

OPINION

Shipping should review contracts before trade sanctions and Brexit bite

FEW, if any, industries are as susceptible to political influence and geopolitical pressure as the international shipping sector, *write Sebastiaan Moolenaar and Reinier Cobussen of Netherlands-based AKD law offices.*

Developments over recent months — notably the trade sanctions and tariffs imposed by the US, the EU and China, and the increasingly difficult negotiations which will lead to the withdrawal of the UK from the European Union in March next year — have only served to accentuate and increase those pressures.

The operational impact on day-to-day business of global trade sanctions enshrined in a variety of sometimes obscure government decrees, and of a changing customs landscape in Europe, may be so severe that companies should already be preparing for their impact.

But to what extent can companies position themselves for sudden political change?

Those in the global shipping industry who fail to respond in an effective and timely manner may well find themselves at a serious commercial disadvantage. The time for action is now.

Geopolitical change, particularly when it is unexpected and unanticipated, can have a significant and immediate impact on trade relations between internationally operating companies.

Even now it is still not clear what the scope of Brexit will be, and the extent and duration of US trade sanctions remain unclear.

As far as Brexit is concerned, companies may also be labouring under a false sense of security as a result of the transition period agreed between the EU and the UK, following which there will be repercussions for citizens, businesses and administrations in both the UK and the EU.

These embrace everything from new controls at the EU's outer borders, to the validity of UK-issued licences, certificates and authorisations and new conditions for data transfer.

There is no certainty at the moment that the UK and the EU can reach agreement on an orderly

withdrawal. And even if an agreement is reached, the UK's relationship with the EU will no longer be one of a member state and will thus result in a fundamentally different situation to that which existed pre-Brexit.

Therefore, everybody concerned needs to be prepared for the withdrawal of the UK from the EU on March 3, 2019, after which the UK will no longer be a party to many internal and external trade agreements concluded by and within the framework of the EU.

In practice, trade tariffs eventually lead to higher product cost, while Brexit will result in renewed customs formalities which in turn will lead to higher product cost and to expensive operational barriers resulting in delays to the transportation of goods to and from the UK, not to mention additional administration costs.

Companies will also have to source greater numbers of employees familiar with all customs-related procedures and formalities.

Such employees are already becoming increasingly difficult to find, and the situation will only get worse as the demand from governments and professional service providers increases.

Ultimately, the key issue is how to manage operational issues in order to guarantee an uninterrupted supply chain and ensure a clear understanding of who is to pay for the additional costs.

From a legal perspective, existing contracts may no longer be effective in accommodating these issues.

Contracting parties may — even unknowingly — already be contractually bound to bear the costs of more expensive products and related logistics under long-term agreements or general terms and conditions governing their contractual relationships.

For example, when selling goods under standard Incoterms Delivery Duty Paid delivery conditions to a company in the US, all extra costs resulting from increased trade tariffs and more elaborate customs formalities are to be borne by the seller.

At the same time, failing a specific escape clause in the contract, buyers may be held to certain

contractually fixed minimum purchase requirements, even if product prices increase due to external factors.

Contracts may also have strict liability clauses in case of late delivery. Given the likelihood of congestion at UK border terminals following Brexit, this may cause serious liability issues.

Specific territorial references in contracts may also assume a different meaning under Brexit.

For example, what will 'exclusivity in the EU' mean to a commercial agent focusing on the UK market?

Choice of law and jurisdiction clauses in contracts and standard terms may also become less certain than predicted at the time of drafting. It remains to be seen whether judgments from UK and EU member-state courts can be reciprocally enforced.

So what can be done to safeguard the interests of parties to shipping-related contracts during this period of acute political uncertainty?

Firstly, new contracts should be negotiated bearing in mind that international political relations are not as stable as previously thought.

Tailor-made clauses which address the consequences

of Brexit or the imposition of future trade tariffs and barriers should be drawn up to establish the rights and obligations of the parties when such events materialize.

This will allow commercial interests to settle the possible consequences of such issues according to a previously agreed roadmap, rather than having to find themselves in a legal vacuum in which it is very unsure whether existing legal concepts like force majeure or unforeseen circumstances will allow them the necessary relief.

The European Commission has officially encouraged commercial interests who may be affected by the UK's withdrawal to make the necessary preparations, and to make them now.

Among other things, existing agreements and general terms and conditions should be reviewed for their implicit impact on liability for late delivery and for volume commitments, as well as for exposure to additional costs relating to tariffs, customs formalities and the provision of logistics services.

If these risks turn out to be unacceptable, it is better to think through their consequences in advance rather than wait until it is too late to avoid a negative outcome.