

C. OTHER LEGAL AND REGULATORY DEVELOPMENTS AFFECTING TRANSPORTATION

Extension of the European Union Consortia Block Exemption Regulation up to 2024

Article 101(1) of the Treaty on the Functioning of the European Union prohibits agreements between undertakings that restrict competition. However, article 101(3) of that treaty allows declaring such agreements compatible with the internal market, provided they contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits. Liner shipping is a highly concentrated industry, with 91 per cent of deep-sea maritime transport services controlled by 10 global operators (see chapter 2, table 10 of this report). In the European Union, liner conferences allowing their members to fix freight rates collectively and discuss market conditions were banned as of 2008 (Council (EC) Regulation 1419/2006). However, liner shipping consortia, as a form of operational cooperation, continue to enjoy a block exemption from European Union competition rules, set to expire on 25 April 2020. Given the international nature of liner shipping services and experience gained from the earlier initiatives of the European Union in this field (Premti, 2016), the impact of the European Union decisions goes beyond Europe and has a bearing on the container shipping markets in developing countries and other European Union trading partners.

In September 2018, the European Commission conducted an evaluation of the Consortia Block Exemption Regulation (European Commission, 2009), which included a consultation of stakeholders in the maritime liner shipping supply chain (for the results, see European Commission, 2019a). The aim was to assess the impact and relevance of that regulation in view of the general policy of harmonizing competition rules and recent important developments in the liner shipping industry and to determine whether it should be left to expire or to be prolonged, and if so, under which conditions. Allowing the Regulation to expire would not mean that consortia agreements become unlawful – but only that they would be examined under the general rules on competition just as cooperation agreements in other sectors (European Commission, 2019b). The first consortia block exemption regulation was adopted

in 1995 and revised in 2009; since then, it has been prolonged every five years without modification.

The main stakeholders participating in the consultation were the carriers which apply the Regulation and their clients (shippers and freight forwarders), and port operators and their respective associations, including those in developing countries who may be affected by the freight rates and the quality and frequency of services resulting from a change in the European Union regulation.

Industry associations representing users of liner shipping services and service providers expressed their objection to the extension of the Regulation.⁴⁴ They argued that the evaluation criteria used by the European Commission were biased towards the interest of the carriers, that the 30 per cent market share threshold was difficult to monitor in practice due to missing data and that quality and choice, as well as service levels and schedule reliability, had decreased in recent years, while rate volatility had increased (Lloyd's Loading List, 2020) (see chapter 2). During the consultation, port operators expressed concerns, among others, about limited competition between individual lines that offered more or less equal service levels, and pointed out that any decrease in freight rates was a relatively small element of the total shipping costs (https://ec.europa.eu/competition/consultations/2018_consortia/index_en.html). In addition, representatives of transport workers were reluctant to prolong the Regulation, arguing that shipping companies were having a negative impact on the economic profitability of terminals and other service providers. Because of the increased size of ships, constant and significant investments from terminals were required, adversely affecting the working conditions and job security in ports.

On 24 March 2020, the European Commission announced an extension of the Consortia Block Exemption Regulation until 25 April 2024. According to the Commission, the Regulation results in efficiencies for carriers that can better use vessel capacity and offer more connections. Further, those efficiencies result in lower prices and better quality of service for consumers and a decrease in costs for carriers – in recent years, prices for customers have dropped by approximately 30 per cent (European Commission, 2020c).

D. STATUS OF CONVENTIONS

A number of international conventions in the field of maritime transport were prepared or adopted under the auspices of UNCTAD. The table below provides information on the status of ratification of each of those conventions as at 31 July 2020.

⁴⁴ European Association for Forwarding, Transport, Logistic and Customs Services; European Shippers Council; Global Shippers Forum and International Union for Road–Rail Combined Transport.

Table 5.1 Contracting States Parties to selected international conventions on maritime transport, as at 31 July 2020

