Global Transportation Finance Newsletter

January 2022

In This Issue

More Frustration at the High Court – Wilmington Trust v SpiceJet

The impact of the COVID-19 pandemic, and the grounding of Boeing MAX aircraft, are back in the spotlight at the High Court – the validity of hell or high water provisions was re-affirmed, and attention was brought to the cross-application of security deposits and the wording of disclaimer provisions in operating leases.

Background

In *Wilmington Trust SP Services (Dublin) Limited and Others v SpiceJet Limited*[1], the Claimants sought summary judgment against SpiceJet in relation to unpaid lease rentals and maintenance reserves, and interests and costs, pursuant to the operating lease agreements for one Boeing 737-800 aircraft with manufacturer's serial number 41397 (**Aircraft 1**) and two Boeing 737-MAX 8 aircraft with manufacturer's serial numbers 64507 (**Aircraft 2**) and 64509 (**Aircraft 3**).

The operation of Aircraft 1 had been curtailed as a result of the COVID-19 pandemic and Aircraft 2 and Aircraft 3 were grounded by the Indian Directorate General of Civil Aviation (the **DGCA**) for an extended period as a result of the loss of other MAX aircraft in Ethiopia and Indonesia.

SpiceJet did not dispute that it had not paid lease rentals or maintenance reserves in accordance with the lease agreements, and the Claimants sought summary judgment on that basis. SpiceJet sought to resist a grant of summary judgment on the basis that there was a real prospect of a successful defence and compelling reason for a trial, as required under the applicable civil procedure rules.[2]

SpiceJet raised six potential heads of defence that the court considered; we will consider five of them here: (i) illegality (for Aircraft 1), (ii) claim for restoration of security deposit (for Aircraft 1), (iii) calculation of maintenance reserves (all Aircraft), (iv) implied condition of satisfactory quality under Supply of Goods and Services Act 1982 (**SOGSA**) (for Aircraft 2 and Aircraft 3) and (v) frustration (for Aircraft 2 and Aircraft 3).

Potential heads of defence

Illegality

SpiceJet claimed that at trial it would be able to argue that it was not required to make the applicable payments to the Claimant for Aircraft 1 because any operation of the Aircraft would have been illegal as a result of the restrictions imposed by the Indian Government on operations of aircraft during the COVID-19 pandemic.

The court found that this defence would not be available to SpiceJet – factually, Aircraft 1 had been operated during the pandemic but even if it had not been capable of operation then, legally, the defence would also fail because the hell or high water provisions of the applicable lease agreement

WELCOME 2022

The Vedder Price Global Transportation Finance team wishes you and your family a wonderful, bright and hopeful New Year. We want to thank you for your continued support and friendship. We sincerely appreciate our community, and we hope this new year brings you much happiness and success.

GTF Environmental, Social, and Governance Task Force

As environmental, social and governance ("**ESG**") factors into investment decisions and become more prevalent in the aviation, shipping, railcar and other transportation sectors, the present and future impact of ESG considerations are not being ignored by market participants. The recognition of these considerations have led (and continues to lead) to the development of sustainable finance, investment and other ESG initiatives on a global scale by industry financiers, investors, banks, owners, lessors, airlines, shipowners and other participants alike.

To that end, the Global Transportation Finance team's ESG Task Force is fully prepared to provide unparalleled support to our clients in their ESG initiatives, including application of ESG to aviation, shipping and railcar financing and leasing transactions. Our Task Force is comprised of high caliber and dedicated attorneys across our offices readily available to support and advise our clients as they navigate through the ESG terrain and the challenging issues facing their ESG initiatives and transactions.

required payment regardless of the availability of Aircraft 1 or its eligibility for any particular use of trade. Additionally, it was clear from the terms of the applicable lease agreement that the risk of any loss of use, possession or enjoyment of Aircraft 1 fell on the Lessee.

Claim for restoration of security deposit

SpiceJet provided a letter of credit in lieu of providing a cash deposit in relation to the lease agreement for Aircraft 1. The terms of that lease agreement permitted the Claimant for Aircraft 1 to draw on the letter of credit following the occurrence of an event of default under that lease agreement or under the lease agreements for Aircraft 2 and Aircraft 3.

The Claimant for Aircraft 1 drew on the letter of credit on the basis of events of default under the lease agreements for Aircraft 2 and Aircraft 3, and sought restoration of the deposit for the amounts drawn. It is not clear if the Claimant for Aircraft 1 applied the drawn funds to losses accrued by the Claimants for Aircraft 2 and Aircraft 3 as well as its own losses, as the Claimant for Aircraft 1 initially indicated to SpiceJet in a letter from 22 October 2019, or if the funds were only applied to losses for Aircraft 1.

Ruling in SpiceJet's favour, the court found that SpiceJet would have an arguable case, based on the 22 October 2019 letter, that as the Claimant for Aircraft 1 was not the lessor for Aircraft 2 or Aircraft 3, the Claimant for Aircraft 1 should not have drawn on the letter of credit as it could not suffer losses under the lease agreements for Aircraft 2 and Aircraft 3, and, accordingly, SpiceJet would have no obligation to restore a deposit on the basis that it had been wrongfully drawn down by the Claimant for Aircraft 1.

Calculation of maintenance reserves

In relation to the claims for unpaid maintenance reserves, SpiceJet sought to defend the claim on the basis that none were payable as the Aircraft had not been operated as a result of the COVID-19 pandemic (for all Aircraft) and the grounding of MAX aircraft (for Aircraft 2 and Aircraft 3). However, the judge found this argument to be "misconceived" since only some elements of the due amount were calculated by reference to flying hours, rather than calendar time, and those amounts that were calculated by reference to flying hours appeared to have been properly calculated by the Claimants.

Implied condition of satisfactory quality under SOGSA

Given the design fault, noted by the judge, that caused the grounding of all MAX aircraft, the question arose as to whether Aircraft 2 and Aircraft 3 were of "satisfactory quality" for the purposes of SOGSA or if the terms of the lease agreements, which sought to disclaim any representations or warranties about the condition of Aircraft 2 and Aircraft 3, meant SpiceJet could claim for the loss of use of Aircraft 2 and Aircraft 3 against the Claimants for Aircraft 2 and Aircraft 3.

SOGSA operates, unless its provisions are excluded, to imply into contracts for the supply of goods and services conditions that, for example, the supplied goods are of satisfactory quality, meaning that they must meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.

In *The Mercini Lady*,[3] the Court of Appeal found that the condition of "satisfactory quality" implied pursuant to SOGSA would apply notwithstanding disclaimer wording that purported to exclude "*guarantees, warranties or representations, express or implied, [of] merchantability, fitness or suitability … for any particular purpose or otherwise*" and that clear language covering "conditions" themselves was required.

Following this, in *Air Transworld v Bombardier Inc.*,[4] Mr Justice Cooke held that a similar clause that included the words "*all other obligation… or liabilities, express or implied, arising by law*" were sufficient to exclude SOGSA.

The judge found that the absence of general words such as "obligation" or "liability" meant that there was an arguable case that the statutory implied conditions were not excluded.[5]

Frustration

The grounding of the MAX aircraft meant that the leases for Aircraft 2 and Aircraft 3 were frustrated, giving further grounds for a defence, according to SpiceJet. In considering whether this would be an arguable defence, the court applied the "radically different" test – through no fault of either party, performance of the contract has been rendered "radically different" from the obligation undertaken.

The judge assumed in SpiceJet's favour – for the purposes of establishing if they may have an arguable defence – that there had been an intention for Aircraft 2 and Aircraft 3 to be operated for

Listed below are members of the Global Transportation Finance team's ESG Task Force. Please reach out to any of your direct GTF contacts with ESG-specific questions or support needs.

Chicago

Jack T. Bycraft

Mark J. Ditto

Jordan R. Labkon

New York

John E. Bradley

John F. Imhof Jr.

London

John Pearson

Singapore

Ji Woon Kim

Honors & Awards

Vedder Price Named 2022 "Law Firm of the Year" in Equipment Finance Law from *U.S. News – Best Lawyers*

U.S. News – Best Lawyers, a publication of *U.S. News & World Report*, has once again named Vedder Price "Law Firm of the Year" for Equipment Finance in its annual "Best Law Firms" rankings. Only one firm per legal practice area receives this recognition. Vedder Price also achieved top-tier status nationally for Equipment Finance Law.

Tier One – Equipment Finance Law

Tier Two – Admiralty & Maritime Law

At the metropolitan level, Vedder Price ranked as "Best Law Firm" in the following practice areas:

commercial use, rather than, as the Claimants for Aircraft 2 and Aircraft 3 claimed just for SpiceJet to hire Aircraft 2 and Aircraft 3 in return for the payment of rent.

However, the court found that the hell or high water provisions clearly allocated the risk of Aircraft 2 and Aircraft 3 being grounded due to any prohibition on use or defect in airworthiness to SpiceJet. On a similar note, please see our article relating to *ACG Acquisition XX LLC v Olympic Airlines SA*[6] – "High Court rules on delivery process for commercial operating lease."[7]

The court further considered that the relatively short period – in the context of a ten-year operating lease – that Aircraft 2 and Aircraft 3 were grounded by the DGCA was not a frustration of the lease agreements for Aircraft 2 and Aircraft 3. The threshold test of "radical difference" was not met.

