

Key Legal Considerations After Supply Chain Disruptions

By **Sean Pribyl, Carrol Hand and Allison Skopec** (November 7, 2024)

In recent memory, the U.S. supply chain has faced significant disruptions that seem to be occurring with increased frequency and severity.

The recent strike by the International Longshoremen's Association, or ILA, and the devastation wrought by Hurricane Helene are the latest in a long line of disruptions that have included the COVID-19 pandemic, extreme droughts affecting the water level of the Panama Canal, an ongoing shipping crisis in the Red Sea and the collapse of the Francis Scott Key Bridge in Baltimore.

As the transportation industry braces for the next major disruption — whether a strike, hurricane, infrastructure failure or completely unrelated event — industry members can benefit from a review of past disruption events, which provide valuable context for understanding the claims that may follow a significant disruption.

The short-lived ILA strike, when 36 container ports from the U.S. East Coast and Gulf Coast ceased operations due to a breakdown in labor contract negotiations between the ILA and the U.S. Maritime Alliance, is illustrative of the breadth of the potential impact a disruption of that magnitude can have.

The ILA strike ended when the parties reached a tentative deal on wage increases and agreed to extend the master contract until Jan. 15, 2025. While the ILA strike only lasted three days, the effect of the closure lingered much longer.

And the industry's relief that the strike ended so quickly may be short-lived. If the parties cannot come to terms on the other outstanding issues before Jan. 15, including the highly contested issue of automation, a second strike seems almost inevitable.

When faced with disruptions that affect ocean shipping, global supply chains and the U.S. economy, affected entities will look to contractual provisions to insulate themselves from claims, mitigate damages and seek recourse to recover losses.

In these circumstances, federal regulators also watch closely for unfair shipping practices. For example, the Federal Maritime Commission issued a reminder during the recent strike that all FMC statutes and regulations remained in full effect in the event of terminal closures related to the strike, and it stood ready to act.

Potential Cargo Claims in Supply Chain Disruptions

When the U.S. supply chain faces a major disruption, the event can affect imports and exports alike. Cargo carried to and from East and Gulf Coast ports is transported under contract, and disputes related to delay, misdelivery and damaged cargo may follow.



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But such disputes may not be clear cut. For example, the Carriage of Goods by Sea Act, or COGSA — a U.S. law that regulates the relationship between cargo owners and ship owners for ocean shipments to and from the U.S. — has certain provisions related to cargo loss or damage caused by strikes, lockouts and labor restraints.

While cargo loss and damage in such circumstances generally falls outside liability under COGSA, it is imperative for potential claimants to assess the extent to which such damage or loss is indeed caused by the disruption event. Nevertheless, unless another COGSA defense applies, a carrier could still face liability exposure for cargo damage and the inevitable dispute that could follow.

Misdelivery will likely rise, and, as evidenced by the ILA strike, in anticipation of an event, thousands of shipping containers may potentially be dumped at the wrong ports as ocean carriers scramble to find alternate options for cargo. In this scenario, tracking of diverted containers may already be strained and present a direct challenge — particularly when the disrupting event is a strike, which directs workers to stop unloading at other ports.

If a shipper or consignee of cargo has goods that are laden on a ship and the ocean carrier diverts the cargo to another port claiming force majeure or otherwise, there are key considerations to address the propriety of the actions. Factors that may be relevant to claims include the tariff, the bill of lading with regard to whether it is door-to-door service or door-to-port service, and the terms and conditions addressing performance.

However, claims related to late delivery and consequential losses only caused by delay in delivering cargo, without any actual physical damage to the cargo, are typically not recoverable under COGSA. In any case, maintaining documentation and records always remain critical to preserving rights.

Cargo Claims in Practice

Incidents like oil spills, bridge collisions or blocked channels can severely affect the economy, causing delays and various other issues. Generally, federal and state law limit recovery for economic loss with no property damage.

Most federal courts, including the U.S. Court of Appeals for the Fourth Circuit, recognize the *Robins Dry Dock v. Flint* ruling, where the U.S. Supreme Court held that limits apply to economic losses related to business or contractual interference beyond foreseeability. Therefore, parties might be unable to claim damages if their losses are only economic.

This background affects the legal realities in the aftermath of the M/V Dali colliding with the Francis Scott Key Bridge in Baltimore, causing its collapse. To date there have been 46 lawsuits filed in the civil case, with the U.S. Department of Justice having settled its non-limitation of liability affected claims for \$100 million on Oct. 24.

Cargo owners whose goods were damaged on the M/V Dali would have claims against the carrier under COGSA, although those suffering delay would typically fall outside the COGSA claim rubric.

Separately, cargo owners with undamaged cargo could actually be required to contribute significant amounts to the general average fund before receiving their cargo, as the shipowner seeks to recover salvage expenses under its general average declaration. This is yet another one of many prolonged legal disputes that will arise from the unfortunate voyage.