Title of convention	Date of entry into force or conditions for entry into force	Contracting States
Convention on a Code of Conduct for Liner Conferences, 1974	6 October 1983	Algeria, Bangladesh, Barbados, Belgium, Benin, Burkina Faso, Burundi, Cabo Verde, Cameroon, Central African Republic, Chile, China, Congo, Costa Rica, Côte d'Ivoire, Cuba, Czechia, Democratic Republic of the Congo, Egypt, Ethiopia, Finland, France, Gabon, Gambia, Ghana, Guatemala, Guinea, Guyana, Honduras, India, Indonesia, Iraq, Italy, Jamaica, Jordan, Kenya, Kuwait, Lebanon, Liberia, Madagascar, Malaysia, Mali, Mauritania, Mauritius, Mexico, Montenegro, Morocco, Mozambique, Niger, Nigeria, Norway, Pakistan, Peru, Philippines, Portugal, Qatar, Republic of Korea, Romania, Russian Federation, Saudi Arabia, Senegal, Serbia, Sierra Leone, Slovakia, Somalia, Spain, Sri Lanka, Sudan, Sweden, Togo, Trinidad and Tobago, Tunisia, United Republic of Tanzania, Uruguay, Bolivarian Republic of Venezuela, Zambia (76)
United Nations Convention on the Carriage of Goods by Sea, 1978	1 November 1992	Albania, Austria, Barbados, Botswana, Burkina Faso, Burundi, Cameroon, Chile, Czechia, Dominican Republic, Egypt, Gambia, Georgia, Guinea, Hungary, Jordan, Kazakhstan, Kenya, Lebanon, Lesotho, Liberia, Malawi, Morocco, Nigeria, Paraguay, Romania, Saint Vincent and the Grenadines, Senegal, Sierra Leone, Syrian Arab Republic, Tunisia, Uganda, United Republic of Tanzania, Zambia (34)
International Convention on Maritime Liens and Mortgages, 1993	5 September 2004	Albania, Benin, Congo, Ecuador, Estonia, Honduras, Lithuania, Monaco, Nigeria, Peru, Russian Federation, Spain, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Serbia, Syrian Arab Republic, Tunisia, Ukraine, Vanuatu (19)
United Nations Convention on International Multimodal Transport of Goods, 1980	Not yet in force – requires 30 contracting parties	Burundi, Chile, Georgia, Lebanon, Liberia, Malawi, Mexico, Morocco, Rwanda, Senegal, Zambia (11)
United Nations Convention on Conditions for Registration of Ships, 1986	Not yet in force – requires 40 contracting parties, representing at least 25 per cent of the world's tonnage as per annex III to the Convention	Albania, Bulgaria, Côte d'Ivoire, Egypt, Georgia, Ghana, Haiti, Hungary, Iraq, Liberia, Libya, Mexico, Morocco, Oman, Syrian Arab Republic (15)
International Convention on Arrest of Ships, 1999	14 September 2011	Albania, Algeria, Benin, Bulgaria, Congo, Ecuador, Estonia, Latvia, Liberia, Spain, Syrian Arab Republic, Turkey (12)

Note: For additional information, see UNCTAD Trade Logistics Branch, Policy and Legislation Section at unctad.org/ttl/legal. For official status information, see the United Nations Treaty Collection, available at <https://treaties.un.org>.

E. COVID-19 LEGAL AND REGULATORY CHALLENGES FOR INTERNATIONAL SHIPPING AND COLLABORATIVE ACTION IN RESPONSE TO THE CRISIS

1. Maritime health preparedness and response to the COVID-19 pandemic

Key shipping stakeholders, including international bodies and Governments, issued a number of recommendations and guidance which aimed to ensure, first of all, that seafarers were protected from the coronavirus disease, were medically fit and had access

to medical care and that their ships met international sanitary requirements.⁴⁵

Together with its industry partners and other international organizations, IMO developed and issued practical advice and guidance on a variety of technical and operational matters related to the pandemic. Given that IMO does not have an enforcement authority of its own, it cannot issue general exemptions from or delay implementation of the mandatory provisions of its relevant conventions or mandatory regulations for flag and port States. However, IMO issued a number of circular letters

⁴⁵ For a list of COVID-19-related communications on measures taken by IMO Member States and Associate Members (updated weekly), see www.imo.org/en/MediaCentre/HotTopics/Pages/COVID-19-Member-States-Communications.aspx. For a detailed list of recommendations by Governments and international bodies, see Safety4Sea, 2020b.

addressed to Member States, seafarers and shipping industry stakeholders and posted a compilation of its guidance and online resources from other international organizations and maritime industry on its website.⁴⁶ Circular letters included the following items:

- Information on the impacts of the pandemic on the shipping industry, including implementation and enforcement of mandatory IMO requirements, and a call for increased cooperation among flag and port States, taking a pragmatic approach to the uncertain COVID-19 situation (Circular Letter No. 4204/Add.1).
- Guidance relevant to all stakeholders, addressing global issues relevant to the health of seafarers, seagoing vessels and offshore infrastructure by establishing and implementing COVID-19 protocols for mitigating and preventing outbreaks at sea, following guidance from the European Commission, the International Chamber of Shipping, IMO and the World Health Organization on health and shipping in the context of COVID-19 (Circular Letters No. 4204/Add.1–Add.4).
- Recommendations for Governments and relevant national authorities on the facilitation of maritime trade during the pandemic (Circular Letter No. 4204/Add.6) and on ensuring the integrity of the global supply chain during the pandemic (Circular Letter No. 4204/Add.9).
- Guidance particularly relevant to shipbuilders, equipment suppliers, shipowners, surveyors and service engineers advising on newbuilding bulk carriers and oil tankers that were scheduled for delivery before 1 July 2020 (Circular Letter No. 4204/Add.7).
- European Commission guidelines on protection of health, repatriation and travel arrangements for seafarers, passengers and other persons on board ships (Circular Letter No. 4204/Add.11).
- World Health Organization information and guidance on the safe and effective use of personal protective equipment (Circular Letters No. 4204/Add.15 and Add.16).