Conclusion

It should be reiterated that the court was deciding if summary judgment could be entered against SpiceJet for unpaid lease rentals and maintenance reserves, and interests and costs, so while SpiceJet may have succeeded on certain of the potential heads of defence it raised, its success was only to the extent that there was a real *prospect* of a successful defence and *not* that the Claimants' claims were invalid.

In relation to the matters of illegality and frustration – and as seen in our recent article "Come hell, high water or pandemic – COVID-19 will not frustrate aircraft lease agreements"[8] – the English courts will stand firmly behind hell or high water clauses and a lessee will have real difficulty in claiming any relief from its unconditional obligation to pay rent under an operating lease.

The judgment highlights two areas in which additional care may be required when drafting operating lease agreements:

1.) where it is the intention of the parties to allow security deposits, or monies drawn under letters of credit provided in lieu of a cash security deposit, to be applied to cure defaults under leases with different lessors, clear drafting may be required to permit such application and the terms on which such deposits are restored; and

2.) it may be useful for disclaimer wording to include references that clarify that no "conditions" are implied in relation to the aircraft and also that no "obligations" or "liabilities" accrue to the applicable lessor as well.

This article is focused on drafting points for lease agreements but the case is also of interest as the judge did find in favour of the Claimants in relation to summary judgment on portions of their claims but stayed judgment, encouraging the parties to alternative dispute resolution.

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Washington, DC

Tier One – Equipment Finance Law

New York

Tier One – Equipment Finance Law

Tier Two – Admiralty & Maritime Law

Vedder Price Recognized in *Chambers Asia-Pacific* 2022

The Singapore Global Transportation Finance team was ranked Band 4 by Chambers Asia-Pacific in 2022 for the Aviation Finance practice in Singapore.

Partner Bill Gibson ranked as Band 4 and Shareholder Ji Woon Kim as Up-and-Coming in the region.

Vedder Price Recognized in *Chambers UK* 2022

The UK Global Transportation Finance team was ranked Band 2 in the Asset Finance: Aviation Finance UK-Wide category. Additionally, *Chambers UK* 2022 recognized Gavin Hill as Band 1, Neil Poland as Band 2 and Derek Watson and Dylan Potter as Band 4.

Two Global Transportation Finance attorneys were recognized in the *2022 Best Lawyers® in America* "Lawyer of the Year" award

John E. Bradley
Admiralty and Maritime Law

Jeffrey T. Veber
Equipment Finance Law

House Passes Ocean Shipping Reform Act Of 2021: Common Carriers And Marine Terminal Operators Remain Wary

The Shipping Act of 1984, as amended (the "**Shipping Act**"),[1] is the primary statutory vehicle by which liner shipping and marine terminals operating in the foreign commerce of the United States are regulated. The Shipping Act applies to key supply chain participants, including "marine terminal operators" ("**MTOs**")[2] and "common carriers,"[3] and is administered and enforced by the Federal Maritime Commission (the "**FMC**" or the "**Commission**").[4]

The activities and practices of common carriers and MTOs have been the focus of increased concern and regulatory scrutiny in the United States over the last several years for various reasons.

Concerns over consolidation in the container liner trades and the sharp rise in market power of global shipping alliances led to Congressional hearings in 2017[5] and the eventual passage of Title VII of the Frank LoBiondo Coast Guard Authorization Shipping Act of 2018,[6] which amended certain provisions of the Shipping Act to address those concerns.

Concerns over the demurrage[7] and detention[8] practices of ocean common carriers and MTOs led to the FMC's Fact Finding Investigation No. 28, *Conditions and Practices Relating to Detention, Demurrage and Free Time in International Oceanborne Commerce*, commenced in March 2018 ("**FFI 28**"),[9] and the subsequent adoption by the FMC of its *Interpretive Rule on Demurrage and Detention Practices under the Shipping Act*,[10] which introduced the "*incentive principle*" into the lexicon of these terms.

Concerns over inefficiencies in the shipping supply chain have been studied and debated for many years. Factors that have contributed to such inefficiencies in the United States have included, from time to time, trade imbalances with key trading partners, shortages and positioning imbalances involving intermodal equipment (containers and chassis), labor shortages, vessel "bunching," port infrastructure limitations and deficiencies, the disappearance of the "working waterfront" in many ports, and just-in-time distribution requirements, among others. Most of these factors are commercial in nature and well beyond the jurisdictional reach of the FMC to remedy under its Shipping Act authorities.

All of these logistical inefficiencies were greatly exacerbated in the United States by the global pandemic beginning in March 2020. The pandemic drove U.S. consumer demand for overseas goods to record levels[11] and those demands further exploited existing inefficiencies, causing unprecedented and well-chronicled disruptions throughout the supply chain. As many marine container terminals in major U.S. ports began reaching their operational capacities, the dwell time for many inbound ships waiting to berth at those terminals increased from days to weeks to months, creating havoc with liner schedules, reducing vessel carrying capacities, and causing numerous blank sailings and massive delivery delays across multiple markets.[12] Marine terminals and depots engaged by common carriers became flooded with empty containers, making it difficult for them to accept additional empties which, in turn, created logistical nightmares for truckers wishing to make returns.

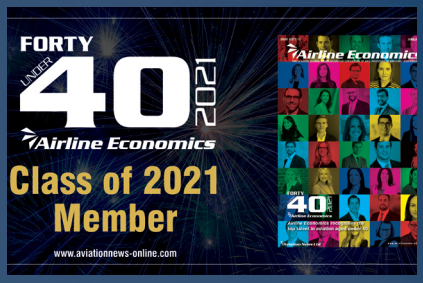
Concerns over supply chain dislocations led to the FMC's Fact Finding Investigation No. 29, *International Ocean Transportation Supply Chain Engagement* ("**FFI 29**"), commenced in March 2020.[13] The original purpose of FFI 29 was to convene "supply chain innovation teams" to address the challenges that were then extant.[14] The FMC thereafter expanded the scope of FFI 29 to determine whether the practices of ocean common carriers calling at the Ports of Los Angeles, Long Beach and New York and New Jersey (specifically involving demurrage and detention, container return requirements and the availability of export containers) also constituted violations of the Shipping Act.[15]

In July 2021, the Fact Finding Officer assigned to FFI 29 issued her *Interim Recommendations* (the "**FFI 29 Interim Recommendations**"), which were aimed at "minimizing barriers to private party enforcement of the Shipping Act, clarifying Commission and industry processes, encouraging shippers, truckers, and other stakeholders to assist Commission enforcement efforts, and bolstering [the Commission's] … ability to facilitate fair and fast dispute resolution." The Fact Finding Officer also expressed her support for the Commission's "continuing investigations into unreasonable demurrage and detention practices."

The demurrage and detention practices of MTOs and common carriers continue to attract much attention at the FMC as a result of FFI 28 and FFI 29. For example, following its adoption of the Interpretive Rule, the FMC has witnessed an uptick in administrative case filings by cargo interests seeking reparations against ocean common carriers and MTOs based upon the alleged unreasonableness of their demurrage and detention practices and charges.[16]

Global Transportation Finance Associate Justine L. Chilvers recognized as a 2021 Rising Star Awards Americas in Aviation by *Euromoney's Legal Media Group* Expert Guides

Vedder Price Global Transportation Finance Associate Justine L. Chilvers was selected as a 2021 Rising Star Awards Americas in *Euromoney's Legal Media Group* Expert Guides for her work in aviation finance. Ms. Chilvers focuses her practice on corporate finance, with a special focus on aviation, equipment and commercial bank finance.
The Rising Stars Awards aims to recognize the outstanding work being done by the region's emerging leaders. The guide represents a listing of the brightest and most talented up and coming practitioners in business law and related practices.



Mark J. Ditto Named to *Airline Economics* 2021 "40 under 40" List

Cameron A. Gee and Neil Poland Named to 2021 Mentors Group

Mark J. Ditto, Vedder Price Shareholder and member of the Global Transportation Finance team, was named to *Airline Economics* 2021 "40 under 40" list, which recognizes the most talented individuals in the commercial aviation industry under the age of 40.

The 2021 list is comprised of professionals across all sectors of the industry, including bankers, lawyers, airline executives and others who demonstrate skill and fortitude under the harshest of industry conditions. Recognized individuals are nominated and endorsed by clients and colleagues. This year's list was compiled from a record number of nominations and endorsements for candidates.

The article announcing the list highlighted that Mr. Ditto is one of the few people to appear for a second time on the "40 under 40" list. It is a testament to the many clients who endorsed his nomination. One of these clients who worked with Mr. Ditto during the pandemic noted,

In November and December 2021, the FMC commenced separate investigative proceedings against Hapag-Lloyd and Wan Hai Lines to determine whether their respective detention policies and charges involving empty container returns violate section 41102(c) of the Shipping Act.[17]

In September 2021, the FMC announced that it would develop an Advanced Notice of Proposed Rulemaking (**ANPRM**) seeking industry views on two questions relating to demurrage and detention: "first, whether the Commission should require ocean common carriers and … [MTOs] to include certain minimum information on or with demurrage and detention billings; and second, whether the Commission should require carriers and … [MTOs] to adhere to certain practices regarding the timing of demurrage and detention billings."[18]

A. Passage of OSRA 2021

Amidst these cascading events, the U.S. House of Representatives passed H.R. 4996, cited as the "Ocean Shipping Reform Shipping Act of 2021" ("**OSRA 2021**"), on December 8, 2021, by an overwhelming vote of 364-60. The measure was received in the U.S. Senate and referred to the Committee on Commerce, Science, and Transportation on December 9, 2021, although its prospects for passage by the Senate in some form remain unclear at the moment. However, since OSRA 2021 has been introduced as the "first overhaul of Federal regulations for the international shipping industry since 1998,"[19] a closer look at its big ticket provisions and possible implications for common carriers and MTOs is in order.

