An Interview with MFB Solicitors discussing global Shipping trends

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Lexology GTDT Market Intelligence provides a unique perspective on evolving legal and regulatory landscapes. This interview is taken from the Shipping volume discussing topics including sources of finance, compliance initiatives and foreign court decisions within key jurisdictions worldwide.

Covid-19

The disruption brought by the covid-19 pandemic has drastically affected economies and markets worldwide and the shipping industry has faced significant challenges since the onset of the pandemic in early 2020. Trade, tourism and travel have all been hugely impacted, with cruise ships, ferries, refrigerated cargo ships, car carriers and the offshore sector particularly suffering.

As a whole, however, the shipping industry is expected to benefit from post-pandemic recovery. At the time of writing, container rates are booming, driven in large part by demand from the United States for container imports. Containership owners are accepting very high charter rates, with corresponding high freight rates for shippers. The dry bulk market has also experienced a record-breaking start to the year, thanks in part to inflation caused by monetary policies introduced in response to the pandemic, as well as high commodity prices resulting from short-term pressure on supply chains. Tanker rates, however, have fallen to record lows, with travel restrictions and reduced global fuel consumption meaning that demand is not expected to fully return. Cruise vessels, many of which have been laid up for many months, are starting to return to business.

Restrictions imposed in relation to the pandemic have led to disruption to crew changes, with many seafarers being unable to leave their vessels as planned. Their plight has made headlines across the globe, bringing the issue of human rights at sea to the attention of the general public.

There has been increased use of infectious diseases clauses in contracts entered into since the start of the covid-19 pandemic and force majeure clauses have been re-examined. A BIMCO covid-19 crew change clause for time charterparties has been released, allowing deviation for crew changes and an option for charterers to contribute to the cost.

Shipbuilding and refits have been delayed, and the ship sale and purchase markets have been very quiet. Ship recycling, which almost reached a standstill, is beginning to pick up.

The Ever Given

The grounding of the *Ever Given*, one of the largest container ships in the world, in the Suez Canal on 23 March 2021, made mainstream news headlines worldwide. The canal, the shortest sea route between Europe and Asia, was blocked for almost a week, causing delays to hundreds of ships waiting to transit. Many others chose to divert around the southern cape of Africa. Releasing the *Ever Given* took numerous tugs, diggers and dredgers. The vessel was detained by the Egyptian authorities, who were reportedly demanding multiple hundreds of millions of dollars in compensation from the vessel’s Japanese owners. After several weeks of negotiations, the parties agreed a settlement for an undisclosed amount and the vessel was released in early July 2021. The owners of the vessel have established a limitation fund in England. The incident demonstrated that even a single event

can have a significant impact on the global supply chain, causing congestion in numerous ports around the world, disrupting container ship schedules, causing a shortage of containers and driving up container shipping rates due to a lack of available capacity on container ships.

Trade wars

Economic conflicts, or 'trade wars', where one country imposes import tariffs or similar restrictions on products from another country, have the potential to cause significant disruption to global markets. Often a side effect of protectionist policies, trade wars can create uncertainty in the global trade environment that fuels the shipping industry.

China – United States

The conflict began when former President Trump imposed tariffs and other trade barriers on China in January 2018. Despite the two sides having signed an economic and trade agreement in January 2020, tensions continue to persist. Although President Trump's tenure ended in January 2021, experts expect the trade war to continue under the new administration, as President Biden reportedly has no plans to end the tariffs in place.

China – Australia

Toward the end of 2020, China leaked to the media a 14-point list of grievances against Australia, including the latter's decisions to ban Huawei from the rollout of the 5G network, enacting foreign interference laws and calling for an inquiry into the origins of covid-19. China subsequently imposed restrictions on an array of Australian imports including lobsters, beef, barley, coal and timber, prompting Australian exporters and Chinese importers to seek new markets for their products.

Brexit

On 24 December 2020, the EU and UK reached a Trade and Cooperation Agreement, which applied provisionally from 1 January 2021, before formally entering into force on 1 May 2021. It provides for free trade in goods, as well as for cooperation in a range of policy areas, transitional provisions about EU access to UK fisheries and UK participation in some EU programmes.

Northern Ireland, the only part of the UK that shares a land border with the EU, is subject to a separate arrangement, known as the Northern Ireland Protocol, by which it continues to follow many of the EU rules on trade. A regulatory border has effectively been created in the Irish Sea, requiring additional checks and paperwork on goods moving between Great Britain and Northern Ireland.