On 20 February 2020, the European Union issued advice for ship operators on preparedness and response to the outbreak of COVID-19, which included a dedicated chapter on maritime transport and a focus on cargo ship travel (European Union, 2020a). Guidelines on the exercise of the free movement of the workers during the COVID-19 outbreak followed (European Commission, 2020d).

Representing the global shipping industry, the International Chamber of Shipping published new guidance for the industry to help combat the spread of the coronavirus disease. The guidance offered advice

on managing port entry restrictions, practical protective measures against the disease for seafarers, including an outbreak management plan (International Chamber of Shipping, 2020a). The International Bunker Industry Association also adopted protective measures against the disease. Considering that in international shipping, the contact between ship and shore personnel during the bunkering process involved a possible risk of spreading the disease, it provided advice to mitigate the risk of infection during such process (Safety4Sea, 2020b). The International Association of Ports and Harbours adopted guidance on ports' responses to the pandemic, structured along a three-layered approach to present a methodology and a range of good practices on immediate measures addressing port operations, governance and communication; measures to protect the business and financial returns; and measures to support customers and supply chain stakeholders (International Association of Ports and Harbours, 2020b).

As part of its response to the COVID-19 outbreak, UNCTAD issued a call for action to keep ships moving, ports open and cross-border trade flowing (UNCTAD, 2020c). It also published a policy brief, highlighting a 10-point action plan to strengthen international trade and transport facilitation in times of pandemic (UNCTAD, 2020d). Related technical cooperation in collaboration with the United Nations regional commissions has already begun.⁴⁷ Moreover, the Secretaries-General of UNCTAD and IMO issued a joint statement in support of keeping ships moving, ports open and cross-border trade flowing during the pandemic (IMO and UNCTAD, 2020). To assist stakeholders in obtaining an overview of the multitude of COVID-19-related measures and responses, plan and potential implications thereof, UNCTAD drafted a technical note for ports and a non-exhaustive list of links to online resources from international organizations and industry groups that provide up-to date information about the ongoing developments in various countries.⁴⁸

2. Maritime certification

Port State control regimes around the world, expressing solidarity with the shipping industry, also developed temporary guidance for their member authorities during the COVID-19 crisis.⁴⁹ In line with IMO efforts and circular letters related to the pandemic, port State control

⁴⁷ Transport and trade connectivity in the age of pandemics (project 2023X) (www.un.org/development/desa/da/da-response-to-covid-19/).

⁴⁸ See <https://tft.unctad.org/ports-covid-19/> and <https://etradeforall.org/unctad-repositories-of-measures-on-cross-border-movement-of-goods-and-persons/>.

⁴⁹ Port State control is the inspection of foreign flag ships in national ports to verify their compliance with international rules on safety, security, marine environment protection and seafarers living and working conditions.

⁴⁶ All COVID-19-related IMO circulars are available at www.imo.org/en/MediaCentre/HotTopics/Pages/Coronavirus.aspx.

regimes developed temporary guidance on how they intended to deal with the impact of the pandemic. These included acceptance of extended periods of service on board for seafarers; extended periods for surveys, inspections and audits; and seafarers' certification, using a pragmatic and harmonized approach (see Indian Ocean Memorandum of Understanding on Port State Control Secretariat, 2020; Paris Memorandum of Understanding on Port State Control Secretariat, 2020; Secretariat of the Memorandum of Understanding on Port State Control in the Asia-Pacific Region, 2020).