B. Prohibited Retaliation and Discrimination

Under section 41104(a)(3) of the Shipping Act, a common carrier may not "retaliate against a shipper by refusing, or threatening to refuse, cargo space accommodations, when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason."[20] As is obvious from its wording, section 41104(a)(3) admonishes common carriers not to "retaliate" against shippers or "resort to other unfair or unjustly discriminatory acts" against shippers with respect to certain practices. It does not apply to retaliatory or discriminatory acts by other regulated entities nor does it protect supply chain participants other than shippers.

Section 8 of OSRA 2021 would broaden the proscriptions contained in section 41104(a)(3) by expanding (a) its anti-retaliation provisions to include MTOs[21] in addition to common carriers, and (b) the universe of persons against whom retaliation is prohibited to include, in addition to shippers, shippers' agents and motor carriers.

This proposed legislative change follows the FFI 29 Interim Recommendations, which urged Congress to broaden the anti-retaliation provisions of the Shipping Act. In her Interim Recommendations, the Fact Finding Officer conjectured that the relative paucity of private party complaints seeking reparations against common carriers and MTOs, and the disinclination of shippers and their agents and contractors to provide information to Commission investigators, might be due to fears of retaliation. However, whatever logic applies to the proposed changes as they affect common carriers is noticeably absent with respect to the changes as they affect MTOs.

First, while retaliation allegations are not uncommon against common carriers under section 41104(a)(3),[22] it is unclear how the broadening of these provisions to include MTOs is justified or in line with the purposes of the Shipping Act. Because MTOs are not in contractual privity with shippers or their agents, it is difficult to imagine how an MTO could retaliate against a shipper or its agent. Shippers and their agents and truckers interact with marine container terminals only because of decisions taken (or not taken) by common carriers. Those decisions are not taken by MTOs which merely service the containerized cargoes delivered to them by their common carrier customers.

Second, because MTOs do not provide "cargo space accommodations" to shippers or their agent or truckers, any legislative requirement that MTOs **not** "retaliate" against them by refusing such accommodations is seemingly pointless.

Third, the anti-discrimination provisions following the "resort to" clause make little sense insofar as MTOs are concerned. Under the proposed legislation, an MTO could not resort "to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, has filed a complaint, or for another other reason." However, this provision is derived from section 41104(a)(3) which, in turn, was derived from section 14 Third of the Shipping Act, 1916, which was copied "virtually verbatim" into the Shipping Act.[23] In construing these provisions in section 14 Third, the U.S. Supreme Court stated that the practices outlawed by the "*resort to*" clause of section 14 Third "take their gloss from the abuses specifically proscribed by the section; that is, *they are confined to practices designed to stifle outside competition*."[24] These practices have no bearing on MTOs which lack the ability to affect competition in the liner trades.

"I'm glad Mark is on our side. He has the ability to remain firm on positions yet still seek compromise. We may still be negotiating this deal (or it could have fallen apart) without his involvement." Mr. Ditto recognizes what it has been like to navigate these unprecedented times: "The highlight of my past 12 months has been the feeling of accomplishment that comes with helping clients execute complicated and challenging transactions in high-pressure situations."

In addition, members of the Global Transportation Finance team and Vedder Price Shareholder Cameron A. Gee and Partner Neil Poland were recognized in the second annual *Airline Economics* Mentors group. The list includes the industry's most respected mentors and inspirational leaders nominated by members of the "40 under 40" list. Mr. Gee was nominated as mentor by Benoist de Vimal, Executive Director at Natixis, and Mr. Poland was nominated as mentor by his former colleague Ahsan Gulabkhan, legal director of Virgin Atlantic Airways.

Recent Speaking Engagements

November 18, 2021

Vedder Price Shareholder **John E. Bradley** moderated a panel at Marine Money's 22nd annual November Ship Finance Forum in New York titled "LPs and GPs: Elements of Successful Maritime Asset Management." His panel highlighted the key factors for success in managing capital for family offices and institutional investors.

November 2 – 3, 2021

Vedder Price Shareholders **Edward K. Gross** and **David M. Hernandez** presented at Corporate Jet Investor Miami where Eddie joined his co-panelists to discuss "Aircraft Finance 2022" and David discussed "U.S. Aircraft Registration."

October 24 – 26, 2021

Vedder Price Shareholder **Edward K. Gross** presented at ELFA's 60th Annual Convention in San Antonio, Texas. Mr. Gross participated as a featured panelist for a session entitled "Back to the Future: Hot Legal Topics for ELFA's 70th Anniversary."

Lastly, and perhaps most importantly, to the extent that Congress is genuinely concerned about discriminatory practices by MTOs, it should be emphasized that the Shipping Act already covers the field. Section 41106 of the Shipping Act specifically makes it illegal for an MTO to "(1) agree with another marine terminal operator or with a common carrier to boycott, or unreasonably discriminate in the provision of terminal services to, a common carrier or ocean tramp; (2) give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person; or (3) unreasonably refuse to deal or negotiate." Why is additional legislation necessary?

C. Demurrage and Detention

Despite the fact that the FMC has been consumed with demurrage and detention practices for well over three years, proposed reforms to such practices through amendments to the Shipping Act feature prominently in OSRA 2021.

Under its proposed section 8, common carriers and MTOs would be prohibited from charging detention or demurrage "under a tariff, marine terminal schedule, service contract, or any other contractual obligation" unless such charges are accompanied by an "accurate certification" stating that they "comply with all rules and regulations concerning demurrage or detention issued by the Commission." This proposed requirement places an additional administrative burden on common carriers and MTOs and that burden has no *de minimis* exceptions. Accordingly, a certification would be required regardless of whether the charge is for $100 or $100,000.[25]

To give teeth to the proposed certification requirements, section 10 of OSRA 2021 would also provide that any failure by a common carrier to include a certification "alongside"[26] any demurrage or detention charge would "eliminate any obligation of the charged party to pay the applicable charge."[27] Under this provision, a common carrier that fails to provide a certification, for whatever reason, essentially loses its right to collect the charge, regardless of its legitimacy and regardless of any associated lien rights. In addition, in the event that any certification is found to be "inaccurate" or "false," in the context of a private party proceeding brought under section 41301 of the Shipping Act, the FMC would be authorized to impose monetary penalties against the common carrier or MTO if it also determines, in a separate enforcement proceeding, that "such certification was inaccurate or false."

What is perhaps most confounding about OSRA 21's certification requirement is its proposed substance. The certification must state that the associated demurrage or detention charge complies with "all rules and regulations concerning demurrage or detention issued by the Commission." However, whether a charge complies with the FMC's regulations may be a function of one's interpretation of the *incentive principle* as it pertains to the circumstances of the specific charge. It comes as no surprise that shippers and common carriers often hold differing views as to the propriety of such charges. In view of the foregoing, does a charge subsequently found to be in violation of the *incentive principle* make its earlier compliance certification "false or inaccurate"?

Section 10 of OSRA 2021 would also amend the Shipping Act by requiring common carriers and MTOs, within 30 days of the law's enactment, to (a) "act in a manner consistent" with any demurrage or detention rules or regulations issued by the FMC; (b) maintain records supporting the assessment of demurrage or detention charges for a minimum of five years; (c) provide such records to the invoiced party or the FMC "upon request"; and (d) "bear the burden of establishing the reasonableness of any … charges which are the subject of any complaint proceeding challenging [such] … charges as unjust and unreasonable."

These last statutory directives seem a bit odd for at least two reasons.

First, what purpose is served by having the Shipping Act direct common carriers and MTOs to "act in a manner consistent" with the FMC's rules and regulations on demurrage and detention? If the FMC establishes additional demurrage and detention rules and regulations in the future, and those rules and regulations have "legal effect" as a matter of administrative law, it stands to reason that such rules and regulations will have the force of law, and that regulated entities subject to the Shipping Act would be obligated to act in a manner consistent with them. Since the FMC is already authorized to "prescribe regulations to carry out its duties and powers,"[28] and since the "legal effect" of its regulations will be determined by applicable administrative law, there is really no need for such a statutory admonition which directs regulated entities to comply with them.

Second, a statutory requirement directing common carriers and MTOs to "bear the burden of establishing the reasonableness of any demurrage or detention charges which are the subject of a complaint proceeding" would seemingly turn established burdens of persuasion and production on their head. Under Rule 203 of the FMC's Rules of Practice and Procedure,[29] the burden of proof is always on the proponent of a motion or order in cases governed by the Administrative Procedure Act.

October 18 – 19, 2021

Vedder Price Shareholders **Kevin MacLeod, Michael Edelman** and **John Bycraft** moderated panels at the 2021 Ishka+ Aviation Investival: North America. Vedder Price Shareholder and Head of New York Capital Markets group Mr. MacLeod led the panel discussion titled "Building the Next Wave of Aircraft ABS Deals." Mr. Bycraft moderated the panel discussion titled "Aircraft ABS vs rail, container, and other ABS alternatives." Mr. Edelman moderated the panel discussion "Airline Restructuring 101" where he and his co-panelists discussed the process of informal and formal restructurings and opportunities created for investors.