The EU introduced full import checks on UK goods on 1 January 2021. The UK, on the other hand, having initially announced it would phase in new customs procedures and border controls in stages between January and July 2021, recently declared a further delay to the introduction of full border checks on goods imported to Great Britain from the EU. The checks will now be introduced in stages on 1 October 2021, 1 January 2022 and 1 March 2022.

Environmental measures

The global cap on sulphur emissions imposed by the International Maritime Organization (IMO), entered into force on 1 January 2020.

The driving factor behind the global cap is to improve vessels' environmental footprints. One of the most harmful pollutants that vessels emit is sulphur dioxide (SO_2), produced from the combustion of fuels containing sulphur. SO_2 is considered to have significant adverse effects on both the environment and human health.

Under the global cap, the IMO set strict limitations on vessels to use fuels with a sulphur content of no more than 0.5 per cent, rather than the previous limit of 3.5 per cent. Potential implications for shipping are substantial, particularly the availability of compliant low-sulphur fuels and their effect on ships' engines.

Focus now seems to be moving to 'zero-carbon bunker fuels', namely shipping fuels that emit zero or, at most, very low greenhouse gas (GHG) emissions across their life cycles. Two alternative fuels – ammonia and hydrogen – have been identified as the most promising zero-carbon bunker fuels for shipping, being more scalable and cost-competitive than other biofuel or synthetic carbon-based options.

Meanwhile, LNG is expected to play a limited role in the decarbonisation of the shipping sector, for specific niche applications on pre-existing routes or in specific vessel types.

Global sanctions

The impact of international sanctions on the global maritime industry remains very significant. Although international sanctions are designed to aid international law and foreign policy objectives in matters such as terrorism and human rights abuses, they continue to be politicised and unpredictable. Shipping businesses and insurers face challenges in managing their exposures to risks in markets affected by sanctions.

Brexit

Prior to Brexit, the United Kingdom pursued its sanctions policy through the United Nations and the European Union. Since Brexit, EU sanctions have continued uninterrupted under the Sanctions and Anti-Money Laundering Act 2018, which also provides for the UK to implement its own sanctions.

Although (at the time of writing) UK sanctions mainly mirror those of the EU, there is scope for divergence in the future, not only in their application, effect and enforcement, but also in relation to designated individuals and companies. Both the UK and EU have stated that they intend to coordinate their sanctions policies as much as possible. With the UK historically having been active in shaping EU sanctions policy, it is expected to continue to take a proactive approach under its own regime. The EU, meanwhile, will likely keep a close eye on UK actions while also striving for more robust, uniform enforcement of sanctions across its member states.

Brexit is likely to have serious practical implications on the machinery of the EU's sanctions as, with the departure of the UK, it has lost a determined sanctions advocate, a well-versed diplomatic corps able to create the consensus needed among member states for issuing new sanctions regimes, and the intelligence on which the European Council has relied to adopt sanctions.

Iran

The 2016 Joint Comprehensive Plan of Action (JCPOA) resulted in the EU lifting restrictions against Iran in the following sectors:

- financial, banking and insurance;
- oil, gas and petrochemicals;
- shipping, shipbuilding and transport; and
- precious metals and currency.

Some restrictive EU measures remain in place (but these relate largely to military goods: weapons and items that might be used for internal repression) and some entities and individuals remain listed. All trades related to Iran, therefore, need to be checked to ensure that they comply with the remaining sanctions.

On 8 May 2018, the Trump administration announced the United States' withdrawal from the JCPOA with effect from 27 June 2018. However, the Biden administration has promised to rejoin the JCPOA. The positions of both sides have shifted considerably in the past three years, however, and the ongoing negotiations to reach a deal are finely balanced. While some argue that the imposition of overly strict sanctions pushes Iran to develop its nuclear programme, others say that the lifting of sanctions will itself allow Iran to develop nuclear weapons.

Other countries

The United States has also imposed sanctions on Venezuela. In particular, it has targeted any vessels considered to be involved in the petroleum trades between Venezuela and Cuba. Vessels that contravene such sanctions risk being added to the list of Specially Designated Nationals and Blocked Persons (the SDN list), maintained by the US Treasury Department's Office of Foreign Asset Control, which has grave implications for the trading and insurance cover of any designated vessel. Additionally, the United States deems any vessel undertaking activity involving PDVSA, a Venezuelan state-owned oil and natural gas company, as being engaged in the Venezuelan oil sector, and thus at risk of being added to the SDN list.

