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FMC TIGHTENS THE ROPES ON OCEAN CARRIERS



A couple of months ago, on June 16, 2022, the President of the United States of America, Joseph R. Biden enacted the Ocean Shipping Reform Act of 2022 (OSRA). The legislation came into consideration due to the impact of the COVID-19 Pandemic, which forced the American consumer to turn to online purchase of goods; while the congestions at the port and erratic sailing schedules left exports stranded and at the mercy of carriers and box operators charging exorbitant rates for shipments.

In order to place checks and balances on account

such events in the future and also to level the playing field for American exporters and importers the US government thought it fit to endow the Federal Maritime Commission (FMC) with significant power to act as a watchdog who would control the international ocean transport and bring to task complaints raised by customers on unreasonable shipping charges. The legislation also intends to curtail the demurrage and detention rates levied by carriers and NVOCC'.

Apart from addressing demurrage and detention charges, OSRA also makes allowance for provisions

limiting “unfair or unjustly discriminatory” trading practices industry and promotes public input and information sharing mechanisms. For instance, some of the powers conferred on FMC include -

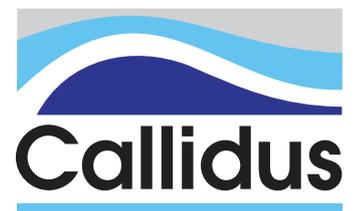
- To self-initiate investigations of ocean common carriers' business practices and apply enforcement measures, as they deem fit and appropriate.

- FMC can make additional rules to define what constitutes “unfair or unjustly discriminatory methods” and “unreasonable



We are what we repeatedly do. Excellence, then, is not an act, but a habit.

ARISTOTLE



refusal to deal or negotiate with respect to vessel space.”

- It prohibits ocean carriers from declining opportunities for U.S. exports unreasonably.
- OSRA expressly prohibits retaliation from a common carrier, marine terminal operator or an ocean transportation intermediary against a shipper, a motor carrier or an agent of such shipper or carrier. It is interesting to note that the word “Retaliation” is defined as “refusing, or threatening to refuse, an otherwise-available cargo space accommodation” or “resort[ing] to any other unfair or unjustly discriminatory action” for the reason that the party retaliated against “patronized another carrier”, filed a complaint” or “any other reason.”
- Ocean carriers are made liable for the reasonableness of “demurrage and detention” charges and to ensure that the rates are in compliance with the federal rules and regulations and/or face penalties for non-conformity
- The creation of the Shipping Exchange Registry authorized by the OSRA which would provide services to ocean carriers and shippers, including the mediation of contract disputes.
- The FMC is to make public on its website: (i) all findings of false D&D invoice information by common carriers, along with the penalties imposed or assessed against the common carriers, which is to be updated periodically (ii) a quarterly report of total import and export tonnage as well as loaded and empty units per vessel. (iii) the submission of comments, complaints, concerns, reports of noncompliance, requests for investigation and requests for alternative dispute resolution.

- FMC is to establish and maintain under its jurisdiction an Office of Consumer Affairs and Dispute Resolution Services which will provide non-adjudicative ombudsman assistance, mediation, facilitation, and arbitration to resolve challenges and disputes involving not just cargo shipments but also household goods shipments and cruises.
- Authorize the FMC to create a temporary emergency authority to collect data during times of an emergency congestion situation, among other improvements.

With the OSRA 2022 in place, the US Government has tactfully tried to control the rates determined by ocean carriers, though it does not directly affect the freight rate formation; any unreasonable increase in freight charges could trigger a bell and lead to an FMC investigation on unfair or discriminatory charges on the customer/shipper. During these so-called investigations, the burden of proof is on the ocean carrier to justify the legitimate increase in cost or charges. Thereby the FMC indirectly controls or determines the charges levied by ocean carriers.

Further, the OSRA also includes a provision that allows individuals to submit complaints on charges assessed by a common carrier, to the FMC. The common carrier in the complaint will then be contacted by the authority and asked to respond to the complaint and justify the charge or rates being investigated. The result of the investigation could lead to an order demanding that the common carrier show cause as to why it should not be ordered to refund the rates or charges paid and/or waive the charges in question. Then the FMC will decide if the charges are in compliance, if a refund and/or waiver is due and/or if a separate civil penalty proceeding is appropriate. For instance, on 8th June 2022, the FMC approved a settlement agreement between its Bureau of

Enforcement (BoE) and Hapag-Lloyd AG wherein the ocean carrier will pay a \$2 million civil penalty to address alleged violations related to their detention and demurrage practices.

Since its inception and as on 1st December 2022, the FMC has reported having received more than 175 filings or complaints. So much so that the FMC has to devise a new process for the complaints and the interim procedures for processing charge complaints to be taken by the FMC under this new authority. Accordingly when the commission receives a complaint with "sufficient information and detail," it will launch a multi-stage progress investigation by its newly staffed Office of Investigations.