October 10 – 11, 2021

Vedder Price Shareholder **David M. Hernandez** presented at the National Business Aviation Association's (NBAA) Tax, Regulatory & Risk Management Conference in Las Vegas, Nevada. In his session titled "Aircraft Leasing Compliance Strategies," Mr. Hernandez discussed aircraft leases and their importance as structuring tools that maximize the efficient use of an aircraft and how failure to implement leases correctly could lead to significant tax and regulatory penalties.

June 29 – July 1, 2021

Vedder Price Shareholder **Edward K. Gross** presented at Corporate Jet Investor Revolution.Aero Global 2021 Virtual Conference; his panel discussion covered "Who will provide debt for new aircraft?" and "What financiers look for."

Deal Corner

Vedder Price Advises Aviation Capital Group on $750 Million Unsecured Notes Offering

Vedder Price advised Aviation Capital Group LLC (ACG), a leading aircraft asset manager, in connection with its Rule 144A/Regulation S offering of $750 million of 1.950% senior unsecured notes due 2026. ACG intends to use the net proceeds from the notes for general corporate purposes, including repayment of outstanding indebtedness and the purchase of commercial aircraft. Kevin MacLeod, Shareholder and Head of the New York Capital Markets group, led the team for Vedder Price that also included Capital Markets

In other words, the ultimate burden of proving that a respondent violated the Shipping Act is on the complainant, and that burden must be supported by a preponderance of the evidence.[30] With respect to claims under section 41102(c) of the Shipping Act,[31] the FMC has already determined that "the complainant has the burden of persuading the Commission that a practice is unreasonable, and if that burden is met, the burden of refuting that conclusion in on the respondent."[32] In view of the foregoing, any effort by OSRA 2021 to re-engineer these burdens will likely be met by strong industry opposition.

Despite the various regulatory initiatives already undertaken or announced by the FMC with respect to demurrage and detention, section 10 of OSRA would also require the FMC, within 120 days after enactment, to commence yet another rulemaking proceeding "to establish rules prohibiting common carriers and [MTOs] … from adopting and applying unjust and unreasonable demurrage and detention rules and practices." OSRA 2021 directs such rulemaking to address a comprehensive list of 11 detailed issues relating to demurrage and detention rules and practices.

The need for such a rulemaking proceeding is puzzling.

First, section 41102(c) of the Shipping Act[33] and the FMC's related interpretations and statements of policy[34] already cover this ground in broad terms. Second, the detailed level of content mandated for this proposed rulemaking is exactly what the FMC sought to avoid when it issued the Interpretive Rule. Third, the number of very specific "prohibitions" and "requirements" contemplated for this proposed rulemaking would seemingly short circuit the intended flexibility of the Interpretive Rule and its *incentive principle*. Fourth, one of the stated purposes of the Shipping Act is to "establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States *with a minimum of government intervention and regulatory costs*."[35] Given the extensive content requirements mandated by the proposed rulemaking, it seems clear that minimal government intervention and regulatory costs were not legislative lodestars for the drafters of OSRA 2021.

D. Equipment, Facilities and Export Cargoes

Concerns by shippers, beneficial cargo owners and truckers have been raised throughout the pandemic concerning the unavailability of intermodal equipment, empty container returns, and the availability of export container slots aboard vessels. While many of these concerns seem to be directly related to the unprecedented congestion at U.S. ports caused by the pandemic, section 9 of OSRA 2021 seeks to remedy them by adding to the Shipping Act several new prohibitions applicable to common carriers.

First, OSRA 2021 would make it a violation of the Shipping Act for a common carrier "to engage in practices that unreasonably reduce shipper accessibility to equipment necessary for the loading and unloading of cargo." What equipment is contemplated by this prohibition? A shipper does not have direct access to gantry cranes, yard hustlers and other container handling equipment used in most marine container terminals. And although a shipper clearly needs access to containers and chassis to deliver cargo, most common carriers do not control the terms by which shippers access chassis within a port. By process of elimination, are containers the only articles of "equipment" which are relevant here? The intended direction of this prohibition is unclear.

Second, OSRA 2021 would make it a violation of the Shipping Act for a common carrier to "fail to furnish or cause a contractor to fail to furnish containers or other facilities and instrumentalities needed to perform transportation services, including allocation of vessel space accommodations, in consideration of reasonably foreseeable import and export demands." Among other things, this provision is seemingly linked to precedent which states that common carriers are required to provide "adequate terminal facilities" for their shippers and consignees.[36]

Third, OSRA 2021 would make it a violation of the Shipping Act for a common carrier to "unreasonably decline export cargo bookings if such cargo can be loaded safely and timely, as determined by the Commandant of the Coast Guard, and carried on a vessel for the immediate destination of such cargo." This provision seemingly is linked to certain frustrations expressed by U.S. exporters, particularly agricultural exporters, in securing containers and container slots for their export products. As explained by FMC Commissioner Daniel Maffei in his prepared remarks delivered to Congress in July 2021:

> I remain particularly concerned about exporters – especially many agricultural exporters – due to the shifting dates of when ships are expected to make their port calls and the lack of reliability of service. While export shipping rates remain much lower than import rates, they too have gone up dramatically. Furthermore, exporters are finding themselves in the frustrating position of having to deal with the fact that a carrier is making so much money on a container full of imports than exports that it is often in the carrier's best short-term economic interest to get more empty containers back to Asian factories faster rather than carrying more export containers.[37]

Shareholder Jennifer King, Tax Shareholder Andrew Falevich, and Associates Lisa Clark and Rachel Behar.

Vedder Price Advises ITE Management on $550 Million Acquisition of The Andersons, Inc. Railcar Leasing Business

Vedder Price represented ITE Management L.P. (ITE) in connection with the acquisition of the rail leasing business of The Andersons, Inc., by ITE affiliate American Industrial Transport, Inc. (AITX) for $550 million. According to its press release, the acquisition will allow AITX and its affiliates to offer customers a leasing fleet of approximately 60,000 railcars across a diverse offering of car - types, equipment lifecycles, commodities and industries - services. The Vedder Price team was led by Jeffrey T. Veber, Global Transportation Finance Shareholder, Vice Chair of the firm's Executive Committee and Member of the firm's Board of Directors, and Michael E. Draz, Global Transportation Finance Shareholder, and was supported by Steven R. Berger, Joel R. Thielen, Brian D. Wendt, Daniel L. Spivey and Zackary G. Theo.

Vedder Price Represents DLL in $1 Billion Securitization

Vedder Price represented DLL in connection with DLLAD 2021-1, a $1 billion securitization of a pool of retail installment sale contracts, loans, leases and other financings and/or refinancings with respect to agricultural, golf course and turf equipment. The transaction is DLL's eighth securitization and involved the issuance of four classes of notes. Global Transportation Finance Shareholder Edward K. Gross and Capital Markets Shareholder Kevin A. MacLeod led the team from Vedder Price which also included Tax Shareholder Matthew P. Larvick and Associates Jonathan M. Rauch and Conor A. Gaughan.

Vedder Price Advises Initial Purchasers on British Airways $553.610 Million First Sustainability - Linked EETC

Vedder Price advised the initial purchasers on the offering of $553.610 million of British Airways Pass Through Certificates, Series 2021-1 in two classes. The proceeds of the EETC and related JOLCO financing will be used to purchase 3 new Airbus A320neo aircraft, 1 new Airbus A350-

In connection with the third mandate above, OSRA 2021 would require the FMC, within 90 days after enactment, to commence a rulemaking proceeding to define the term "unreasonably decline." Such rulemaking would require the FMC to "address the unreasonableness of ocean common carriers prioritizing the shipment of empty containers while excluding, limiting, or otherwise reducing the shipment of full, loaded containers when such containers are readily available to be shipped and the appurtenant vessel has the weight and space capacity available to carry such containers if loaded in a safe and timely manner."

The third prohibition and its corresponding rulemaking may be well intended, but they seem unwieldy and impractical. For example, with respect to containerized export cargo that is shut out, is the Commandant of the Coast Guard going to become an arbiter as to whether a violation of the Shipping Act has occurred? It seems impractical and unlikely, even if the Commandant was willing to weigh in on a case-by-case basis as to whether shut out export cargo could have been loaded "safely and timely."

E. Required Rulemaking on Minimum Service Standards

Section 10 of OSRA would require the FMC, within 90 days after enactment, to commence a third rulemaking proceeding to "incorporate" the minimum service provisions of OSRA 2021, including the following:

"(1) The obligation to adopt reasonable rules and practices related to or connected with the furnishing and allocation of adequate and suitable equipment, vessels space accommodations, containers, and other instrumentalities necessary for the receiving, loading, carriage, unloading and delivery of cargo.

"(2) The duty to perform the contract of carriage with reasonable dispatch.

"(3) The requirement to carry United States export cargo if such cargo can be loaded safely and timely, as determined by the Commandant of the Coast Guard, and carried on a vessel scheduled for such cargo's immediate destination.

"(4) The requirement of common carriers to establish contingency service plans to address and mitigate service disruptions and inefficiencies during periods of port congestion and other market disruptions."

A proposed rulemaking designed to set "minimum service standards" along the lines set forth in OSRA 2021 seems like regulatory overkill. For example, if a common carrier fails to perform a contract of carriage with "reasonable dispatch," that may constitute a breach of the contract or a violation of other statutes relating to the carriage of goods, but how is it a violation of the Shipping Act? Similarly, how can a common carrier establish "contingency service plans" to address and mitigate "service disruptions and inefficiencies" occurring during "periods of port congestion and other market disruptions" when each event is likely to be *sui generis*? And if such a plan fails to sufficiently "mitigate" the event, how is that failure a violation of the Shipping Act in view of the Act's long established purposes?