Thus, as a general principle, the guidance adopted by the port State control regimes suggests that a pragmatic and risk-based approach regarding the above-mentioned issues be taken. In such cases, the active involvement of the flag State, and if appropriate, the recognized organization for the conduct of inspections and the issue of certification was expected. This would include examination of the available information on the ship and its history, as well as the performance of the ship's company. Whether an inspection took place remained the decision of the port State. Such temporary guidance might be reviewed, as appropriate, to keep aligned with the rapidly successive developments of the coronavirus disease and future initiatives by relevant stakeholders, including the International Labour Organization and IMO. In addition, recognized organizations,⁵⁰ including the American Bureau of Shipping,⁵¹ Bureau Veritas,⁵² DNV GL,⁵³ Indian Register of Shipping⁵⁴ and Lloyd's Register,⁵⁵ issued guidance for shipowners on how to apply for an extension of statutory certificates, including the Safety Management Certificate under the International Safety Management Code (International Convention for the Safety of Life at Sea, chapter IX); the International Ship Security Certificate under the International Code for the Security of Ships and of Port Facilities (International Convention for the Safety of Life at Sea, chapter XI-2); and the Maritime Labour Certificate (Maritime Labour Convention, 2006), or if possible, for remote surveys. A number of flag States also provided initial instructions on possible ways forward in cases where these certificates needed to be extended beyond the three months already suggested.⁵⁶

⁵⁰ Those organizations responsible for carrying out surveys and inspections on behalf of Administrations.

⁵¹ See <https://www2.eagle.org/en/news/abs-covid-19-update.html>.

⁵² See <https://marine-offshore.bureauveritas.com/newsroom/covid-19-update-bureau-veritas-marine-offshore>.

⁵³ See www.dnvgl.com/news/dnv-gl-maritime-response-to-the-coronavirus-covid-19-outbreak-166449.

⁵⁴ See www.irclass.org/covid-19/.

⁵⁵ See <https://info.lr.org/l/12702/2020-02-27/8ntgzw>.

⁵⁶ For example, Belgium, Denmark, the Marshall Islands, the Netherlands and Norway. For updated information, see Lloyds Register, 2020.

Enabling the extension of the validity of licences and certificates leads to greater flexibility and legal certainty. These are necessary to maintain supply chains and ensure continued mobility at sea, while safeguarding safety and security. In this context, it is worth noting that in addition to the Safety Management Certificate and the International Ship Security Certificate, flag States are allowed to extend for up to three months the period of validity of the following certificates required under different mandatory IMO legal instruments (IMO, 2019d):

- Cargo Ship Safety Equipment Certificate.
- Cargo Ship Safety Construction Certificate.
- Cargo Ship Safety Radio Certificate.
- International Load Line Certificate.
- International Oil Pollution Prevention Certificate.
- International Pollution Prevention Certificate for Carriage of Noxious Liquid Substances in Bulk.
- International Sewage Pollution Prevention Certificate.
- International Air Pollution Prevention Certificate.
- International Certificate of Fitness for the Carriage of Dangerous Chemicals in Bulk or the Certificate of Fitness for the Carriage of Dangerous Chemicals in Bulk.
- International Certificate of Fitness for the Carriage of Liquefied Gases in Bulk.
- Passenger Ship Safety Certificate.
- Polar Ship Certificate.
- International Ballast Water Management Certificate.

As a general rule, according to IMO mandatory instruments, no certificate should be extended for a period longer than three months (IMO, 2019c), while according to the Maritime Labour Convention of the International Labour Organization (standard A5.1.3, paragraph 4), the flag State may extend the validity of the Maritime Labour Certificate for a period not exceeding five months. Therefore, it appears that due to the prevailing exceptional circumstances during the COVID-19 crisis, flag States should be able to extend the validity of all statutory certificates for a period of three months. If the normal operation of ports and travel of surveyors should continue to be restricted by the pandemic or eventual problems or delays created after the pandemic, alternative ways to address this would need to be found on a case-by-case basis, such as issuing short-term certificates based on remote surveys or use of alternative survey locations (Lloyds Register, 2020). On 8 April 2020, representatives of

the 10 port State control regimes⁵⁷ that cover the world's oceans and the IMO Secretariat met in an online meeting. They reported that, while the number of physical on-board ship inspections had been reduced considerably to protect both port State control officers and seafarers, the regimes continued to work to target high-risk ships that might be substandard. They reported taking a pragmatic, practical and flexible approach, recognizing that exemptions, waivers and extensions to certificates had been granted by many flag States, and expressed a general desire for such practices to be standardized and harmonized (IMO, 2020e) (Circular Letter No. 4204/Add.8).