Syria also faces comprehensive sanctions by the United States, the UK, UN and the EU in response to the Syrian government's alleged support of international terrorism and human rights violations in the country. Since implementation, the sanctions have been strengthened several times as a result of escalating violence in the region. Current imposed sanctions include trade restrictions on the import, purchase and transport of crude oil and petroleum products from Syria. Other restrictions include travel bans and asset freezes on certain Syrian officials, as well as a ban on Syrian investment by US persons.

Russia is also subject to economic sanctions by the UK, EU and United States, following Russia's failure to comply with demands regarding the annexation of Crimea and Sevastopol. The sanctions were initially in the form of asset freezing and restrictions on travel. Since July 2014, UK, EU and US sanctions prohibit:

- the import into the EU of goods from Crimea or Sevastopol; and
- the provision, directly or indirectly, of financing or financial assistance, as well as insurance and reinsurance related to such imports.

Since August 2014, the supply of dual-use goods to Russian persons or for use in Russia if they are intended for military use, as well as the supply without prior EU authorisation of goods related to oil exploration and production activities in Russia, are also prohibited. Russia has issued its own embargo on the importation into the Russian Federation of goods from the United States, EU, Canada, Australia and Norway. At the time of writing, there have been tensions between Russia and the UK when the latter sent a warship into the region.

Autonomous vessels

Interest in autonomous and remotely controlled ships continues to gather pace. From completely unmanned vessels, to vessels remote-controlled from ashore, to vessels with automated processes and decision support systems, the field is a wide one.

The potential benefits of autonomous vessels are attractive to the marine industry. Crewless vessels not only reduce crew wages and expenses but can also eliminate systems once needed to make the vessel habitable for crew, simplifying vessel design and creating more space for cargo. Autonomy also offers the potential for reducing human error, which is currently estimated to account for 75 to 96 per cent of shipping-related incidents. This has the obvious appeal of reducing costs relating to accidents and insurance. Also, by enabling operations that do not put human lives at risk, the number of human tragedies will be reduced. Without crews to hold hostage, the issue of piracy may also be reduced.

Although this has obvious appeal, there are nonetheless many challenges that will need to be addressed before this technology can be put fully into operation. For example, although risk of human error is reduced, new risk factors will emerge, such as possible technological failures and inadequacies. Cyber threats could also present new forms of piracy. While the developments will affect existing market players such as shipowners, charterers, banks and insurers, new parties will enter the picture, including suppliers of autonomous systems and onshore operators controlling or supervising vessels.

Insurers face the challenge of understanding and pricing the risk correctly, as autonomous vessels present new, as well as existing, risks. They will also need to consider how the current legal framework will fit with the new technology, not only with respect to technical requirements but also as to liability. For example, if an autonomous vessel is involved in an accident and causes damage to a third party, the question arises as to who is liable.

Due to the pandemic, the IMO suspended its Maritime Safety Committee (MSC) meetings, which are central to the process to regulate Maritime Autonomous Surface Ships (MASS). The aim had been to complete a scoping exercise, to determine how the safe, secure and environmentally sound operation of MASS may be introduced in IMO instruments by the end of 2020. It is not yet clear when this scoping exercise will now be completed. In June 2019, the IMO approved Interim guidelines for trials of MASS, addressing the identification and reduction of risks, appropriate training of personnel and cyber risk management of the systems and infrastructure.

With autonomous vessels due to enter operation in the near future, consideration is being given to the commercial framework for their use. It is anticipated that charterparties may not be appropriate in the future, as vessels will initially be designed and built for dedicated routes. Instead, early users of autonomous ships are expected to be non-maritime companies, who will contract with experienced ship managers for the vessels' operation. BIMCO is currently adapting an existing standard contract, SHIPMAN 2009, for such use. The 'service-based' structure of SHIPMAN will be adapted to add autonomous ship-related services and to build in provisions for the operation and manning of a remote control centre. At the time of writing, the contract, currently called AUTOSHIPMAN, is due to be published later this year.