F. Conclusion

OSRA 2021 is a sweeping and intrusive piece of legislation which, if passed by the Senate and signed into law, would introduce significant burdens and radical changes for common carriers and MTOs under the Shipping Act. Although it seems unlikely that OSRA 2021 will be passed by the Senate in its current form, common carriers, MTOs and their industry trade associations, such as the World Shipping Council and the National Association of Waterfront Employers, remain wary of this legislation and should keep close tabs on its progress. We suspect that they will.

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1000 aircraft and 3 new Boeing 787-10 aircraft. This is the first EETC ever to use a sustainability - linked structure. The Equipment Notes will be subject to a key performance indicator in respect of the flight fuel efficiency of British Airways and its subsidiaries measured by the average grammes of gross carbon dioxide emitted per equivalent passenger per kilometre (gCO2/pkm) of flights during 2025.

The Vedder Price team was led by Jeffrey T. Veber, Vice Chair of the firm's Executive Committee and member of the firm's Board of Directors, Kevin A. MacLeod, Head of the New York Capital Markets group, and Global Transportation Finance Shareholders Clay C. Thomas and Partner Neil Poland, with support from Tax Shareholder Matthew P. Larvick, , Capital Markets group Counsel Christopher G. Barrett and Global Transportation Finance Associates John Pearson, Majk Kamami and Daniel L. Spivey.

Thought Leadership

Recent Developments in the Transportation Leasing and Finance Industry in the U.S., World Leasing Yearbook 2022

Edward Gross and Melissa Kopit recently co-authored an article on the U.S. transportation leasing and finance industry in the World Leasing Yearbook 2022. In the article, "Recent Developments in the Transportation Leasing and Finance Industry in the United States," Mr. Gross and Ms. Kopit highlight recent trends, legislation and developments in the U.S. transportation equipment leasing and finance industry over the past year. The article focuses on issues pertaining to commercial law, aircraft and vessel finance. To read the article in full click here.

Under Pressure: Shipping Navigates Toward a Sustainable Future

David Bowie and Queen's timeless tune "Under Pressure," released some forty years ago, has little relation to the shipping industry, but pressure is what many in the shipping industry now face amid ever-increasing calls, from both within and without the industry, to address climate change and implement broad environmental, social and governance ("**ESG**") policies.[1] While these issues have broad impacts across many global industries, their impact on the shipping industry, and in particular the ship finance industry, is continually changing, creating ever-evolving challenges for shipowners, managers, operators, lenders and others.

If it seems that you have heard the term ESG more often recently, you are absolutely right, as ESG has found its way into conversations in many areas, particularly with an increase in ESG investing. The Forum for Sustainable and Responsible Investment ("**US SIF**") first measured sustainable investment[2] in the United States in 1995 at just $639 billion.[3] By the start of 2020, that number had increased 25-fold, with the most rapid growth occurring since 2012, and from the beginning of 2018 to the beginning of 2020, the amount of U.S.-domiciled assets under management using sustainable investing strategies grew from $12 trillion to $17.1 trillion.[4] Not only was this a 42% increase, but it also represented nearly one-third of total United States assets under professional management at that time.[5] Regardless of the impetus behind the increase in awareness of ESG principles, they are here to stay, and many industries, including the shipping industry, are incorporating ESG principles into their business models.

Increased interest in ESG has not been the only factor driving change in this area. Various sources of capital, including institutional lenders and pension funds, are now either required to report ESG investment or are diversifying their portfolios to include or actively seeking to deploy new capital into ESG-conscious investments.[6] New loan structures have been and continue to be developed that offer financial incentives based on borrowers' performance as measured against target metrics. The Loan Syndications and Trading Association ("**LSTA**"), the advocacy and education association for the $1.2 trillion institutional leveraged loan market in the United States, published its ESG Questionnaire in 2020 to facilitate information-sharing on the part of corporate borrowers and to give borrowers access to a standardized tool intended to improve the dissemination of reliable ESG-related information about their businesses to their lenders.[7] Credit-rating agencies have also begun to offer ESG-related products. In recent months, credit-rating agency Fitch Ratings announced the launch of a platform offering its ESG ratings products that will eventually focus on all fixed-income asset classes.[8]

Nowhere else has the pressure to adopt ESG principles been more evident than in efforts currently underway to reduce dramatically, if not completely eliminate, the impact of the global shipping industry on climate change. Numerous shipowners and other shipping industry participants have come together to form coalitions dedicated to finding ways to reduce shipping's greenhouse gas ("**GHG**") emissions footprint.[9] In shipping finance, twenty-eight leading lenders with a combined global shipping loan portfolio of more than $185 billion have committed to the Poseidon Principles, which are intended as "a global framework for assessing and disclosing the climate alignment of ship finance portfolios consistent with the policies and ambitions"[10] of the International Maritime Organization (the "**IMO**"). The IMO, the United Nations agency established in 1948 that is responsible for improving the safety and security of international shipping and preventing pollution from ships,[11] has adopted policies and ambitions, as referenced above, that include a reduction in "shipping's total annual GHG emissions by at least 50% by 2050"[12] (more on that below). With the recent broad and marked increase in ESG-conscious investing, these developments reaffirm the growing recognition of the importance of ESG as it relates to capital and will no doubt have far-reaching effects on the shipping industry.

Aside from capital-side ESG requirements, corporate governance and regulation by governmental and non-governmental organizations have also begun to steer moves toward environmental sustainability in shipping. Publicly listed shipowners striving to maintain or improve their public image as environmentally conscious and private shipowners seeking to incorporate ESG requirements into their business models must now take note.[13] Adding to this movement from within the shipping industry, European and U.S. governments, as well as international organizations, have begun promulgating regulations and aspirational targets aimed at reducing GHG emissions in the coming years and decades, which will have particular impact on the shipping industry.

As indicated above, the IMO, the specialized agency of the United Nations tasked with regulating the shipping industry, has set ambitious goals for the reduction of carbon emissions by ships. In 2011, in an amendment to the International Convention for the Prevention of Pollution from Ships ("**MARPOL**"), the IMO set out its first set of mandatory measures to improve ships' energy efficiency.[14] Since those initial measures, the IMO has continued to push for reductions in GHG emissions from shipping, in both the short term and the long term. In 2018, the IMO adopted its Initial Strategy for reducing GHG emissions, which identified ambitions including "to reduce CO_2 emissions per transport work, as an average across international shipping, by at least 40% by 2030, pursuing efforts towards 70% by 2050, compared to 2008, . . . to peak GHG emissions from international shipping as soon as possible and to reduce the total annual GHG emissions by at least 50% by 2050 compared to 2008 whilst pursuing efforts towards phasing them out . . . on a pathway of CO_2 emissions reduction" consistent with the temperature goals of the 2015 Paris Agreement on climate change.[15] In June 2021, the IMO adopted amendments to MARPOL Annex VI that are expected to come into force in November 2022 and combine technical and operational approaches to improve ships' energy efficiency and cut the carbon intensity of international shipping in line with the IMO's 2018 initial strategy.[16] Aside from reduction of carbon emissions, as many in the industry are familiar, the IMO in 2020 also implemented a more stringent cap on the sulfur content in the fuel oil used on board ships, significantly lowering the limit outside designated operating areas to 0.5% mass-by-mass from the prior limit of 3.5%, with the stated effect of "major health and environmental benefits for the world, particularly for populations living close to ports and coasts."[17]

Some in the shipping industry have argued that the IMO's target of a 50% reduction in shipping GHG emissions does not go far enough[18] and proposed the adoption of even more strict standards at the 77th meeting of the IMO's Maritime Environment Protection Committee

("**MEPC77**") during the week of November 22, 2021.[19] While MEPC77 acknowledged that the search for new fuels and other decarbonization strategies for shipping has never been more urgent[20] and agreed to initiate a revision of its GHG reduction targets by 2023,[21] it failed to commit to a statement that it would aim for net-zero GHG emissions from shipping by 2050[22] and delayed any decision on the establishment of a $5 billion decarbonization research fund until this year's meeting of the Intersessional Working Group on the Reduction of Greenhouse Gas Emissions from Ships.[23]

In Europe, as restrictions on emissions have been steadily imposed, the shipping industry has been pushed more rapidly to reduce carbon emissions. This past summer, the European Commission released an ambitious plan for reducing GHG emissions in the European Union by at least 55% (from 1990 levels) by 2030 with a carbon pricing plan called the European Union Emissions Trading System ("**ETS**") covering every sector and all modes of transportation and which would be extended to maritime transport.[24] In referencing the IMO's proposals, the European Commission noted that they fall short of decarbonizing shipping in line with international climate objectives and proposed a series of measures to increase the contribution of the EU maritime community to climate efforts, including the deployment of renewable alternative transport fuels and a review of the current exemption from taxation of fuel used by ships in addition to the extension of the ETS to maritime transport.[25]

In the United States, the change in administrations has brought a change in policy regarding reductions in GHG emissions and new plans for cutting emissions. In reference to a recent Executive Order aimed at coordinating regulatory efforts to assess climate-related financial risks and risks to financial stability,[26] U.S. Secretary of the Treasury Janet Yellen noted that the global financial sector will be a crucial player in achieving net-zero emissions in the United States by helping to bring capital into transformational investments.[27] This investment-focused approach can be seen in the launch of investment vehicles, including exchange-traded funds, specifically investing in maritime technology tied to carbon reduction.[28]

