. CMA CGM (America) LLC and Fenix Marine Services, Ltd. (FMC Docket No. 21-08).

In this complaint, filed on August 31, 2021, Eucatex claimed that certain containers from shipments being imported into the United States were selected for CBP inspection. Because the containers to be inspected were moving under bills of lading covering numerous other containers, none of the containers covered by the relevant bills of lading could be released until the inspected containers were ready for release. Eucatex claimed that Fenix, the terminal operator, did not move the containers to the inspection location in a timely manner and that, as a result, Eucatex incurred significant demurrage charges.

Had this case moved forward, it would have presented the issue of what is reasonable in the context of government inspections. However, the complainant voluntarily dismissed the case with prejudice in early October. Thus, the FMC may have to await another case with similar issues to address the government inspection question.

5. Final Thoughts on Demurrage/Detention.

To some extent, it is unfortunate that the FMC's interpretative rule on detention and demurrage was adopted just as supply chain congestion was developing. From a purely legal perspective, it might have been preferable for the initial cases involving this rule to have been decided against the backdrop of more typical trade conditions. As matters currently stand, these cases will be decided in a highly charged atmosphere in which shippers

are pressuring the FMC, directly and through Congress, to take action to address supply chain congestion. While there may be situations in which the FMC finds the assessment of demurrage or detention to be unreasonable, the agency may find it difficult to adhere to the fact-based, case-specific approach reflected in the interpretative rule when so many are pushing for bold and broad action on the issue. In addition, bold and broad action could protect shippers and equipment users from charges, thereby creating disincentives for those actors to assume their roles in addressing supply chain congestion. Moreover, on a more fundamental level, it seems unlikely that decisions interpreting the reasonableness of demurrage and detention practices will have any impact on the larger issue of supply chain congestion.

B. The Sufficiency of Carrier Service Levels.

Historically, the predominant condition in ocean commerce is overcapacity, or vessel supply that exceeds cargo demand.[26] The surge in cargo volumes described at the beginning of this article has created a situation that is atypical in the U.S. international ocean trades: a demand for vessel capacity that is equal to or in excess of the supply of such capacity. The result, as any student of supply and demand would predict, is higher rates. But there are other consequences which result from increased demand that have the potential to raise issues under the Shipping Act. One such issue is the extent to which ocean common carriers are legally obligated to provide service.

When vessel capacity exceeds cargo demand, ocean common carriers tend to aggressively pursue cargo because each additional container carried, even if it is at a low rate, contributes something to the high fixed cost of the carrier.[27] This phenomenon is best observed in the so-called backhaul trades. In most bi-directional trades, more cargo volume moves in one direction than the other. The higher volume trade is referred to as the "headhaul" trade, and the lower volume trade is referred to as the "backhaul" trade. In the U.S.-Asia trade, the inbound trade from Asia to the United States is the headhaul trade and the outbound trade from the United States to Asia is the backhaul trade. Because vessel capacity is typically deployed based on demand in the headhaul trade, there is normally chronic overcapacity in the backhaul trade. This means lower rates in the backhaul trade from the United States to Asia. For many years, U.S. exporters (many of which export relatively low-value agricultural commodities) have benefitted from low ocean freight rates and a willingness of carriers to accommodate their needs.

In this regard, many U.S. agricultural exports originate in locations that are far from the destinations of U.S. imports, meaning that empty containers must be transported from the port or inland location to which they are returned empty by the importer to where they will be loaded by an exporter. In the past, carriers frequently absorbed all or part of the cost of making the empty container available to the U.S. agricultural exporter, in addition to providing a low ocean freight rate and allowing their equipment to be tied up for the additional time it took to get the empty container to the exporter, have it loaded, and then get it to the port of loading. Because vessel capacity exceeded cargo demand in the headhaul

[26] *See., e.g.*, H. Rep. No. 53 Part II, 98th Cong., 1st Sess., at 4.
[27] *See, e.g.*, H. Rep. No. 53 Part I, 98th Cong. 1st Sess., at 14.

trade, and even more so in the backhaul trade, this did not present a lost opportunity for the ocean carrier and the agricultural exporters were the beneficiaries of these trade conditions.

