NVOCC - Curse or Gift ?

Challenges of Set-up and Operation of a global Non-Vessel Operating Common Carrier under Consideration of the Demands of an international Logistics Company

WCL – Worldwide Consultants in Logistics

Dr. Wolfgang Draeger

18/09/2015

Non-Vessel-Operating-Common-Carrier (NVOCC) – What is that?

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

- a common carrier that holds itself out to the public to provide ocean transportation, issues its own house bill of lading or equivalent document, and does not operate the vessels by which ocean transportation is provided.
- a shipper in its relationship with the vessel-operating common carrier involved in the movement of cargo.
- The Non-Vessel-Operating-Common-Carrier (NVOCC) is a vital organizational setup/structure of a globally acting freight forwarder/logistics service provider.

How does the FMC view the NVOCC?

- As per FMC definition Ocean Transportation Intermediaries (OTIs) are either Ocean Freight Forwarders (OFF) or Non-Vessel-Operating Common Carriers (NVOCC) and are regulated by the FMC pursuant to the Shipping Act of 1984.

Non-Vessel-Operating-Common-Carrier (NVOCC) – A Curse or a Gift?

- Many FMC licensed NVOCC are not aware of the requirements and risks and have not organized their documents and processes to comply with the rules and regulations of the FMC. Often their liability risks are not covered in case of claims.

- The FMC is strictly differentiating between an „Ocean Freight Forwarder“ and a “NVOCC”. Often a freight forwarder does not consider that as Ocean Freight Forwarder he is only allowed to charge the customer as per outlays according the charges of the vessel operation common carrier (VOCC), i.e. the freight forwarder may not add any profit on top (besides handling fees etc.). Please check further details as per content of the FMC website (www.fmc.gov under Ocean Transport Intermediaries).

- Damages, Claims und fines (potentially millions of US Dollars) imposed by FMC and other governmental bodies, prove that many NVOCC are not organized on a professional basis, often due to cost and time constraints. It may go unnoticed over years until such an “accident” may arise and endanger the running business of a company or even its core substance.

News: Compromise Agreements Recover $503,000 in Penalties (October 10, 2014) (FCC Logistics = USD 70K, Sea Central = 85K, CCL = 100K, Orient Star = 100K -> mostly tariff and wrongly declared cargoes)

Therefore each and every freight logistic company should carefully check the following questions (1)

- Has it been enforced that all ocean freight contracts, rates and conditions with the VOCC are concluded as and for the NVOCC and not as freight forwarder? Are all ocean freight quotations by the freight forwarder issued “as agent” of the NVOCC? This is particularly important in Germany! (Otherwise you have the risk as fixed-cost-forwarder with an unlimited liability as per German law).

- Where is my NVOCC organization registered and licensed? Have all legal and tax aspects been considered? (Example: To which entity will legally agreed volume incentives be paid to in case you have negotiated such incentives with a VOCC?)

- Is there a strict separation between the NVOCC entity and the shareholders in view of decision making and management processes? Have you made sure that the separation is sufficiently structured and documented to ensure that a claimant cannot file a claim against the shareholders or mother company (i.e. not to pierce the corporate veil!)?

- Is the risk management organized properly? Do the company structure, working processes and documents cope with cases of substantial claims? Is the insurance coverage strictly separated from the mother company and does it cover expected claims and other liabilities?

Therefore each and every freight logistic company should carefully check the following questions (2)

- Is the FMC registration valid and is the FMC bond extended/renewed timely? Are all service contracts, NVOCC tariffs and conditions registered and published as per FMC rules and regulations?

- Is the NVOCC registration in P.R. of China done according the law and governmental regulations? Are especially the Branch Offices (Agents) registered and licensed as NVOCC operator too?

- How is your company's claim management organized and structured in case of substantial claims? (Did you consider the NVOCC carrier's liability as well as forwarder's liability?)

- Do you have valid NVOCC agency contracts and are your agents (subsidiaries and third party agents) covered sufficiently by their own insurance for liabilities and errors & omissions?

Not only the US FMC is very strict in adherence to the rules and regulations, but other countries like China, Canada and Japan are enforcing their NVOCC rules more and more.