The facts and figures make it evident that the FMC is all set to restore full confidence in the ocean freight system, by vigorous enforcement of FMC rules. Thereby ensuring that powerful ocean carriers obey the Shipping Act, whilst dealing with American importers and exporters. On the other hand, many exporters, small shippers and even truckers have responded positively to the legislation as it shifts the burden of proof to carriers in the case of disputes, which is a huge benefit to such groups who did not file complaints in the past due to this burden.

To conclude we note that the main objective of the OSRA 2022 was to boost container exports from the US. The act tries to safeguard its exporters by controlling and regularizing charges by ocean carriers/ shipping lines/ NVOCC' that provide their services in the ports of the USA. Though one of the core issues was to also address the congestion at ports in the US, it is unlikely that this matter will be ironed out with the mere passing of legislation without taking into account other key players like marine terminal operators, smaller domestic carriers and dry port operators who are currently outside the purview of the enactment but who also contributed to the problem of congestion. The other challenge that the act was to curb was the high ocean

charges however the focus here was only on small shippers and exports, as clearly the big guns like Amazon, Costco, Walmart and other major entities are chartering their own containers vessels, thereby minimizing the impact of shipping lines on freight rates while also increasing control over their own supply chains. Main major ocean contributors and especially the big carriers see the enactment as a 'forceful' policy by

the US, which could backfire with an increase in export rates from the US to Asia. To top it off the huge penalties, the burden of proof and justification placed on ocean carriers, such carriers are trying to pass on the buck to the 'NVOCC' and other Multimodal transport operators, that operate in other parts of the world by making demands that these operators who are for instances in India and having exports sent to the

US, enter into Indemnities backed by Bank Guarantees to protect the ocean carriers from undue penalties under the FMC for non-compliance. This could potentially trigger an additional cost which will be ultimately passed on to the importers in the US. Only time will tell whether such enactment is going to benefit US exporters and importers or create a further rift between them and major ocean carriers ■

MARITIME ANTI-PIRACY BILL 2022



Some of the highlights in the bill:-

- ① It authorizes the central government to establish Special Court for the prosecution of an offence under Maritime Piracy.
- ② Bail conditions are tighter and only on reasonable grounds alone bail can be obtained.
- ③ In case of death caused during Maritime Piracy, the accused will be subject to life imprisonment or the death penalty.
- ④ In case of an attempt to commit Piracy or assist someone in Maritime Piracy, the term of imprisonment will be 10 years.
- ⑤ Participating or organizing or directing others to participate in committing Maritime Piracy will be punishable with 14 years of imprisonment or a fine or both.

On 21st December 2022, India passed a historic bill to safeguard the interest of Mariners, shippers and vessel owners from Maritime piracy. The bill enables the Indian Authorities to take action against Maritime Piracy on High Seas which is beyond 200 Nautical miles from the baseline of India. During the winter session, it was informed by the external affairs Minister that 90% of the country's

trade takes place by the sea, 80% of the country's Hydrocarbon requirements are seaborne and the security of these routes was very critical and the bill ensures the safety of these activities. The Bill marks a new era, where prosecution under the Indian penal code for armed robbery will no longer be effective and the new Bill brings tighter regulation with respect to the prosecution for the offence of Maritime Piracy.

The Indian Government felt a need for a special code on Maritime Piracy After the hijacking case of MV Alondra Rainbow in 1999, where the pirates were tried under the Indian penal code before the sessions court which convicted the

accused and later Bombay High Court overruled the lower court's decision.

The Indian Government realized that they lacked a proper code for

regulating offences for Maritime Piracy. This new Bill is yet another step to ensure that offences under Maritime Piracy will be properly prosecuted in the

country. The new Bill is a welcoming step for the Marine community whose safety is now well ensured ■



HOT NEWS

HYBRID-ELECTRIC SHORTSEA VESSEL READY FOR METHANOL AND HYDROGEN ON MV

The first ship in a series of new highly efficient shortsea cargo vessels entered service at the end of 2022 continuing the evolution of the segment. In addition to having an efficient design and innovative power plant, the Vertom Patty was designed to anticipate future trends. Her electric power plant is ready for conversion to methanol fuel or hydrogen power.

The Vertom Patty was built at the Thecla Bodewes Shipyards in The Netherlands for Vertom, a Dutch shortsea shipping company with a fleet of approximately 100 vessels ranging between 1,500 and 10,000 dwt. The first of six ships that the group ordered from the shipbuilder, the Vertom Patty is 390 feet long and 7,000 dwt.



The LABRAX design was developed to Vertom's requirements and to provide both a highly efficient ship as well as one with versatility in its cargo operations. The completely box-shaped cargo holds ensure optimal loading flexibility and maximum cargo intake. The vessel is capable of grain or bale loading and

can also transport containers with a capacity of up to 56 TEU. This hybrid concept is also designed to be ready for future developments. It will be possible to convert the vessel's propulsion to either methanol-electric or hydrogen-electric.

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