Beyond marine casualties, natural disasters such as Hurricanes Helene and Milton also affect domestic supply chains. In the case of Hurricane Helene, there were widespread reports of delays related to general healthcare supplies for the hospitals.

Additionally, Hurricane Helene hit at the heart of Spruce Pine, the location of the world's largest deposit of high-purity quartz. This is a key component used in semiconductor chip manufacturing, smartphones, automobiles, medical devices and solar panels.

Delays in shipments of critical minerals such as quartz may lead to increased risks of chip shortages and price hikes. Supply contracts should be closely evaluated when contemplating claims — including whether force majeure and mine shutdowns are expressly included, and if so, the applicability and scope of same.

In any case, impacts from natural disasters highlight the potential vulnerability of a supply chain depending on just one source, and the claims that can flow from such disruptions.

With regard to Hurricane Milton, the closure of the Tampa port disrupted the flow of goods, leading to delays and congestion. In the future, where ports are out of commission due to extreme weather events, cargo ships will be diverted to other ports, potentially overwhelming their capacity and causing further delays along the Gulf and East Coasts.

These disruptions are likely to drive up shipping costs, as carriers face increased expenses due to delays, rerouting and potential damage to vessels.

FMC Oversight in Supply Chain Disruptions

Beyond vessel accidents and natural disasters, human-induced disruptions from labor disputes and strikes can cripple the supply chain and lead to scrutiny of potential claims.

In the week before the ILA strike began, the FMC issued an industry advisory, with the stated purpose of reminding regulated entities that all commission statutes and regulations would remain in full effect throughout any potential strike.[1]

Building on this general reminder, the industry advisory further highlighted and summarized the FMC's prior efforts related to demurrage and detention fees, from the 2020 issuance of the Interpretive Rule on Demurrage and Detention Under the Shipping Act to the present.

The FMC specifically pointed to the rule and its requirement that D&D fees "serve as legitimate financial incentives to encourage cargo movement," stating that the commission would scrutinize any D&D fees assessed during the ILA strike. The FMC also highlighted the recently adopted regulations on D&D billing practices, issuing the reminder that all D&D invoices must be lawful and in compliance with the new regulations.

The FMC's decision to issue the industry advisory, which states it will "prosecute violators to the fullest extent of the law," is a clear indication that when a major potential disruption occurs, the agency fully anticipates an increase in D&D charges — and consequently, an increase in the shipping public seeking relief and assistance.

The FMC used the industry advisory to invite industry members to actively participate in ensuring compliance with applicable regulations, either by reporting unlawful actions or filing a complaint. Given the magnitude of the potential impact from the strike and similar disruptions, it seems likely the industry will accept the invitation.

The industry advisory issued before the ILA strike is not the first time the FMC has reminded the industry that its regulations remain in effect, and that relief is available when faced with an impending disruption.

Similar industry advisories were issued at the outset of the shipping crisis in the Red Sea, and immediately after the collapse of the Francis Scott Key Bridge in Baltimore. In each case, the FMC made clear that federal regulators will be watching closely for unfair shipping practices and intend to investigate any unlawful conduct.

Beyond contractual disputes between parties, the FMC cautioned in its recent industry advisory that although all applicable laws and regulations still apply to governing tariffs, service contracts, marine terminal operator schedules, the application of and invoicing for demurrage and detention, and all other fees and surcharges assessed, there still may be some potential claims that arise due to the ILA strike.

After a major disrupting event occurs, shippers who believe they have been subject to unlawful policies or fees by ocean carriers, such as congestion, demurrage or detention, have a number of options to report violations to the FMC. These options include:

- Filing a complaint proceeding for adjudication before the FMC's Office of Administrative Law Judges;
- Submitting a charge complaint requesting a refund or waiver of an erroneous or unlawful charge;
- Requesting informal assistance from the FMC's Office of Consumer Affairs and Dispute Resolution Services; and
- Reporting alleged violations to the FMC's Bureau of Enforcement, Investigations and Compliance.

When deciding whether to report unlawful actions or file a complaint with the FMC, industry members need to consider not only the regulatory framework discussed above, but also the individual D&D policies and procedures of regulated entities, and any specific contractual terms that apply.

An understanding of these policies and procedures, along with the relief and assistance available before the FMC if invoiced charges are believed to be unreasonable, can be invaluable when navigating any potential industry disruption, but particularly one the size of the ILA strike.

Conclusion

Whatever national policy and response takes shape in the wake of a major supply chain disruption, the contractual realities of international shipping will undoubtedly be tested. And the FMC has issued a clear warning to industry to maintain lawful practices — so regulated entities would do well to pay heed.

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[1] <https://www.fmc.gov/articles/industry-advisory-all-fmc-statutes-and-regulations-remain-in-full-effect-in-the-event-of-terminal-closures-related-to-possible-work-stoppage/>.