

New Ocean Shipping Regs On Deck, But Inland Woes Persist

By **Linda Chiem**

Law360 (June 14, 2022, 8:42 PM EDT) -- Ocean container carriers will face tougher regulatory scrutiny under new federal legislation aimed at reducing costs for shippers and consumers and easing the supply-chain crunch, but experts say it won't completely tame freight congestion or record high inflation and fuel prices.

The Ocean Shipping Reform Act of 2022, which **cleared Congress** with overwhelming bipartisan support Monday and is expected to be signed into law by President Joe Biden, is the first major overhaul of U.S. shipping law in over two decades. It's an attempt to offer relief to U.S. importers, exporters, freight carriers, port operators and other businesses contending with skyrocketing costs to move cargo and keep the economy humming.

The legislation empowers the Federal Maritime Commission to more aggressively go after ocean container carriers suspected of unscrupulous business practices, such as charging unreasonably high fees for delays or refusing to accept cargo shipments that might be deemed less profitable.

Legal experts say the OSRA is a positive step, but it remains to be seen how impactful these robust enforcement efforts will be on inland congestion at ports, rail yards and warehouses that are also contributing to backlogs.

"I don't know that this will immediately clear congestion in a direct way, but I think it's a good bill," Squire Patton Boggs partner Sarah Rathke, who specializes in complex supply-chain disputes, told Law360. "It empowers the FMC to be a better regulator [and] to hire more investigators to hold ocean carriers accountable for behavior that — whether or not you want to characterize it as predatory — is unproductive in our current atmosphere."

The legislation would sharpen the FMC's enforcement tools while also giving manufacturers, suppliers, retailers and other companies seeking to ship their goods — known as shippers — a broader avenue to bring disputes against the mostly foreign-owned ocean container carriers that transport the goods.

"It helps to establish a cleaner way to bring allegations of misconduct to the FMC — [potentially having] a quicker resolution so you don't have to go through a docketed proceeding — and it also would empower the FMC to investigate these allegations at a more rapid pace," Ashley Craig, co-chair of Venable LLP's international trade group, told Law360.

"It's designed to not level the playing field necessarily, but to provide the customer, the shipper, with the ability to go to the FMC in an informal way and raise concerns or complaints," he added.

Under the OSRA, the FMC would be able to self-initiate investigations of ocean common carriers' business practices and apply enforcement measures as appropriate.

For years, the FMC's hands had been statutorily tied, and it generally waited 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. Importantly, the FMC would establish the standards for what's considered an unreasonable or discriminatory practice by ocean container carriers.

But here's the rub: The FMC would still have to draft new rules and regulations before it wields the new powers it's been granted under the OSRA. The rulemaking process could take up to a year or longer.

"As with so much contemporary legislation, OSRA merely establishes certain broad policy goals and delegates implementation to the FMC and other federal agencies," said Marc Blubaugh, co-chair of the transportation and logistics practice group at Benesch Friedlander Coplan & Aronoff LLP. "In other words, while some markers have been placed by Congress, the real-world details will be hashed out in the course of rulemaking."

But when those rules eventually take shape, there's plenty for shipping customers to get excited about, experts say.

The bill directs the FMC to more robustly regulate how so-called detention and demurrage fees are imposed. These are the penalties that ocean container carriers or marine terminals can assess their shipping customers for the time their cargo is left sitting, waiting to be loaded or unloaded.

With sky-high demand for containers, shipping customers who couldn't access their freight to get it moving quickly enough were often hit with exorbitant fees for those delays. Those customers could also be hit with fees if the containers and the trailers used to haul them, known as chassis, are not returned within a specified time.

But amid all the gridlock, companies across the supply chain say they're being hit with unfair detention and demurrage fees — sometimes totaling millions of dollars — for delays they have no control over.

"It doesn't fix port congestion by itself, but it certainly will address a lot of the problems plaguing the industry right now, and one of them is detention and demurrage charges," according to Husch Blackwell LLP partner Carlos Rodriguez, who said he's overseeing a dispute involving \$2.5 million in detention and demurrage fees assessed against a shipper. "So it's not pocket change."

Another key takeaway is that the burden of proof in these disputes will shift from shipping customers having to prove they've been wronged to the ocean container carriers or marine terminals having to justify that the fees they're charging are reasonable, according to Rodriguez. Given that more than 80% of domestic manufacturers are at the mercy of foreign-owned ocean cargo carriers, this shift is a big deal.

The bill also directs the FMC to draft rules addressing a new category of "prohibited acts," such as barring ocean container carriers from "unreasonably" refusing to allot space or haul goods from U.S. exporters.

Lawmakers had said the tight supply of containers meant ocean container carriers openly engaged in discriminatory practices like, for example, shutting out smaller or mid-sized U.S. agricultural exporters in favor of mega-retailers that could pay higher rates to ship more volume.

So-called front-haul voyages importing goods to the U.S. are generally more profitable for ocean container carriers compared to so-called back-haul voyages exporting goods out of the U.S. on the return trip. During the pandemic, carriers were often sending empty containers back to Asia instead of waiting for them to be filled with U.S. exports for the trip, according to lawmakers and industry stakeholders.

"All of these new prohibited acts reflect U.S. exporters' frustration where they were being cut out of the market, where their service contracts were being breached by nonperformance or refusal to accept cargo," according to Craig of Venable.

The FMC, which says it's ready to get to work on the expanded enforcement efforts, applauded lawmakers for their "impressive" bipartisan and bicameral efforts to advance the reforms.

"These changes will have a beneficial effect on how U.S. shippers are served and will bring more accountability to how ocean cargo services are provided," FMC Chairman Daniel B. Maffei said in a Tuesday statement. "We will move promptly to implement the steps necessary to bring shippers the benefits of this legislation, beginning with the rulemaking addressing export shipments."

"OSRA will provide the FMC with enhanced authority to ensure industry players have the right incentives and that all stakeholders in the ocean freight transportation system can have a voice," Maffei continued. "We are grateful for all those who have contributed to making the commission a more robust and capable entity."

Meanwhile, the World Shipping Council, the lead industry trade group representing the international ocean liner shipping industry, said ocean container carriers "have gone all out to keep goods moving" throughout the pandemic, and they're being unfairly blamed for increased rates that are, in fact, a product of demand outstripping supply, landside congestion and other pandemic-related disruptions.

"We are appalled by the continued mischaracterization of the industry by U.S. government representatives, and concerned about the disconnect between hard data and inflammatory rhetoric," the World Shipping Council said in a Monday statement. "The 22 — not nine — international carriers that serve the American people, industry and government on the Asia-United States trade are part of the global supply chain that has built this country, importing and exporting food, medicine, electronics, chemicals and everything else we depend on."

In fact, the FMC's own two-year investigation into the COVID-19 pandemic's effects on the U.S. international ocean transportation supply chain concluded the "markets are competitive and the high ocean freight rates have been determined by unprecedented consumer demand, primarily in the United States, that overwhelmed the supply of vessel capacity."

According to Commissioner Rebecca F. Dye's May 31 final report on the so-called Fact Finding 29 investigation, "congestion further constrained available capacity."

The World Shipping Council has maintained that until import congestion is remedied, export congestion will persist. Other solutions, such as continued investment in port infrastructure, can have a "real impact in strengthening the intermodal transportation system that has supported the U.S. economy through the pandemic," the council said.

--Editing by Philip Shea and Kelly Duncan.