

# NVOCC - Curse or Gift

The challenges of setting up and operating a global non-vessel operating common carrier in consideration of the demands of an international logistics company.

WCL WilConLog e.K.



# NVOCC – What is it?

A Non-Vessel-Operating Common Carrier (NVOCC) is defined as follows:

- A carrier that offers ocean transportation to the public, issues its own bill of lading or equivalent document, and does not operate the vessels used for this transportation.
- It is a shipper in its relationship with the Vessel-Operating Common Carrier (VOCC) involved in the movement of cargo.
- The NVOCC is a vital organisational structure of a freight forwarder or logistics service provider operating globally.

# How does the FMC view the NVOCC?

- According to the FMC's definition, ocean transportation intermediaries (OTIs) are either ocean freight forwarders (OFFs) or non-vessel-operating common carriers (NVOCCs), and are regulated by the FMC under the Shipping Act of 1984.
- Many FMC-licensed NVOCCs are unaware of the requirements and risks, and have not organised their documents and processes to comply with the FMC's rules and regulations. Often, their liability risks are not covered in the event of claims.
- The FMC strictly differentiates between an 'Ocean Freight Forwarder' and a 'NVOCC'. A freight forwarder must consider that, as an ocean freight forwarder, they are only permitted to charge the customer according to the charges of the vessel operating common carrier (VOCC), i.e. they may not add any profit (besides handling fees, etc.). Further details can be found on the FMC website ([www.fmc.gov/ocean-transport-intermediaries](http://www.fmc.gov/ocean-transport-intermediaries)).
- Damages, claims and fines (potentially amounting to millions of US dollars) imposed by the FMC and other government bodies prove that many NVOCCs are not organised professionally, often due to cost and time constraints. Such an 'accident' may go unnoticed for years until it arises and endangers the ongoing business of a company or even its core operations.

# NVOCC Compliance Checklist (I)

- Has it been confirmed that all ocean freight contracts, rates and conditions with the VOCC are concluded for the NVOCC, rather than the freight forwarder? Are all ocean freight quotations issued by the freight forwarder 'as agent' of the NVOCC? This is particularly important in Germany! Otherwise, as a fixed-cost forwarder, you may run into a huge liability under German law.
- Where is my NVOCC organisation registered and licensed? Have all legal and tax aspects been considered? (Example: Which entity will be paid the legally agreed volume incentives in the event that you have negotiated such incentives with a VOCC?)
- Is there a strict separation between the NVOCC entity and the shareholders with regard to decision-making and management processes? Have you ensured that this separation is structured and documented sufficiently to prevent a claimant from filing a claim against the shareholders or parent company (i.e. to prevent the corporate veil from being pierced)?
- Is risk management organised properly? Does the company structure, working processes and documentation cope with substantial claims? Is insurance coverage strictly separate from the parent company, and does it cover expected claims and other liabilities?

# NVOCC Compliance Checklist (II)

- Is the FMC registration valid, and has the FMC bond been extended or renewed in a timely manner? Have all service contracts and NVOCC tariffs and conditions been registered and published in accordance with the FMC's rules and regulations?
- Has the NVOCC registration in the People's Republic of China been completed in accordance with the law and government regulations? Are the branch offices (agents) also registered and licensed as NVOCC operators resp. agents?
- How is your company's claims management organised and structured in the event of substantial claims? Have you considered the liability of the NVOCC as carrier as well as the liability of the forwarder?
- Do you have valid NVOCC agency contracts, and are your agents (including subsidiaries and third-party agents) sufficiently covered by their own insurance for liabilities and errors and omissions?

The US FMC enforces its rules strictly, and other countries are also tightening their NVOCC regulations.

# Known Issues of NVOCC Activities (I)

## **Piercing the company's veil**

A major logistics company was faced with a cargo claim of around 60 million USD from its NVOCC organisation. In the worst case scenario, the parent company would have had to bear this cost. Ultimately, a commercial settlement of around 6 million USD was reached. The company immediately changed the NVOCC's place of registration and its organisational structure. Other major logistics companies have done the same in the meantime, considering the implications for their own NVOCC registration.

## **Legal and tax implications of NVOCC registration**

Many logistics companies operating an NVOCC have relocated their registration to Hong Kong or other suitable locations to avoid piercing the corporate veil and tax issues. The experience and treatment of claim cases by the respective courts was also considered.

## **NVOCC versus forwarder's liability in Germany**

German forwarders have agreed with their customers to apply the ADSp. If the forwarder has not quoted rates as an agent on behalf of an NVOCC, the NVOCC B/L terms and conditions cannot be applied, and the so-called 'Haftung als Fixkostenspediteur' will come into effect.

# Known Issues of NVOCC Activities (II)

## **FMC registration and adherence to FMC regulations**

As mentioned, many companies did not adhere to the FMC's strict tariff and rate filing rules. Consequently, companies were subject to substantial penalties. Since 1 October 2013, the FMC has ended the discrimination against foreign-based NVOCCs, meaning that no tariff filing is necessary anymore. Only the general tariff terms and conditions need to be published. To gain access to the new rules, a fully updated NVOCC registration had to be completed by 17 October 2013. Instead of the former rate filing, Negotiated Rate Agreements (NRAs) must now be signed with customers. These agreements must be signed before accepting bookings, maintained in-house, and submitted to the FMC when requested.

**FMC registrations shall be effective for a period of three (3) years.** Thereafter, they will be renewed for sequential three-year periods upon submission of an updated registration form.

# Known Issues of NVOCC Activities (II)

## PRC registration issues

In the 1990s, thousands of NVOCC and forwarders' offices were closed down overnight, and the Chinese authorities handed out stiff fines. A few years ago, a major international logistics company faced severe problems when its China NVOCC licence was found to be fake by the Ministry of Transport after years of operation. There are still cases of foreign NVOCCs and their Chinese agent branch offices having incomplete NVOCC licences.

# WilConLog Know-How and Services (I)

- We have proven our competences and specialised knowledge in advising, assisting and managing NVOCC organisations for logistics service providers. We have experience in setting up, registering and restructuring NVOCCs, creating NVOCC cargo documents, contracts and operational procedures, and implementing these based on detailed project/action plans.
- We have successfully advised, managed and/or assisted in the restructuring of the internal workflows and processes of medium-sized and large logistics service providers, taking into account their NVOCC requirements.
- We are ready to assess the current status of your company's NVOCC setup, suggest improvements to any shortcomings, and assist with implementing changes if requested.
- We can also offer you a blueprint for professional NVOCC documentation that has been developed in collaboration with maritime lawyers in the USA, Europe and Asia, and endorsed by a major global insurance broker.

# WilConLog Know-How and Services (II)

- Based on our years of experience, we propose setting up (or shifting) a NVOCC entity in Hong Kong.
- Setting up an NVOCC in Hong Kong would avoid potential taxation issues relating to NVOCC earnings and costs, such as management fees, B/L fees and VIDs.
  - EU regulations
  - local taxation laws and regulations, especially tax allocations.
  - the treatment of earnings and payouts for NVOCC operations.
  - strict money control rules regarding income and payouts in the EU, USA, etc.
  - High tax payments when not outsourcing management to Hong Kong.
- As per Hong Kong taxation rules, any earnings from or payouts to overseas parties are not subject to Hong Kong inland tax. Only income from local activities (e.g. earnings from B/L fees charged to an agent of the NVOCC) is subject to tax.
- When there is no income from any Hong Kong operation, an audit report is not required by Hong Kong law.

# Thanks!

Any questions?

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