Shipowners have begun to heed these calls to action in reducing GHG emissions and many are using a range of approaches and tactics to meet the challenges laid down by national and international governments. Additional pressure has come from farther down the supply chain, as many charterers have called for sustainable transportation solutions as the default option in shipping.[29] Shipowners are ordering air lubrication systems, which are anticipated to facilitate typical fuel savings of between 5 and 10% when deployed in certain types of vessels by introducing a layer of air micro-bubbles between a vessel's hull and seawater, for installation on newbuild and existing vessels.[30] Some shipowners are committing to alternative fuels as either low-GHG or GHG-neutral solutions, including liquified natural gas,[31] carbon neutral e-methanol and sustainable bio-methanol,[32] green ammonia,[33] green hydrogen,[34] and even nuclear,[35] with no one fuel seen as the solution.[36] Shipowners are also collaborating with maritime technology companies, fuel suppliers and each other to find ways to transition to these fuels, to develop the infrastructure needed to transport, store and deliver them,[37] and to promote wind-assisted propulsion technologies, including sails and Flettner rotors,[38] to reduce the consumption of GHG-producing fuels in response to the greater awareness of the threats posed by global warming and external pressures like charterers' ESG strategies, the European Union's ETS and other means of carbon pricing, and IMO regulations.[39]

Unlike some other transportation sectors, the shipping industry has at times been relatively slow to embrace technological change, but the increasing internal and external pressures to reduce and eliminate GHG emissions are forcing technological innovations in shipping not seen since sail-powered vessels were replaced by the coal-fired steamships of the mid-nineteenth century and coal-fired steamships were replaced by the oil-fired ships of the early and mid-twentieth century. With the first IMO and EU regulatory milestones less than a decade away, the decarbonization of shipping is already upon us and will almost certainly have profound and lasting effects on the shipping industry.

This article has been updated through December 1, 2021. For an update on subsequent developments or more information on the topics of ESG and the reduction and elimination of GHG in shipping, please contact the authors, John F. Imhof Jr., at jimhof@vedderprice.com or +1 212 407 6984, and John H. Geager, at jgeager@vedderprice.com or +1 212 407 7642.

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Endnotes

More Frustration at the High Court – *Wilmington Trust v. SpiceJet*

[1] [2021] EWHC 1117 (Comm)

[2] CPR Part 24.2

[3] [2010] EWCA Civ. 1145

[4] [2012] EWHC 243 (Comm.)

[5] It is of interest that the inclusion of the word "condition" in the disclaimer, which the Court of Appeal's decision had pointed to.

[6] [2012] EWHC 1070 (Comm.)

[7] ACG v. Olympic - Affirmation of "As-Is, Where-Is" and "Hell or High Water" Clauses

[8] Come Hell, High Water or Pandemic - COVID-19 Will Not Frustrate an Aircraft Lease Agreement

House Passes Ocean Shipping Reform Act Of 2021: Common Carriers And Marine Terminal Operators Remain Wary

[1] 46 U.S.C. Subtitle IV, Part A.

[2] A marine terminal operator is "a person engaged in the United States in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier." 46 U.S.C. § 40102(15)

[3] A common carrier is a person that "(i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country." 46 U.S.C. § 40102(7) A common carrier includes "non-vessel operating common carriers" as well as "ocean common carriers" (i.e., vessel operating common carriers). 46 U.S.C. §§ 40102(17)-(18)

[4] The FMC is a small, independent federal agency whose administration of the Shipping Act is said to be for the benefit of "U.S. exporters, importers, and the U.S. consumer." Federal Maritime Commission, *59th Annual Report for Fiscal Year 2020* at 9.

[5] *See* Maritime Transportation Regulatory Issues: Hearings Before the Subcommittee on Coast Guard and Maritime Transportation of the House Committee on Transportation and Infrastructure, 115th Cong., 1st Sess. (May 3, 2017); Authorization of Coast Guard and Maritime Transportation Programs: Hearings before the Subcommittee on Coast Guard and Maritime Transportation of the House Committee on Transportation and Infrastructure, 115th Cong., 1st Sess. (Apr. 4, 2017).

[6] Public Law 115-282 (Dec. 4, 2018).

[7] The term "demurrage" is generally associated with the charge assessed against cargo for remaining at a marine terminal in excess of allotted free time. *See* Federal Maritime Commission, *Fact Finding Investigation No. 28, Conditions and Practices Relating to Detention, Demurrage and Free Time in International Oceanborne Commerce*, Interim Report at 6 (Sept. 4, 2018) ("FFI 28 Interim Report").

[8] The term "detention" is generally associated with the charge assessed against cargo for use of a container, outside of a marine terminal, in excess of allotted free time. *See* FFI 28 Interim Report at 6.

[9] FFI 28 came on the heels of a petition submitted to the FMC by shippers, truckers and others requesting that the FMC adopt a rule specifying the circumstances in which the demurrage and detention practices of common carriers and MTOs would be deemed to be unreasonable. *See* Coalition for Fair Port Practices Petition for Rulemaking, FMC No. P4-16 (Dec. 7, 2016).

[10] Federal Maritime Commission, *Interpretive Rule on Demurrage and Detention under the Shipping Act*, Docket 19-05, 85 F.R. 29638 (May 18, 2020) (the "Interpretive Rule"). *See* 46 C.F.R. § 545.5.

[11] The economic recession in the United States caused by the pandemic did stop Americans from purchasing goods. Instead, bolstered by the Paycheck Protection Program, "which saved hundreds of thousands of businesses and millions of jobs, and nearly $400 billion in government stimulus checks," U.S. consumers went on a buying spree, purchasing "nearly $1 trillion more in goods in 2021 compared with pre-pandemic times." S.K. O'Neil, *Why the Supply Chain Slowdown Will Persist,* Foreign Affairs (Dec. 21, 2021) (https://www.foreignaffairs.com/articles/world/2021-12-21/why-supply-chain-slowdown-will-persist).

[12] To make matters worse, reported freight costs associated with transporting containerized cargo from Asia to the United States spiked dramatically and, in some reported cases, by a factor of ten in less than one year. *See* 167 Cong. Rec. 7472 – 7479, *Ocean Shipping Reform Shipping Act of 2021* (Statement of Rep. Garamendi).

[13] 85 Fed. Reg. 19146 (Apr. 6, 2020).

[14] In November 2021, the FMC announced that six supply chain innovation teams were being convened "to identify and implement improvements to the process and timing of return and delivery of containers to marine terminals." Federal Maritime Commission, *New Supply Chain Initiatives Announced at FMC Meeting* (Nov. 17, 2021) (https://www.fmc.gov/new-supply-chain-initiatives-announced-at-fmc-meeting/).

[15] As part of its investigation, the FMC sent information demands to 27 entities in connection with FFI 29 – ten common carriers and 17 MTOs.

[16] *See e.g., TCW, Inc., v. Evergreen Shipping Agency (America) Corporation, Informal Docket No. 1966(I) (FMC 2021); Eucatex of North America Inc. v. CMA CGM (America) LLC et al., Docket No. 21-08 (FMC 2021); Mohawk Global Logistics Corp. MSC Mediterranean Shipping Company (USA) Inc. et al., Informal Docket No. 1971(I) (FMC 2021); Orange Avenue Express, Inc. v. Hapag-Lloyd AG, Docket No. 21-10 (FMC 2021); Greatway Logistics Group, LLC v. Ocean Network Express Pte. Ltd, Docket No. 21-04 (FMC 2021).*

[17] *See* Federal Maritime Commission, Order of Investigation and Hearing, *Hapag-Lloyd, A.G. and Hapag-Lloyd (America) LLC – Possible Violations of 46 U.S.C. § 41102(c), Docket No. 21-09,* 86 Fed. Reg. 64203 (Nov. 17, 2021); Federal Maritime Commission, Order of Investigation and Hearing, *Wan Hai Lines, Ltd. and Wan Han Lines (USA) Ltd. – Possible Violations of 46 U.S.C. § 41102(c), Docket No. 21-16*, 87 Fed. Reg. 781 (Jan. 6, 2022).

[18] *See FMC to Issue Guidance on Complaint Proceedings and Seek Comments on Demurrage and Detention Billings, https://www.fmc.gov/fmc-to-issue-guidance-on-complaint-proceedings-and-seek-comments-on-demurrage-and-detention-billings/* (Sept. 15, 2021). The ANPRM has not been issued as of this writing.

[19] 167 Cong. Rec. 7472 – 7479, *Ocean Shipping Reform Shipping Act of 2021* (Statement of Rep. Garamendi).

[20] Under the Shipping Act, a "shipper" is defined to mean "(A) a cargo owner; (B) the person for whose account the ocean transportation of cargo is provided; (C) the person to whom delivery is to be made; (D) a shippers' association; or (E) a non-vessel-operating common carrier that accepts responsibility for payment of all charges applicable under the tariff or service contract." 46 U.S.C. § 40102(23)

[21] The proposed legislation would also cover "ocean transportation intermediaries." Under the Shipping Act, an "ocean transportation intermediary" is defined to mean an "ocean freight forwarder or a non-vessel-operating common carrier." 46 U.S.C. § 40102(20)

[22] On December 28, 2021, the FMC issued a policy statement explaining how it interprets the anti-retaliation and anti-discrimination provisions contained in section 41104(a)(3) insofar as they involve or affect common carriers and shippers. *See* Federal Maritime Commission, *Statement of the Commission on Retaliation*, Docket No. 21-15 (Dec. 28, 2021).