The trade surge, which has lasted longer than past spikes in demand, has fundamentally altered the trade conditions described above, perhaps for good. With cargo volumes soaring in the inbound trade from Asia to the United States and rates rising along with them, carriers were less willing to allow the time necessary to have empty containers loaded with export cargoes and were less willing to absorb the cost of doing so. From a simple revenue-generation standpoint, in many cases it arguably became more profitable for carriers to return empty containers to Asia for prompt loading with import cargoes than to position an empty container for an export load and carry the loaded container back to Asia.[28]

Agricultural exporters have questioned the lawfulness of the carriers' actions, and more recently chemical shippers have voiced similar complaints.[29] [30] This naturally raises the question of what are the legal obligations of the carriers under such circumstances? Once again, the relevant statute is the Shipping Act.

The Shipping Act defines the term "ocean common carrier" (46 U.S.C. § 40102(17)) but does not define the term "common carrier." The FMC has held that the term "common carrier" as used in the Shipping Act is understood to mean a common carrier at common law.[31] A "common carrier" at common law is "one who holds himself out to carry for hire the goods of those who choose to employ him."[32]

A literal reading of this definition might suggest an ocean common carrier has an unlimited obligation to serve its customers. However, the Shipping Act and its predecessors have never been read so literally. The FMC itself has held that a common carrier is not required to accept any and all commodities.[33] Moreover, carriers can and do decline to accept shipments of certain commodities on a temporary or on-going basis, often for

[28] "Ag shippers slam carriers for refusing some export loads," *Journal of Commerce*, Oct. 23, 2020; "Regulators can't compel container lines to accept agriculture exports," *Journal of Commerce,* Mar. 30, 2021. It should be noted that carriers have always returned some empty containers to Asia, as this is necessary given the difference between inbound and outbound cargo volumes. It also appears that the increase in the number of containers leaving the United States empty instead of full is up only slightly in 2021 when compared with 2019. "Viewpoint: LA empty containers tell a compelling story," *Freightwaves*, Oct. 4, 2021 (movement of empties up less than 6%).

[29] In some cases, the complaints of the agricultural exporters have been twisted into xenophobic United States v. China hyperbole. *See* Tom Ozimek, "Lawmakers Say Ocean Carriers Are Undermining US Export Trade, Cry Foul on China," *The Epoch Times*, Mar. 11, 2021, https://www.theepochtimes.com/lawmakers-say-ocean-carriers-are-undermining-us-export-trade-cry-foul-on-china_3729278.html?welcomeuser=1. Such claims ignore the simple fact that most U.S. imports are controlled by the U.S. importer rather than the Chinese supplier, and the fact that Chinese exporters are also having difficulty securing sufficient numbers of containers. *See* Stell Qiu, *et al.*, "Boxed out: China's exports pinched by global run on shipping containers," *Reuters*, Dec. 20, 2020, https://www.reuters.com/article/us-global-shipping-container/boxed-out-chinas-exports-pinched-by-global-run-on-shipping-containers-idUSKBN28K0UA.

[30] "Chemical group rails against ocean carriers' 'unfair' practices." *Journal of Commerce*, Sept. 2, 2021.

[31] *Banana Distribs., Inc. v. Grace Line Inc.*, 5 FMB 615, 620 (FMB 1959) (citing Agreement No. 7620, 2 USMC 749 (1945)).

[32] *Id.* (internal citations omitted).

[33] *Id.* at 622.

safety or liability reasons. Examples of such commodities include calcium hypochlorite[34] and live animals.[35] Although a refusal to carry goods for safety or liability reasons can be distinguished from a refusal to carry for commercial reasons, it is nonetheless clear that a common carrier's obligation to accept cargo is not unlimited. Moreover, there are circumstances where a refusal to carry could be commercially justified, such as when a customer is in arrears in its payment to the carrier for previous shipments.