Known Major Issues of NVOCC Activities (1)

- **Piercing of company‘s veil**

  A major logistic company was faced by a cargo claim of about 60 million USD of his NVOCC organization, which the mother company would have had to bear in worst case. Finally it came to a commercial settlement of about 6 million USD. The company immediately changed the place of NVOCC registration and the organizational structure.

  Other major logistics companies did the same in the meantime considering that case too.

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

  Many logistics companies, operating a NVOCC, did relocate their NVOCC registration to Hong Kong or other suitable locations to avoid piercing of company‘s veil and tax problems. The expierence and treatment of claim cases by the respective court was considered too.

- **NVOCC versus Forwarder‘s Liability in Germany**

  German Forwarders having agreed with their customers to apply the “ADSp”, are running a major risk in case of “fire aboard” as well as “navigational error”. If the forwarder has not quoted rates as agent of a NVOCC, the NVOCC B/L terms and conditions cannot be applied. Thus the ADSp will apply and these do not include the above risks. Recourse against VOCC’s is not possible because VOCC B/L’s exclude the above risks.

Known Major Issues of NVOCC Activities (2)

- **FMC Registration and Adherance to FMC Regulations**

As said, many companies did not adhere to the strict tariff and rate filing rules of the FMC. Therefore companies paid stiff penalties.

Since October 1, 2013 FMC has ended the discrimination of foreign based NVOCC and no tariff filing is necessary anymore. Just the general tariff terms & conditions have to be published. In order to get access to the new rules a complete renewed NVOCC registration had to be done before October 17, 2013.

Instead of former rate filing now Negotiated Rate Agreements (NRA) have to be signed with customers before accepting the booking, maintained in-house and have to be submitted to FMC when requested.

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

Known Major Issues of NVOCC Activities (3)

- **PRC Registration issues**

  In the 90‘s thousands NVOCC and forwarders offices were closed down overnight and stiff fines were handed out by Chinese authorities.

  Few years ago a major international logistic company faced severe problems as his China NVOCC license was faked by own staff, which was detected by Ministry of Transport after years of operation.

  There are still cases of incomplete NVOCC licenses for foreign NVOCCs as well as their Chinese agents branch offices.

WCL Know-How and Services (1)

- A comprehensive article on this subject has been published by the German newspaper DVZ 41/42 05.04.2012 page 10.

- We, the company WCL, represented by Mr. Hans-Jürgen Willam and Dr. Wolfgang Draeger, have proven our competence and very special knowledge for advising, assisting and managing a NVOCC organization for logistics service providers in respect of a professional NVOCC setup, registration and/or restructuring, creation of NVOCC cargo documents, contracts and operational procedures and implementation based on a detailed project/action plan.

- We have advised, managed and/or assisted the restructuring of internal work flows/ processes of medium size and large logistics service providers under consideration of their NVOCC requirements successfully.

- We are ready to check the current status of the NVOCC setup of your company, propose improvements of shortcomings and execute/assist changes if so requested.

- Particularly we are able to offer you a blue print of professional NVOCC documentation, which has been worked out together and confirmed by maritime lawyers in the USA, Europe and Asia and has been endorsed by a large global insurance broker as well.

WCL Know-How and Services (2)

- Based on our experiences over years we propose to set up/shift any NVOCC in Hong Kong.

- The set up of an NVOCC in Hong Kong would avoid problems of taxations of NVOCC earnings and costs (being management fees, B/L fees, VIDs etc), which could arise due to

  - EU regulations
  - Local taxation laws and regulations, especially tax allocations
  - Treatment of earnings and payouts for NVOCC operations
  - Strict money control rules of income/payouts of EU, USA …
  - High tax payment, when not outsourcing the management to Hong Kong

- As per Hong Kong Taxation rules any earnings from/payouts to oversee parties are not subject to Hong Kong inland tax. Only income from local activities (f.e. earnings from B/L fees charged to an agent of the NVOCC) are subject to tax.

- When there is no income from any HKG operation – no audit report is required by HKG law.

Please contact us - we will be more than happy to assist you.