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FMC Notice of Inquiry on Carrier Billing Practices

Comments submitted by FIATA International Federation of Freight Forwarders Associations in response to the FMC Notice of Inquiry (NOI) on Vessel-Operating Common Carrier (VOCC) Definition and Application of the Term 'Merchant' in Bills of Lading

Introduction

FIATA is a nongovernmental, membership-based organization representing freight forwarders and supply chain managers in some 150 countries. FIATA's membership is composed of 108 national association members and more than 5,500 individual members, overall representing an industry of 40,000 freight forwarding and logistics firms worldwide.

FIATA welcomes the inquiry initiated by the FMC on carrier billing practices, which touches on an important topic of ongoing concern amongst the FIATA membership. The inclusion of third-party intermediaries via Vessel-Operating Common Carriers' (VOCCs) broadly defined 'Merchant' clauses is a common phenomenon, through which carriers have sought to extend liability beyond the contractual parties to those who do not have any beneficial interest in the cargo in question. In doing so, such third parties are often subjected to joint and several liability, despite not having consented to such terms and conditions of the bill of lading. This is particularly noted in relation to liability situations concerning abandoned cargo, as well as demurrage and detention charges. Such issue is exacerbated by the unequal bargaining power as between the VOCCs and the freight forwarders and other third-party intermediaries, which often means that the VOCC prevails in the event of a dispute.

FIATA invites the FMC to take good note of its comments herewith submitted in response to the NOI, and looks forward to the outcome of its thorough investigation in the interests of encouraging a level playing field within the supply chain.

Application of the definition of 'Merchant' in VOCC bills of lading

The bill of lading is a contract signed between two parties, being the shipper and the carrier. The inclusion of the intermediary via a 'Merchant' clause is a recent phenomenon over the last decade, providing for the ability of the carrier to hold an intermediary responsible or accountable for acts



and/or omissions of others, despite not having any beneficial interest in the cargo. This includes freight forwarders acting as agent only and identified as a 'notify party'.

The wording of such 'Merchant' clauses is, for the most part, widespread and homogeneous in construction. Commonly, it will define a 'Merchant' as including the shipper, consignor, consignee, receiver and owner of the goods, and 'any person acting on their behalf'. Below are some specific examples of such clauses in practice:

- **Evergreen:** "Merchant" includes the shipper, Holder, consignee, the receiver of the Goods, any person owning or entitled to the possession of the Goods or this Bill and anyone acting on behalf of any such persons.
- **One:** "Merchant" includes the Shipper, consignor, consignee, owner and receiver of the Goods, and the holder of this Bill and any other person acting on their behalf.

In other terms and conditions, it also states: "Merchant" includes the Shipper, Consignee, owner, Person owning or entitled to possession of the Goods or of this Bill, Receiver, Holder, and anyone acting on behalf of any such person, including but not limited to agents, servants, independent contractors, non-vessel operating common carriers ("NVOCCs"), and freight forwarders;

- **APL:** "Merchant" includes the Shipper, Consignee, Receiver, Holder of the Bill of Lading, Owner of the cargo or Person entitled to the possession of the cargo or having a present or future interest in the Goods and the servants and agents of any of these, all of whom shall be jointly and severally liable to the Carrier for the payment of all Freight, and for the performance of the obligations of any of them under this Bill of Lading.
- **Cosco:** "Merchant" includes the Consignor, the Shipper, the Receiver, the Consignee, the Owner of the Goods, the Holder or Endorsee of this Bill of Lading, any Person owing, entitled to or claiming the possession of the Goods or this Bill of Lading and anyone acting on behalf of any such person.
- **Hamburg Sud:** "Merchant" includes the booking party, shipper, consignee, receiver, holder of this bill of lading, or any person owning or entitled to possession of the Goods or of this bill of lading, and the servants and agents and principals of any of these, all of whom shall be jointly and severally liable to Carrier for the payment of all Charges, and for the performance of the obligations of any of them under this bill of lading.
- **MSC:** "Merchant" includes the Shipper, Consignee, holder of this Bill of Lading, the receiver of the Goods and any Person owning, entitled to or claiming the possession of the Goods or of this Bill of Lading or anyone acting on behalf of this Person.
- **CMA CGM:** "Merchant" includes the Shipper, Holder, Consignee, Receiver of the Goods, any Person owning or entitled to the possession of the Goods or of this Bill of Lading and anyone acting on behalf of any such Person.
- **MARFRET:** "Merchant" includes the shipper, the receiver, the consignee of the goods, the consignor, any person possessing or entitled to possession of the goods described in the bill



of lading, the Carrier this bill of lading or any document proving the existence of the contract of carriage, as well as any other person acting on behalf of the parties listed above.

- **Maersk:** “Merchant” includes the Shipper, Holder, Consignee, Receiver of the Goods, any Person owning or entitled to the possession of the Goods or of this bill of lading and anyone acting on behalf of such Person.
- **OOCL:** “Merchant” includes the Shipper, consignor, endorsee, transferee, Holder of this document, consignee, receiver of the Goods, any person or entity owning or entitled to the possession of the Goods or of this Bill of Lading and anyone acting on behalf of any such persons.