That a common carrier's obligation is not boundless is arguably confirmed by the language of the Shipping Act. For example, 46 U.S.C. § 41104(10) makes it unlawful for a common carrier to "unreasonably refusal to deal or negotiate," thereby suggesting that some refusals to deal or negotiate are reasonable and therefore lawful. In other words, there is at least some basis for an ocean carrier to refuse to accept a particular commodity or a particular class of commodities.

Moreover, the Shipping Act does not contain any provisions which require a carrier to maintain a particular frequency of service (e.g., how often ships call at a port), a particular level of vessel capacity (the size of its ships), a minimum number of containers, or to provide any other level of service. In light of historical overcapacity and the need for carriers to remain competitive with one another, such provisions have arguably not been necessary. Indeed, over the years, the trend has been to rely more on market forces than government regulation to ensure sufficient service. For example, prior to 1984, the FMC could not only declare a carrier practice to be unreasonable and therefore unlawful, it could also prescribe precisely what practice the offending carrier must adopt. However, under the Shipping Act, the FMC can only order a common carrier to cease and desist from an unlawful practice or award reparations to those who prove they have been injured by the unlawful practice – the agency no longer has the authority to require adoption of a reasonable practice.

The FMC has ruled that, when a carrier is short of vessel space, it must equitably prorate its available space among shippers.[36] However, this decision is over 60 years old, deals with the allocation of vessel space in a single direction (not the allocation of equipment as between imports and exports), and pre-dates containerization. Thus, it is arguably of limited utility to those grappling with the present situation.

At this time, there is no case pending before the FMC which would address the scope of an ocean common carrier's obligations in this precise context. Indeed, the Shipping Act as currently in effect does not appear to be well-suited to addressing the situation. Legislation has been introduced in the U.S. House of Representatives[37] which, if adopted in its proposed form, would seek to address a number of service-related issues. For example, the proposed legislation would make it unlawful for carriers to: (i) fail to furnish the facilities

[34] JOC Staff, "Calcium hypochlorite shippers get new guidance," *JOC.com*, May 9, 2016, https://www.joc.com/maritime-news/container-lines/calcium-hypochlorite-shippers-get-new-guidance_20160509.html.

[35] This statement regarding live animals is based on an informal survey of the rules tariffs of a number of ocean common carriers. Moreover, most ocean common carriers appear to reserve the right to reject any given shipment for a variety of reasons, mostly related to safety.

[36] *Banana Distribs.*, 5 FMB at 625.

[37] H.R. 4996, Ocean Shipping Reform Act of 2021, 117th Cong.

and instrumentalities needed to perform transportation services (including containers); (ii) fail to establish, observe and enforce just and reasonable regulations and practices relating to the allocation of vessel space accommodations in consideration of foreseeable import and export demands; or (iii) unreasonably decline export cargo bookings if such cargo can be loaded safely and timely and carried on a vessel schedule for such cargo's immediate destination. The legislation would also require a common carrier to "adhere to minimum service standards that meet the public interest." The legislation charges the FMC with prompt initiation of a rulemaking proceeding to incorporate these new prohibitions and requirements (as well as other new provisions in the legislation not relevant to this discussion).

As of this writing, it is not clear if this legislation will be enacted, either in its original or a revised form, and no comparable legislation has been introduced in the Senate. However, the legislation appears to be aimed almost exclusively at addressing the complaints of shippers about conditions during the recent cargo surge, including the complaints of exporters outlined above.

Aside from the wisdom of re-regulating the international ocean transportation industry to an extent beyond that to which the United States regulates the commercial activities of any other transportation mode and beyond that to which any other country regulates international ocean transportation, there are serious questions about the workability of some of the proposals in this legislation. A few brief illustrations of the types of questions include:

- The "public interest" standard is bound to lead to questions and litigation. Which part of the "public" should the FMC be concerned about: U.S. importers and consumers who buy the goods they import, or U.S. agricultural exporters?
- If carriers are subject to the laws of multiple jurisdictions, each saying they must accommodate the exports of that jurisdiction, who pays for the cost of purchasing or leasing the equipment necessary to fulfill these legal obligations? The same U.S. agricultural exporters who claim rates are already too high?
- In many cases, carriers lease containers and chassis from third-party leasing companies that are not subject to FMC jurisdiction. Is a carrier liable under the Shipping Act if its contractor fails to deliver? Is that reasonable?
- What about other supply chain participants? If this legislation is intended to fix the supply chain issues currently facing the industry, shouldn't it be unlawful for shippers to make bookings they don't fulfill? Phantom bookings tie up equipment and vessel space that could be allocated to others. Shouldn't warehouses be required to provide a minimum level of service or operation that prevents cargo from remaining on the marine terminal, awaiting delivery? Shouldn't railroads and truckers be held to minimum service standards when it comes to the movement of international, intermodal cargo?
- Are carriers required to accept shipments even if the rates they are able to charge for those shipments are not profitable? Who makes this determination and when?

In addition to the foregoing questions, it should also be borne in mind that requiring carriers to provide more containers and to accept exports will do nothing to resolve supply chain congestion unless other participants in the supply chain on which the timely and efficient movement of cargo depends (e.g., container manufacturers, chassis providers, marine terminals, railroads, truckers, distribution centers/warehouses) are subject to concomitant requirements.

C. Carrier Adherence to Contractual Service Commitments.

The third and final legal issue this article will examine also relates to service but, unlike the general common carrier obligation discussed above, this issue relates to carriers' contractual obligations to their customers and the FMC's authority to decide cases involving disputes arising under such contracts.

Since the entry into effect of the Ocean Shipping Reform Act of 1998 on May 1, 1999, the vast majority of ocean-borne cargo moving in the U.S. foreign commerce moves under service contracts.[38] [39] The Shipping Act requires that service contracts be filed with the FMC (46 U.S.C. § 4052(b)) but, significantly, also provides:

> Unless the parties agree otherwise, the exclusive remedy for a breach of a service contract is an action in an appropriate court. The contract dispute resolution forum may not be controlled by or in any way affiliated with a controlled carrier or by the government that owns or controls the carrier.

46 U.S.C. § 40502(f). Although one can question the wisdom of requiring contracts to be filed with an agency that has no jurisdiction over breach of contract claims, keeping the FMC out of contractual disputes appears to be consistent with the Shipping Act's policy of minimizing government intervention and regulatory costs.[40] Having said this, as we know, a single set of facts may give rise to more than one cause of action. The FMC has struggled with situations in which conduct that might constitute a breach of a service contract might also be characterized as a violation of the Shipping Act. While this has not been a major issue for some time, the difficulties created by supply chain congestion may require the FMC to address this issue again.

The FMC first addressed the question of its jurisdiction over conduct alleged to be both a violation of the Shipping Act and a breach of contract in *Vinmar, Inc. v. China Ocean Shipping Co*., 26 SRR 420 (FMC 1992). In that case, the shipper Vinmar received

[38] A "service contract" is "a written contract, other than a bill of lading or receipt, between one or more shippers, on the one hand, and an individual ocean common carrier or an agreement between or among ocean common carriers, on the other, in which—

(A)the shipper or shippers commit to providing a certain volume or portion of cargo over a fixed time period; and

(B)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."

46 U.S.C. § 40102(21).

[39] "The Impact of the Ocean Shipping Reform Act of 1998," Federal Maritime Commission, at 17, Sept. 2001.

[40] 46 U.S.C. § 40101(1).

an unsigned service contract from the carrier, COSCO. Vinmar signed the contract and returned it to COSCO, but COSCO did not countersign the contract or file it with the FMC. Vinmar filed a complaint with the FMC, alleging a violation of the Shipping Act. The administrative law judge found that a valid contract between the parties existed because COSCO made a contract offer by sending the unsigned contract to Vinmar, and that Vinmar has accepted the offer by signing and returning the contract. The failure of COSCO to sign and file the contract might raise Shipping Act issues, but those regulatory issues did not preclude the creation of a valid contract under basic principles of contract law. The ALJ then went on to dismiss the complaint that the relief sought by Vinmar was effectively enforcement of the contract, a claim over which the Commission lacked jurisdiction under the predecessor of the present 40502(f), quoted above. The Commission affirmed the decision, saying:

> Congress placed the limitation in section 8(c) in order to limit the Commission's jurisdiction to award remedies that would otherwise be available in a breach of contact action if the matter were brought before a court. Where, as here, the alleged conduct under a service contract would constitute a breach of contract *as well* as a violation of one or more of the prohibited acts, the limitation in Section 8(c) requires the aggrieved party to proceed in a breach of contract action.