In addition, IMO addressed the certification of seafarers and fishing vessel personnel (Circular Letter No. 4204/Add.5/Rev.1), including medical certification, ship sanitation certification (Circular Letters No. 4202/Add.10 and Add.11), and certification of ships (Circular Letter No. 4204/Add.19/Rev.2), while the Special Tripartite Committee of the Maritime Labour Convention, 2006, as amended, in a statement on COVID-19 suggested extending the validity of seafarers' certificates for at least three months and adopting a flexible approach to ship certification (International Labour Organization, 2020). In addition, temporary measures were adopted in May 2020 at the European Union level, enabling the extension of the validity of certain certificates and licences in the road, rail and waterborne transport sectors (European Union, 2020b). An amendment was adopted to the Port Services Regulation (EU) 2017/352, which relaxed the rules on charging ships for the use of port infrastructures, providing flexibility on the reduction, deferral, waiver or suspension of port infrastructure charges as a response to the COVID-19 crisis, thus contributing to the financial sustainability of ship operators in the context of the pandemic (European Union, 2020c). Further, measures could be decided on a case-by-case basis by port-managing bodies. The temporary amendment

could be applied for all measures taken as from 1 March 2020 until 31 October 2020 (European Union, 2020d).

Members of the International Association of Classification Societies, acting on behalf of flag States, also developed guiding principles for the provision of technical and implementation advice to such States when considering whether to permit statutory certificate extension beyond three months (Circular Letter No. 4204/Add.19). It was further clarified that the extension of the validity of certificates beyond the statutory maximum should only be considered in extraordinary circumstances and if no other alternative exists. The issuance of short-term certificates or other measures should be limited to specific situations caused by the pandemic, and relevant decisions should be made on a case-by-case basis. The guiding principles provide technical and implementation advice to flag States when considering whether to extend certificates beyond the three months allowed by the IMO treaty regime. They represent a six-step approach to an informed decision-making process that respects the existing regulatory regime and that can result in an evidence-based assessment for the justification of such an extension. Considering that port State control measures had been temporarily suspended to some degree by some port State control regimes, it is the responsibility of the flag State to issue clear statutory instructions and decisions to owners and recognized organizations regarding such extensions.

3. Crew changes and key worker status

Shipping and seafarers are vital to global supply chains and the world economy. Each month, a large number of seafarers need to be changed over to and from the ships they operate to ensure compliance with international maritime regulations for safety, crew health and welfare, and to prevent fatigue. Because of COVID-19-related restrictions, however, large numbers of seafarers had to have their service extended on board ships after many months at sea, unable to be replaced or repatriated after long tours of duty. The International Transport Workers' Federation estimated in July that approximately 300,000 seafarers were trapped working aboard ships due to the crew change crisis caused by government border and travel restrictions relating to the pandemic; the same number of unemployed seafarers, who were ashore, were waiting to join them. That makes 600,000 seafarers affected by this crisis (International Transport Workers' Federation, 2020a). This was considered unsustainable, both for the safety and well-being of seafarers and the safe operation of maritime trade (Marine Insights, 2020) (see also chapter 2 of this report).

During the implementation of border closures, lockdowns and preventative measures aiming to reduce the exposure to COVID-19 risk at ports and terminals, including the temporary suspension of crew changes and prohibition of crew disembarking at port

⁵⁷ Since the first regional port State control agreement (Paris Memorandum of Understanding on Port State Control) was signed in 1982, IMO has supported the establishment of eight other regional port State control regimes, achieving a global maritime network. The areas of responsibility cover the waters of the European coastal States and the North Atlantic basin from North America to parts of Europe and the north Atlantic (Paris Memorandum of Understanding on Port State Control); Asia and part of the Pacific Ocean (Memorandum of Understanding on Port State Control in the Asia-Pacific Region); Latin America (Latin American Agreement on Port State Control of Vessels); the Caribbean (Memorandum of Understanding on Port State Control in the Caribbean Region); West and Central Africa (West and Central Africa Memorandum of Understanding on Port State Control); the Black Sea (Memorandum of Understanding on Port State Control in the Black Sea Region); the southern part of the Mediterranean Sea (Mediterranean Memorandum of Understanding on Port State Control); the Indian Ocean (Indian Ocean Memorandum of Understanding on Port State Control); and the Persian Gulf (Riyadh Memorandum of Understanding on Port State Control). The United States Coast Guard maintains a tenth port State control regime.

terminals,⁵⁸ a major issue was the need for recognition by Governments and relevant national authorities of key-worker status for those operating essential services in maritime transport, including professional seafarers and marine personnel, regardless of nationality, when in their jurisdiction. This would give them the right to transit international borders and obtain medical attention ashore.⁵⁹ Another key issue was for Governments and national authorities to allow and facilitate crew changes and repatriation upon completion of their periods of service, permitting professional seafarers and marine personnel to disembark from ships in port and transit through their territory.