Cybersecurity measures

Since 2017, all of the four biggest container shipping companies (APM-Maersk, COSCO, MSC and CMA CGM) and the IMO have been hit by cyber-attacks. The shipping industry is considered to be a vulnerable and highly lucrative target, with maritime companies' shore-based networks particularly exposed to ransomware. The 'NotPetya' malware cyber-attack on Maersk in 2017, which reportedly cost the company around US$300 million, highlighted the opportunity for cyber criminals to bring a critical industry down, meaning payment of a ransom was perhaps more likely than other industries. Shipowners and operators should be aware that traditional marine insurance products might not cover all the risks of cyber incidents.

We also note that cyber-attacks can produce benefits for the shipping industry: on 7 May 2021, Colonial Pipeline, which carries fuel from Texas to the eastern United States, suffered a ransomware cyber-attack, resulting in the pipeline's operations being halted to contain the attack. The ransom (of around US$5 million) was promptly paid, but the impact on operations was significant, leading to tankers being booked to carry fuel that would otherwise have been carried in the pipeline.

Ransom payments to cyber-criminals could put companies at risk of breaching sanctions, as well as other national and international laws and regulations, which could lead to severe penalties and enforcement action.

There is increasing concern that as the maritime industry becomes more reliant on technology, the exposure to cyber-attacks will increase. In recent years, the industry has taken measures to tackle the cyber threats and adopt the appropriate crisis management tools. In 2017, the IMO Maritime Safety Committee approved various

measures intended to enhance maritime security, including adopting a resolution (MSC.428(98)) that required shipowners and operators to incorporate cyber risk management into their ships' safety management systems by no later than the first annual verification of the company's Document of Compliance after 1 January 2021. The third edition of BIMCO Guidelines on Cyber Security Onboard Ships in 2018 provides additional guidance for shipping companies in carrying out appropriate risk assessments and to include measures in their safety management systems to protect ships from cyber-incidents.

Some critics say, however, that the shipping industry disproportionately prioritises the less likely ship hacking scenarios and should instead focus on the more common attacks on shore-based systems, including the rise of 'cyber-piracy', where container booking applications are hacked by criminals looking for ship manifests, container identity numbers, and ship sea routes to organise theft of containers transporting high-value goods such as electronics and jewellery.

Shipowners face an increasing obligation to avoid and mitigate the risk of cyber-attacks, to develop a cyber response plan and to train and educate crew and other relevant personnel. Failure to keep up to date in this respect could expose shipowners to allegations of 'unseaworthiness' in the event of a cyber incident affecting a ship, shore-based control systems, electronic cargo documents or handing systems and the like. The development of autonomous vessels also presents the possibility of remote access to vessel controls, which could put autonomous vessels at risk of hijacking or sabotage.

Electronic bills of lading

The covid-19 pandemic has accelerated the digital revolution and renewed the interest of the shipping industry to move towards more wide scale adoption of electronic bills of lading (e-Bills).

E-Bills are currently used only in closed systems through platforms whereby subscribers sign up to a set of rules that set out the specific form of electronic trading documentation to be used and by which subscribers agree that using such documentation shall mirror the position at law as if they were paper documents.

This self-evidently has significant limitations; where a subscriber to an electronic trading platform enters into a transaction with a party who is not subscribed, the electronic platform cannot be used and the parties must resort to issuing paper documents.

Currently, seven such platforms are approved by the International Group of P&I Clubs. Those Clubs provide cover for liabilities where e-Bills are issued within these platforms, but only if such liability would also have arisen under a paper bill.

However, the use of e-Bills also potentially exposes users to risk from hacking, systems collapse, e-theft and viruses, which are not traditionally covered by P&I Clubs and would need to be insured separately.

Meanwhile, BIMCO continues to champion the cause, having included an 'Electronic Bills of Lading' clause in the latest iteration of the popular NYPE form time charterparty and more recently having teamed up with the International Chamber of Commerce with the goal of establishing a global standard for e-Bills in the dry and liquid bulk sectors and encouraging their acceptance and adoption by regulators, banks, carriers and insurers.

While e-Bills have been given recognition in Singapore, and the England and Wales Law Commission recently published a consultation paper addressing the issue of e-Bills, it seems unlikely that legislative change in a few jurisdictions alone will result in a substantial increase in their use. The breakthrough, it seems, will come once they are recognised as transferable documents in all the jurisdictions through which they pass.

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