26 SRR at 424 (emphasis in original). In *Vinmar*, the Commission read what was then Section 8(c) (now 40502(f)) broadly to deprive the Commission of jurisdiction over alleged Shipping Act violations if the remedy sought by the complainant would be available in a breach of contract action in court.

Several years after issuing its decision in *Vinmar*, the Commission revisited and reconsidered that case in *Cargo One, Inc. v. COSCO Container Lines Co., Ltd.*, 28 SRR 1635 (2000). In *Cargo One*, the complainant alleged that COSCO had violated multiple provisions of the Shipping Act by allegedly refusing to honor the rates in the service contract between them and by allegedly refusing to provide equipment and vessel space to Cargo One. COSCO moved to dismiss based on *Vinmar*, which motion was denied. COSCO appealed the denial of its motion to the Commission, which vacated the order denying the motion and remanded the case. In so doing, the Commission modified the rule established in *Vinmar*.

The Commission found that "strict deference" to some of the language in *Vinmar* "may have eviscerated other statutory rights and remedies."[41] The Commission then went on to articulate what it called "a more precise and less expansive" view of what was then section 8(c) of the Shipping Act. The Commission wrote:

> However, we find it inappropriate and contrary to the intent of the statute that section 8(c) bar any Shipping Act claim which bears some similarity to, overlaps with, or is couched in terms suggesting that the remedy may

[41] 28 SRR at 1643.

> be available in a breach of contract action. We believe the more appropriate test is whether a complainant's allegations are inherently a breach of contract claim, or whether they also involve elements peculiar to the Shipping Act. We find that as a general matter, allegations essentially comprising contract law claims should be dismissed unless the party alleging the violation successfully rebuts the presumption that the claim is no more than a simple contract breach claim. In contrast, whether the alleged violation raises issued beyond contractual obligations, the Commission will likely presume, unless the facts as proven do not support such a claim, that the matter is appropriately before the agency.

28 SRR at 1645 (internal footnotes omitted). While the foregoing is indeed a less-expansive reading of the statutory language than *Vinmar*, it is questionable whether it constitutes a "more precise" view or whether it articulates a meaningful test. Indeed, while the language of *Cargo One* quoted above describes how the Commission will approach this issue, it does not appear to set forth any meaningful standard for distinguishing what are inherently breach-of-contract claims from claims involving elements "peculiar to the Shipping Act."

One of the shortcomings of the *Cargo One* test is that it deals with a jurisdictional issue, but requires the introduction of evidence to rebut presumptions. This makes resolution of jurisdictional issues prior to addressing the merits of a claim difficult, but that may be unavoidable given the nature of the jurisdictional issue. A second shortcoming is that, in practice, there appears to be a tendency to accept the complainant's characterization of its claims as "peculiar to the Shipping Act" based on the face of the complaint rather than requiring the complainant to overcome a presumption to the contrary.

For example, in *Anchor Shipping Co. v. Aliança Navegaçao e Logística Ltda.*, 30 SRR 991 (2006), the administrative law judge had dismissed a complaint filed by a shipper that had already prevailed on a breach-of-contract claim in arbitration. The administrative law judge relied on *Cargo One* and found that the claims were essentially breach-of-contract claims. The complainant appealed, and the Commission reversed the dismissal, finding on the face of the complaint that the allegations were not precluded under the Cargo One rationale. *Cargo On*e has also been relied on to find Commission jurisdiction on the face of the complaint in cases involving issues other than service contracts.[42] If the language of the complaint is determinative of Commission jurisdiction, then *Vinmar* has been overruled and the Commission has moved from *Vinmar*'s expansive reading of section 40502(f) to what could be an overly narrow reading of that statutory provision.