In cooperation with global industry associations representing various sectors of the maritime transport industry,⁶⁰ IMO adopted a number of general measures and protocols designed to address these issues and ensure that ship crew changes could take place safely during the pandemic (Circular Letter No. 4204/Add.14). Such protocols covered the travel and movement of seafarers to and from ships for the purpose of effecting ship crew changes, which included various locations (and potential locations) throughout the process of crew change and travel and the periods of time when there might be risks that needed to be managed and controlled in the process. The circular letter contained recommendations to maritime Administrations and other relevant national authorities, such as health, customs, immigration, border control, seaport and civil aviation authorities and outlined the roles of shipping companies, agents and representatives, including crew agencies and seafarers. The information was also extended to seaports, airports and airlines involved in travel operations for ship crew changes. Despite a gradual trend towards the easing of restrictions on crew changes by authorities, such easing was subject to conditions, mainly travel history and/or nationalities of crew on board. In many cases, full prohibition or closure of borders still remained.⁶¹ Out of more

than 102 countries surveyed in July 2020, 45 countries allowed crew changes, while 57 did not.

In a joint statement issued in May 2020, the International Civil Aviation Organization, IMO and the International Labour Organization recognized that for humanitarian reasons and the need to comply with international safety and employment regulations, crew changes could not be postponed indefinitely (Circular Letter No. 4204/Add.18). They advised that from mid-June 2020, around 150,000 seafarers a month would require international flights to ensure crew changeovers could take place. To facilitate crew change, they urged Governments and local authorities to designate the following personnel as key workers: seafarers, marine personnel, fishing vessel personnel, offshore energy sector personnel, aviation personnel, air cargo supply chain personnel and service provider personnel at airports and ports, regardless of nationality. They were urged to exempt them from travel restrictions to ensure the smooth changeover of crews, their access to emergency medical treatment and if necessary, emergency repatriation. The implementation included permitting seafarers, marine personnel, fishers and offshore energy sector personnel to disembark from and embark ships in port and transit through the territory of Governments and local authorities (that is to say, to an airport) for the purpose of crew changes and repatriation and the implementation of appropriate approval and screening protocols. Gradually, more and more reports of successful crew changes were being received (Splash, 2020c).

4. Commercial law implications of the COVID-19 crisis

As highlighted in an UNCTAD policy brief (UNCTAD, 2020d), the unprecedented disruptions associated with the pandemic and its massive socioeconomic consequences are giving rise to a plethora of legal issues affecting traders across the globe (for example, delays and performance failure, liability for breach of contract, frustration and force majeure). The effects of such issues may lead to large-scale economic losses and bankruptcies, in particular for small and medium-sized enterprises, including in developing countries, and in turn overwhelm courts and legal systems. Collaborative approaches by Governments and industry, policy coherence and synergy will be required to minimize adverse effects. Industry and traders need to be encouraged to waive some of their legal rights and agree on moratoriums for payments, performance and the like where appropriate, and Governments should consider where intervention or financial assistance may be necessary.

In all cases where performance is disrupted, delayed or becomes impossible, legal consequences arise, leading to the need for dispute resolution and potential litigation involving complex jurisdictional issues in a globalized context. Unless common approaches are found to reducing the incidence of disputes and facilitate their

⁵⁸ For COVID-19-related port restrictions on vessels and crew and an interactive map of ports around the world, see Wilhelmsen, 2020.

⁵⁹ For a draft template of letters of authorization from the International Chamber of Shipping and the International Transport Workers' Federation to help seafarers and authorities recognize key worker status, see International Chamber of Shipping and International Transport Workers' Federation, 2020.

⁶⁰ BIMCO, Cruise Lines International Association, Federation of National Associations of Ship Brokers and Agents, Intercargo, Interferry, InterManager, International Air Transport Association, International Association of Ports and Harbours, International Chamber of Shipping, International Federation of Shipmasters Associations, International Marine Contractors Association, International Parcel Tankers Association, International Transport Workers' Federation, Intertanko, Protection and Indemnity Clubs and World Shipping Council. See also International Transport Workers' Federation (2020b, 2020c and 2020d).

⁶¹ For a list of countries that allow disembarkation for the purpose of crew change and related information on relevant restrictions, see BIMCO, 2020; S5 Agency World, 2020; and Waterfront Maritime Services, 2020.

resolution, for example by agreement on contractual extensions, restraint in terms of pursuing rights and legal claims, and efforts at mediation and informal dispute resolution, this could be on a scale overwhelming legal and administration of justice systems, with implications for global governance and the rule of law.⁶² Coordinated government and collective industry action is required, as well as commercial risk-allocation through standard contractual clauses drafted to address contractual rights and obligations in the light of the circumstances associated with the pandemic. As part of its response to the COVID-19 crisis, UNCTAD has already begun lending technical assistance to provide related technical advice and guidance to small and medium-sized traders and policymakers, in particular in developing countries;⁶³ two related briefing notes are under preparation.