[23] *MAVL Capital Inc. et al. v. Marine Transport Logistics, Inc., et al*., Initial Decision Partially Dismissing Complaint, at 26, Docket No. 16-16 (FMC 2017) ("MAVL Capital"), *citing International Association of NVOCCs v. Atlantic Container Line,* 1990 FMC LEXIS 5 (ALJ Jan. 25, 1990).

[24] *MAVL Capital at 26, quoting, Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, 495 (1958).

[25] On the other hand, OSRA 2021 sensibly takes into account that the billing practices of MTOs and common carriers are such that one party will sometimes bill and collect demurrage or detention as an accommodation for the other party. In such circumstances, OSRA 2021 would apply the certification requirement only "to the entity that establishes the charge," meaning that a common carrier or MTO that collects a charge on behalf of the other would not be responsible for providing the certification other than one from the party "that established the charge" being collected.

[26] The use of the term "alongside" suggests that, as a matter of timing, the certification must accompany any demurrage or detention invoice issued by the common carrier.

[27] As passed by the House, section 10 does not impose similar forfeiture provisions on MTOs that fail to provide required certifications.

[28] 46 U.S.C. § 46105(a).

[29] 46 C.F.R. § 502.203.

[30] *Maher Terminals LLC V. The Port Authority of New York and New Jersey, Memorandum Opinion and Order at 27* (FMC Docket No. 08-03) (Dec. 17, 2014) ("*Maher*").

[31] 46 U.S.C. § 41102(c).

[32] *Maher* at *27*.

[33] 46 U.S.C. §41102(c).

[34] *See* 46 C.F.R. §§ 545.3 and 545.4.

[35] 46 U.S.C. § 40101(1) .(emphasis added)

[36] *See* Interpretive Rule at 29650 and text accompanying footnote 194.

[37] *See Review of Fiscal Year 2022 Budget for the Coast Guard and Maritime Transportation Programs*: Hearings Before the Subcommittee on Coast Guard and Maritime Transportation of the House Committee on Transportation and Infrastructure, 117th Cong., 1st Sess. (July 21, 2017) (Statement of Commissioner Maffei at 2).

Under Pressure: Shipping Navigates Towards a Sustainable Future

[1] For a guide to ESG investing and an overview of the societal and financial forces driving ESG investing and similar investment strategies, see E. Napoletano & Benjamin Curry, *Environmental, Social and Governance: What Is ESG Investing?*, Forbes, updated Mar. 1, 2021 <https://www.forbes.com/advisor/investing/esg-investing/>.

[2] Although the terms are often used interchangeably, ESG investing, in which investment decisions are made using strategies intended to promote the environment, social goals and good corporate governance, is a subset of sustainable investing, in which investment decisions are made using broader socially responsible and ethical strategies. *See*, e.g., Corporate Finance Institute, Sustainable Investing <https://corporatefinanceinstitute.com/resources/knowledge/trading-investing/sustainable-investing/#:~:text=What%20is%20Sustainable%20Investing%3F%20Sustainable%20investing%20is%20investing,in%20follows%20a%20high%20standard%20of%20socially-conscious%20principles>.

[3] See US SIF Foundation, Report on US Sustainable and Impact Investing Trends 2020, at 1 <https://www.ussif.org/files/US%20SIF%20Trends%20Report%202020%20Executive%20Summary.pdf>.

[4] *See id.*

[5] *See id.*

[6] An "alphabet soup of regulation" that came out of the EU in 2021 is intended to make ESG investing more transparent. S&P Global, New EU ESG Disclosure Rules to Recast Sustainable Investment Landscape, Aug. 3, 2021 <https://www.spglobal.com/esg/insights/new-eu-esg-disclosure-rules-to-recast-sustainable-investment-landscape>. The EU's Sustainable Finance Disclosure Regulation ("SFDR"), which will be rolled out over the next

two years, "dovetails with the EU's proposed Corporate Sustainability Reporting Directive, or CSRD, which will replace yet another acronym, the Non-Financial Reporting Directive (NFRD). NFRD currently requires large businesses to report how they take sustainability into account annually, and the CSRD proposal aims to broaden its reach. Importantly, it will ensure companies report the information that fund managers need to comply with SFDR." *Id*.

[7] See LSTA Press Release, The LSTA Issues First ESG Disclosure Tool for Corporate Loan Market Participants, Feb. 3, 2020 <https://www.lsta.org/content/the-lsta-issues-first-esg-disclosure-tool-for-corporate-loan-market-participants-press-release/>.

[8] See Fitch Ratings Press Release, Fitch Group Announces Creation of Sustainable Fitch and Launches ESG Ratings Products, Sep. 15, 2021 <https://www.fitchratings.com/research/banks/fitch-group-announces-creation-of-sustainable-fitch-launches-esg-ratings-products-15-09-2021>.

[9] For example, the Getting to Zero Coalition is a group of shipowners, ports and countries who have pledged to introduce zero-emission vessels on deep sea routes by 2030. *See* Global Maritime Forum, Getting To Zero Coalition <https://www.globalmaritimeforum.org/getting-to-zero-coalition/>; *see also* Jocelyn Timperley, *The Fuel That Could Transform Shipping, BBC Future*, Nov. 29, 2020 <https://www.bbc.com/future/article/20201127-how-hydrogen-fuel-could-decarbonise-shipping>. GHGs are various gaseous compounds that are thought to absorb infrared radiation, trap heat in the atmosphere and contribute to global warming. They include water vapor (H2O), carbon dioxide (CO2), methane (CH4), nitrous oxide (N2O), ozone (O3) and various chlorofluorocarbons (CFCs).

[10] Global Maritime Forum, Poseidon Principles <https://www.globalmaritimeforum.org/poseidon-principles>; see also Poseidon Principles Press Release, Citi, Societe Generale, Dnb And Other Leading International Banks Promote Greener Global Shipping Through New Principles, Jun 18, 2019 <https://www.poseidonprinciples.org/news/citi-societe-generale-dnb-and-other-leading-international-banks-promote-greener-global-shipping-through-new-principles/>.

[11] International Maritime Organization, Frequently Asked Questions – What Exactly is IMO? <https://www.imo.org/en/About/Pages/FAQs.aspx>.

[12] Global Maritime Forum, *supra* note 10.

[13] *See supra* note 6. With the entry into force of the EU's SFDR in March 2021 and additional reporting requirements taking effect in 2022 and 2023, including the CSRD, large businesses will need to report how they take sustainability into account, in part to aid in sustainable investing. *See id*.

[14] See IMO Resolution MEPC.203(62), Amendments to the Annex of the Protocol of 1997 to Amend the International Convention for the Prevention of Pollution from Ships, 1973, as Modified by the Protocol of 1978 Relating Thereto, adopted July 15, 2011 <https://wwwcdn.imo.org/.../MEPC.203(62).pdf>.

[15] IMO Resolution MEPC.304(72), Initial IMO Strategy on Reduction of GHG Emissions from Ships, adopted April 13, 2018, at 5 <https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/MEPCDocuments/MEPC.304(72).pdf>. *See also* Note by the International Maritime Organization to the UNFCCC Talanoa Dialogue, Adoption of the Initial IMO Strategy on Reduction of GHG Emissions from Ships and Existing IMO Activity Related to Reducing Emissions in the Shipping Sector <https://unfccc.int/sites/default/files/resource/250_IMO%20submission_Talanoa%20Dialogue_April%202018.pdf> and the Paris Agreement, Dec. 12, 2015 <https://unfccc.int/sites/default/files/english_paris_agreement.pdf>.

[16] International Maritime Organization, Further Shipping GHG Emission Reduction Measures Adopted, June 17, 2021 <https://www.imo.org/en/MediaCentre/PressBriefings/pages/MEPC76.aspx>.

[17] International Maritime Organization, IMO 2020 – cutting sulphur oxide emissions, last visited Jan. 9, 2022 <https://www.imo.org/en/MediaCentre/HotTopics/Pages/Sulphur-2020.aspx>.

[18] *See, e.g.*, Paul Berrill, *Poseidon Principles 'Won't Wait for IMO' to Add Zero-Carbon Goal to Ship Finance*, TradeWinds (updated Nov. 3, 2021) <https://www.tradewindsnews.com/finance/poseidon-principles-wont-wait-for-imo-to-add-zero-carbon-goal-to-ship-finance/2-1-1092421> (subscription required), quoting Michael Parker, Chairman of Global Shipping at Citibank and Chairman of the Poseidon Principles Association, as stating "[w]e expect to amend the Poseidon Principles ambition to zero by 2050 early [in 2022] once we see what comes out of [the UN Climate Change Conference UK 2021 in Glasgow, Scotland ("COP26"), held from October 31 through November 12, 2021, and MEPC77]." In the days before COP26, numerous participants, including the International Chamber of Shipping, called to change the IMO's targeted reduction in shipping GHG emissions from 50% to net zero by 2050. See, e.g., Barry Parker, The COP26 Gathering and Upcoming IMO Meeting, With a Sprinkling of US Strategy, gCaptain, Nov. 2, 2021 <https://gcaptain.com/the-cop26-gathering-and-upcoming-imo-meeting-with-a-sprinkling-of-us-strategy/>. COP26 produced a number of more concrete shipping GHG emission initiatives, including the Clydebank Declaration, pursuant to which nineteen countries (subsequently expanded to twenty-two, including the United States, the United Kingdom and Germany) expressed support for the establishment of at least six "green shipping corridors," or zero-emissions maritime routes between two or more ports, before the middle of the decade. See Clydebank Declaration, published Nov. 10, 2021 <https://www.gov.uk/government/publications/cop-26-clydebank-declaration-for-green-shipping-corridors/cop-26-clydebank-declaration-for-green-shipping-corridors>. *See also* Paul Berrill, *Group of 19 Countries Unveil 'Green Corridor' Plan at COP26*, TradeWinds (updated Nov. 10, 2021) <https://www.tradewindsnews.com/regulation/group-of-19-countries-unveil-green-corridor-plan-at-cop26/2-1-1096406> (subscription required).