The Commission will have an opportunity to address this issue in *MCS Industries, Inc. v. COSCO Shipping Lines Co., Ltd. and MSC Mediterranean Shipping Company SA*,

[42] *See also YSN Imports Inc. d/b/a Flame King v. Feige "Peggy" Oberlander*, *et al.*, FMC Docket No. 21-02, Order Denying Respondents' Motion to Dismiss (ALJ, July 7, 2021); *VerTerra Ltd. v. D.B. Group America Ltd. and D.B. Group India Ltd.*, FMC Docket No. 19-09, Order Denying Motion To Dismiss Or Stay Proceeding (ALJ, Mar. 5, 2020).

FMC Docket No. 21-05.[43] In its complaint, MCS alleges that the respondents entered into service contracts with it, but then refused to provide the vessel space contemplated by those contracts and to honor the rates set forth in those contracts and requiring MCS to pay higher "spot rates." MCS alleges this conduct violates several different provisions of the Shipping Act.[44] The complaint also contains a variety of allegations of parallel or concerted conduct by the carriers, and different treatment of other customers.[45] In its answer to the complaint, MSC alleged that the FMC lacks jurisdiction over the claim because it arises out of a service contract that by its terms requires disputes to be resolved in arbitration.

This proceeding may provide the Commission with an opportunity to clarify further the test set forth in *Cargo One*, and thus provide the public with important guidance on the scope of the Commission's jurisdiction over complaints that involve allegations of Shipping Act violations that arise out of or are related to the breach of a service contract.

III. CONCLUSION

It should not be surprising that the difficult trade conditions created by supply chain congestion have resulted in disputes between ocean carriers and their customers, with a corresponding uptick in the number of cases filed with the FMC. The pending cases discussed above will give the FMC an opportunity to interpret its relatively new interpretative rules on demurrage and detention, and to clarify existing precedent relating to other issues. The decisions issued by the FMC in these cases, as well as any legislation revising the Shipping Act, could have significant implications for both regulated entities and their customers.

However, those who expect or hope that decisions in these proceedings or some version of H.R. 4996 will address supply chain congestion in any meaningful way are likely to be disappointed. In most instances, the status quo is likely to have changed by the time a final decision is issued in most of these cases, or legislation is enacted and takes effect. Moreover, even if these cases are decided or legislation is adopted while supply chain congestion continues, they will do little or nothing to relieve that congestion. Unless any new obligations imposed on ocean carriers and marine terminals (which are regulated by the FMC and are the focus on the pending legislation) are matched by similar obligations imposed on equipment providers, inland transportation providers, distribution centers and warehouses, and shippers themselves, any such obligations will impose regulatory burdens and liabilities on entities regulated by the FMC but will fail to address other problematic elements of the supply chain.

[43] The administrative law judge approved a settlement between MCS and COSCO on September 23, 2021, thereby leaving MCS and MSC and the only parties in this case and creating virtually unlimited potential for the confusion of similar acronyms.

[44] The Shipping Act provisions allegedly violated include section 41102(c). It is worth noting here that section 41102(c) applies only to the receiving, handling, storing and delivering of property, and not to the transportation of property. *Definition of "Package" under the Carriage of Goods by Sea Act*, 23 SRR 111, 114 (FMC 1985).

[45] It is not clear that such allegations are alleged with sufficient particularity to comply with the *Twombly/Iqbal* standard of pleading applicable in FMC proceedings. *See, e.g.*, *Port Elizabeth Terminal & Warehouse Corp. v. The Port Auth. of N.Y. & N.J.*, FMC Docket No. 17-07, at 2 (ALJ, Apr. 17, 2018). Moreover, these allegations appear to be an effort by complainant to create a Shipping Act issue in a case that, based on the essence of the allegations, appears to be a breach-of-service contract claim.