5. Need for systemic and coordinated policy responses at the global level

The urgent need for systemic and coordinated policy responses at the global level has prompted the United Nations Global Compact to issue a call to action that identifies recommendations for urgent political action to keep global ocean-related supply chains moving (United Nations Global Compact, 2020a). The recommendations were a consolidation of the work of the COVID-19 Task Force on Geopolitical Risks and Responses initiated by the Action Platform for Sustainable Ocean Business of the Global Compact (United Nations Global Compact, 2020b). The Task Force consists of representatives from leading international companies, industry associations, financial institutions, United Nations specialized agencies and academic institutions. The call to action recognizes that:

The scale, complexity and urgency of the problem call for a comprehensive, systemic and coordinated approach at the global level. These issues cannot be effectively dealt with on a case-by-case basis, bilaterally or between a limited number of countries. An absence of decisive policy responses at the global level will likely trigger ripple effects which will reverberate through national economies and impede cross-border supplies of critical goods.

The call to action includes the following recommendations:

- Recognize the fundamental role robust international ocean-related supply chains play in the COVID-19 pandemic response.
- Pursue holistic and harmonized global cooperation and coordination to ensure the safety and integrity of ocean-related global supply chains.

- Ensure the continued cross-border flow of goods by sea to avoid disruptions to the integrity of ocean-related global supply chains.
- Adopt an internationally recognized key worker status system enabling unhindered movement, regardless of nationality, across international borders of personnel key to the safety and integrity of ocean-related supply chains.
- Implement measures to facilitate the safe and efficient cross-border movement of key personnel and flow of goods by sea.
- Adopt a uniform, evidenced-based and globally consistent approach to certification and classification procedures to ensure the safety and integrity of ocean-related global supply chains.
- Establish a system of metrics to gauge disruptions in the global ocean-related supply chains. (United Nations Global Compact, 2020a).

Detailed elaborations on the recommendations, along with suggestions for concrete actions to be taken, can be found in the annex to the aforementioned call to action.

F. SUMMARY AND POLICY CONSIDERATIONS

Technological advances, the COVID-19 pandemic and changes in the regulatory and legal environment provide a challenging environment for policymakers, who need to respond to these developments. Key issues presented and discussed above include the following.

1. Ensuring cybersecurity

The maritime industry is increasingly embracing automation, and ships and ports are becoming better connected and further integrated into information technology networks. Other trends affecting the industry are a growing shift towards digitalization and the development of smart navigation and advanced analytics. As a result, the implementation and strengthening of cybersecurity measures is becoming an essential priority for shipowners, managers and port operators. For ships, this becomes even more important regarding the need to implement IMO Resolution MSC.428(98), on Maritime Cyberrisk Management in Safety Management Systems, which encourages Administrations to ensure that cyber risks are appropriately addressed in safety management systems, starting from 1 January 2021. Thus, in preparation for the implementation of the IMO resolution during 2020 – ahead of the first inspection by the International Safety Management auditors after 1 January 2021 – shipping companies need to assess their risk exposure and develop information technology policies for inclusion in their safety management systems. Owners who fail to do so are not only exposed

⁶² Note in this context Sustainable Development Goal 16 on peace, justice and strong institutions and Goal 17 on the Global Partnership for Sustainable Development.

⁶³ Transport and trade connectivity in the age of pandemics (project 2023X), www.un.org/development/desa/da/da-response-to-covid-19/.

to cyber risks but may have their ships detained by port State control authorities that would need to enforce this requirement.

The COVID-19 outbreak has brought maritime industry stakeholders closer in their efforts to ensure supply chains continue to function. Virtual platforms have played an important role in facilitating communication and operations during this time. However, an increase in shipping cyberattacks of 400 per cent was reported between February and June 2020, exacerbated by the reduced ability of companies to sufficiently protect themselves, in particular as a result of travel restrictions, social distancing measures and economic recession.

Cyber risks are likely to continue to grow significantly, as a result of greater reliance on electronic trading and an increasing shift to virtual interactions at all levels; this heightens vulnerabilities across the globe, with a potential for crippling effects on critical supply-chains and services. Coordinated efforts towards developing appropriate protection mechanisms against cybercrime and attacks should therefore be pursued as a matter of urgency; this may require significant scaling up of investment and capacity-building for developing countries, including with respect to skilled human resources.

2. Using electronic trade documents

In the context of the pandemic, international organizations and industry have issued calls for Governments to remove restrictions on the use and processing of electronic trade documents and the need for documentation to be presented in hard copy. Governments have made significant efforts to keep their ports operational and speed up the use of new technologies, including digitalization. In addition, industry associations have been working to promote the use of electronic equivalents to the negotiable bill of lading and their acceptance by more government authorities, banks and insurers.