[19] *See, e.g.*, Paul Berrill, *Kitack Lim Says the IMO Will Hear the Calls for Urgent Action at COP26*, TradeWinds (updated Nov. 10, 2021) <https://www.tradewindsnews.com/regulation/kitack-lim-says-the-imo-will-hear-the-calls-for-urgent-action-at-cop26/2-1-1094880> (subscription required), which quotes IMO Secretary General Kitack Lim as stating that "[t]he calls for action by world leaders, both from government and business, are loud and clear . . . at COP26. We need to act now, we need to act urgently but we also need to act collectively, inclusively, equitably and sustainably, leaving no one behind."

[20] *See* Paul Bartlett, *IMO Kicks for Touch on Much-Sought-After $5bn R&D Fund*, Seatrade Maritime News, Nov. 25, 2021 <https://www.seatrade-maritime.com/regulation/imo-kicks-touch-much-sought-after-5bn-rd-fund>.

[21] *See* Adam Corbett, *Governments Accused of 'Kicking the Can Down the Road' at IMO Decarbonisation Meeting*, TradeWinds (updated Dec. 1, 2021) <https://www.tradewindsnews.com/esg/governments-accused-of-kicking-the-can-down-road-at-imo-decarbonisation-meeting/2-1-1107360> (subscription required).

[22] *See id*.; *see also IMO MEPC Resolves to Discuss Carbon Policy for Two More Years*, The Maritime Executive, Nov. 26, 2021 <https://www.maritime-executive.com/article/imo-mepc-agrees-to-discuss-carbon-policy-for-two-more-years>.

[23] *See* Bartlett, *supra note* 19; *see also IMO MEPC Resolves, supra* note 21.

[24] *See* Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union, Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and Regulation (EU) 2015/757, COM/2021/551 final (English) at 3 <https://eur-lex.europa.eu/resource.html?uri=cellar:618e6837-eec6-11eb-a71c-01aa75ed71a1.0001.02/DOC_1&format=PDF>.

[25] *See id.* at 5.

[26] Executive Order 14030, Climate-Related Financial Risk, May 20, 2021, 86 Fed. Reg. 27,967 <https://www.federalregister.gov/documents/2021/05/25/2021-11168/climate-related-financial-risk>.

[27] *See* U.S. Department of the Treasury Press Release, Remarks by Secretary of the Treasury Janet L. Yellen on the Executive Order on Climate-Related Financial Risks, May 20, 2021 <https://home.treasury.gov/news/press-releases/jy0190>; *but cf. The Uses and Abuses of Green Finance – Why the Net-Zero Pledges of Financial Firms Won't Save the World*, The Economist, Nov. 6-12, 2021, at 12 <https://www.economist.com/leaders/the-uses-and-abuses-of-green-finance/21806111> (subscription required) (concluding that state ownership of polluting industries (lack of coverage), the current unavailability of tools to accurately assess carbon footprints (lack of measurement) and the financial industry's focus on maximizing risk-adjusted returns (lack of incentive) will cause the financial industry to fall short of this ideal, at least without carbon pricing, mandatory carbon reporting and investment in new green technologies).

[28] *See* Barry Parker, Investing in Shipping Decarbonisation Tech with Exchange Traded Funds, Seatrade Maritime News, Sep. 28, 2021 <https://www.seatrade-maritime.com/finance-insurance/investing-shipping-decarbonisation-tech-exchange-traded-funds>.

[29] *See, e.g.*, Vincent Wee, *Sustainable Transport Should Be Default Option: IKEA*, Seatrade Maritime News, Sep. 21, 2021 <https://www.seatrade-maritime.com/environmental/sustainable-transport-should-be-default-option-ikea> (referencing statements by IKEA Global Sustainability Head Elisabeth Munck af Rosenschöld). Twenty-four charterers from a variety of segments, including ADM, Bunge, Dow and Trafigura, are signatories to the Sea Cargo Charter, a framework for aligning chartering activities with responsible environmental behavior to promote international shipping's decarbonization. See Sea Cargo Charter, About <https://www.seacargocharter.org/about/>.

[30] *See* Paul Bartlett, *Maersk to Test Air Lubrication on Large Containership*, Seatrade Maritime News, Oct. 7, 2021 <https://www.seatrade-maritime.com/environmental/maersk-test-air-lubrication-large-containership>; see also UBM EMEA, *Silverstream Air-Lubrication Test Finds 4.3% Fuel Saving*, Seatrade Maritime News, Feb. 4, 2015 <https://www.seatrade-maritime.com/europe/silverstream-air-lubrication-test-finds-43-fuel-saving>, *and* Paul Bartlett, *Air Lubrication to Become a Standard Feature – Silverstream CEO*, Seatrade Maritime News, Sep. 27, 2021 <https://www.seatrade-maritime.com/environmental/air-lubrication-become-standard-feature-silverstream-ceo>.

[31] Although liquified natural gas ("LNG") is more widely available as a marine fuel than other alternatives and produces fewer GHG emissions than traditional marine fuel oils, it is not a zero-emission fuel. LNG is often described as a transition fuel because it is "insufficient to meet the [IMO's] 2050 ambition" of a 50% reduction in GHG emissions compared to 2008 levels, but "is the only alternative we have today, and it will get [the shipping industry] under the 2030 IMO target" of a 40% reduction in CO2 emissions compared to 2008 levels. Mirza Duran, *Shell's Shipping Study Confirms LNG as Transition Fuel*, Offshore Energy, Jul. 8, 2020 <https://www.offshore-energy.biz/shells-shipping-study-confirms-lng-as-transition-fuel/>. Others have expressed concern that LNG "may distract the industry from investments in zero-emission fuels." *Id*.

[32] *See, e.g.*, Marcus Hand, *Maersk Bets Big on Methanol with Eight 16,000 TEU Ship Order at HHI*, Seatrade Maritime News, Aug. 24, 2021 <https://www.seatrade-maritime.com/environmental/maersk-bets-big-methanol-eight-16000-teu-ship-order-hhi>.

[33] *See, e.g.*, Marcus Hand, *Singapore Exploring Ammonia Bunkering for First Castor Initiative Vessel*, Seatrade Maritime News, Jun. 2, 2021 <https://www.seatrade-maritime.com/bunkering/singapore-exploring-ammonia-bunkering-first-castor-initiative-vessel); see also Timperley, *supra* note 9.

[34] *See* Timperley, *supra* note 9.

[35] *See, e.g.*, Jasmina Ovcina, *DNV: Nuclear Power Might Offer a Pathway to Reach IMO GHG Targets*, Offshore Energy, Jun. 8, 2021 <https://www.offshore-energy.biz/dnv-nuclear-power-might-offer-a-pathway-to-reach-imo-ghg-targets/>; cf. Gary Dixon, *Core Power Buoyed by $170m in US Funding for Shipping's Pioneering Nuclear Option*, TradeWinds, updated Nov. 26, 2021 <https://www.tradewindsnews.com/technology/core-power-buoyed-by-170m-in-us-funding-for-shippings-pioneering-nuclear-option/2-1-1106352?utm_source=alert&utm_medium=email&utm_campaign=2021-11-26T07%3A54%3A00.264Z&utm_term=%5BTOPIC,%20AUTHOR%5D&utm_content=%5BTechnology,%20esg,%20nuclear_fuel,%20g_dixon,%20technology%5D> (subscription required).

[36] *See, e.g.*, Marcus Hand, *No Silver Bullet to Shipping's Decarbonisation Journey*, Seatrade Maritime News, Sep. 21, 2021 <https://www.seatrade-maritime.com/environmental/no-silver-bullet-shippings-decarbonisation-journey>.

[37] *See, e.g.*, Randall Krantz, Kasper Søgaard and Dr. Tristan Smith, Insight Brief -- *The Scale of Investment Needed to Decarbonize International Shipping*, Getting to Zero Coalition, Jan. 2020 <https://www.globalmaritimeforum.org/content/2020/01/Getting-to-Zero-Coalition_Insight-brief_Scale-of-investment.pdf>.

[38] *See, e.g.*, Lee Hong Liang, *ABS Joins IWSA to Push for Uptake of Wind Propulsion Solutions*, Seatrade Maritime News, Jan. 18, 2021 <https://www.seatrade-maritime.com/offshore/abs-joins-iwsa-push-uptake-wind-propulsion-solutions>.

[39] *See* Paul Bartlett, *ESG and Carbon Pricing to Propel Surge in Wind Power*, Seatrade Maritime News, Sep. 10, 2021 <https://www.seatrade-maritime.com/environmental/esg-and-carbon-pricing-propel-surge-wind-power>.

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