3. Reducing greenhouse gas emissions from international shipping and adapting transport infrastructure to the impacts of climate change

With regard to the reduction of greenhouse gas emissions from international shipping, progress was made at IMO towards achieving the levels of ambition set out in the Initial Strategy on reduction of greenhouse gas emissions from ships, including on ship energy efficiency, alternative fuels and the development of national action plans to address greenhouse gas emissions from international shipping. This includes the publication in 2020 of the fourth IMO greenhouse gas study. UNCTAD collaborates with IMO in a review of the impact assessments submitted to the Intersessional

Working Group on Reduction of Greenhouse Gas Emissions from Ships. From the perspective of developing countries, many of which are particularly vulnerable to the growing risks of climate-change impacts, it is important that their legitimate interests be taken into account in the quest to reduce emissions from international shipping.

The twenty-fifth session of the United Nations Framework Convention on Climate Change, held in Madrid in December 2019, highlighted that much remains to be done on both the domestic and international fronts if climate action is to be achieved that is consistent with the long-term goal of the Paris Agreement under the Convention.⁶⁴

In the context of climate-change adaptation and resilience-building for seaports – an issue of particular relevance to the developing world – the transport action table prepared by the Marrakech Partnership for Global Climate Action includes two distinct areas with a focus on adaptation, for transport systems and transport infrastructure, respectively, as well as related milestones for 2020, 2030 and 2050 (Marrakech Partnership for Global Climate Action, 2019a). These envisage, among others, that by 2030, all critical transport infrastructure will be climate-resilient to at least 2050. Relevant key actions and milestones for transport have also been integrated into the cross-sectoral resilience and adaptation action table, which highlights key actions and milestones for climate resilience-building (Marrakech Partnership for Global Climate Action, 2019b). UNCTAD actively contributed to the preparation of these documents. In the light of scientific projections, climate-change impacts and adaptation for critical transport infrastructure will remain key challenges, including during post-pandemic recovery.

4. Reducing pollution from shipping

There are several important areas where regulatory action has recently been taken or is under way for the protection of the marine environment and conservation and sustainable use of marine biodiversity. These are as follows: implementation of the IMO 2020 sulphur limit; ballast water management; action to address biofouling; reduction of pollution from plastics and microplastics; safety considerations of new fuel blends and alternative marine fuels; and the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction.

The implementation as of 1 January 2020 of the mandatory IMO limit of 0.5 per cent on sulphur content in ship fuel oil was considered to be relatively smooth at the outset; however, some difficulties have arisen as a result of the disruptions caused by the COVID-19

⁶⁴ Paris Agreement, article 2.1(a): “Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels...”.

crisis. In March 2020, the ban on the carriage of non-compliant fuel oil entered into force to support the implementation of the sulphur cap. However, it appears that its enforcement by port State control authorities has been suspended, owing to measures put in place to reduce inspections and contain the risk of spreading the coronavirus disease. It will be important to ensure that any delay will not adversely affect the implementation of the sulphur cap regulation in the long term.

5. Responding to the COVID-19 pandemic

The spread of the coronavirus placed the entire world – and thus the international maritime industry – in an unprecedented situation. To slow the spread of the disease and mitigate its impacts, key shipping stakeholders, including international bodies and Governments, issued a number of recommendations and guidance that aimed to ensure, first of all, that port workers and seafarers were protected from the coronavirus disease, were medically fit and had access to medical care, and that ships met international sanitary requirements.

Seafarers in particular face major challenges stemming from the pandemic. Owing to COVID-19 restrictions, many seafarers had to have their service extended on board ships after many months at sea, unable to be

replaced or repatriated after long tours of duty. This is a problematic state of affairs, both in terms of their safety and well-being and the safe operation of maritime trade. Therefore, calls have been issued to designate seafarers and other marine personnel as key workers, regardless of nationality, and to exempt them from travel restrictions, to enable crew changes. In addition, temporary guidance was developed for flag States, enabling the extension of the validity of seafarers and ship licences and certificates under mandatory instruments of the International Labour Organization and IMO. It has become more and more clear that due to the scale, complexity and urgency of the COVID-19 crisis, addressing these issues effectively calls for a comprehensive and coordinated approach at the global level.

In respect of the important and wide-ranging commercial law implications of the COVID-19 crisis and its aftermath, coordinated government and collective industry action will be required. Further, commercial risk-allocation through standard contractual clauses drafted to address legal rights and obligations will be necessary in light of the circumstances associated with the pandemic and to ensure that legal and administrative systems are not overwhelmed. In this regard, capacity-building and legal technical advice and guidance will be needed to support small and medium-sized enterprises, as well as policymakers in developing countries.