As the above example clauses demonstrate, broadly defined ‘Merchant’ clauses have become common and widespread in recent years. Such practice should be distinguished from the Himalaya Clause, which purports to extend certain protections in the bill of lading to parties who actually carry out the maritime activities contemplated in the bill of lading, despite not being the carrier who is party to the bill of lading. In such instance, those parties gain the benefit of those protections by carrying out the carrier’s transportation obligations, and this has been found to be commercially reasonable and necessary. That is in no way analogous to a ‘Merchant’ clause which purports to place all the obligations, and not the benefits, of the contractual shipper on any party listed in the clause, regardless of whether they take any action in respect of, or have any interest in, the cargo. Extending carrier protections to performing parties is a completely different matter to extending shipper obligations to agents with no beneficial interest in the cargo.

Such asymmetry in requisite rights and obligations are noted with carriers, whilst increasingly holding forwarders responsible for charges as principals captured by the ‘Merchant’ clause, frequently refusing to deal with the forwarder as agent when something goes wrong in a movement. The forwarder is prevented from giving instructions and mitigating damages, but will be held responsible for the charges that are incurred.

Accordingly, it is considered that the inclusion of such third-party intermediaries that are not party to, and have not consented to the terms of the contract, is contrary to the notion of privity of contract and ordinary contract law principles, thus casting the net far further for the attribution of liability. In practice, it is almost impossible to get ocean carriers to accept any change in their general terms and conditions printed on the reverse of their bills of lading. It should be noted that the French Supreme Court has previously held that the final drafting of a bill of lading is such as to exonerate persons who had ceased to appear in the bill of lading, in constituting a novation by change of debtor¹.

¹ Cass. com., 7 juill.2009, n° 08-17375



Whether the definition, as applied, subjects third parties who are not in contractual privity with the carrier to joint or several liability

As can be seen from the various examples cited above, joint and several liability is often included directly within the definition of 'Merchant'. Even where the definition does not include any reference to joint and several liability, it is often included in another article within the terms and conditions. Below are some specific examples which demonstrate that all mentioned ocean carriers subject those falling within their broad definition of 'Merchant' to joint and several liability, including third parties that have not consented to be bound by, or otherwise accept, the terms and conditions of the bill of lading:

- **Maersk** (Art. 15 § 1): All of the Persons coming within the definition of Merchant in clause 1, including any principal of such Person, shall be jointly and severally liable to the Carrier for the due fulfilment of all obligations undertaken by the Merchant in this bill of lading.
- **OOCL** (Art. 15 § 4): All the persons coming within the definition of Merchant shall be and remain jointly and severally responsible for all freight and charges due under this Bill of Lading, applicable tariffs and/or contracts together with any court costs, expenses and reasonable attorney fees incurred in collecting any sums due to Carrier.
- **Evergreen** (Art. 14 § 4): The Merchant of the Goods shall be jointly and severally liable to Carrier for the payment of all freight, Bunker Adjustment Factor (BAF), Currency Adjustment Factor (CAF), Terminal Handling Charge (THC), demurrage, detention, General Average, salvage and other charges, including but not limited to court costs, expenses and reasonable attorney's fees incurred in collecting sums due to the Carrier. Payment of ocean freight and charges to a freight forwarder, broker or anyone other than the Carrier, or its authorized agent, shall not be deemed payment to the Carrier and shall be made at payer's sole risk.
- **One** (Art. 23 § 6): The shipper, consignor, consignee, owner or receiver of the Goods and holder of this Bill of Lading shall be jointly and severally liable to the Carrier for the payment of all freight and charges and for the performance of the obligation of each of them hereunder.
Or, in the other terms and conditions found, in Art. 13 § 1): All of the Persons coming within the definition of Merchant in Clause 1.1 shall be jointly and severally liable to the Carrier for the due fulfilment of all obligations of the Merchant in this Bill
- **Cosco** (Art. 13 § 1): The parties defined as Merchant in clause 1 hereof shall, where applicable, be jointly and severally liable to the Carrier for the due fulfilment of all obligations undertaken by any of them under this Bill of Lading.

Consequently, such third parties will be bound to pay charges that the shipper is unable or unwilling to pay. Such practice constitutes overreaching on the part of the carriers in a blanket attempt to attribute liability to a party to pay charges that should not be their responsibility in the first place. It logically follows from this practice that a shipper or consignee can theoretically designate any third party as a 'notify party' without their knowledge or consent, automatically making them financially liable for shipper or consignee payment obligations.



Whether carriers have enforced the definition of merchant against third parties that have not consented to be bound by, or otherwise accept, the terms and conditions of the bill of lading

Numerous concerns have been expressed to FIATA and its national association members regarding claims made by ocean carriers based upon the merchant clause of their bill of lading. In these situations, the freight forwarder either acted as booking party, as agent for the shipper, or as notify party. This issue arises frequently in the case of abandoned cargo, as well as in the case of demurrage and detention charges billed after delivery, where it is either impossible or very difficult for carriers to recover from the cargo interests. Whilst noting the lack of case law on this matter, in certain jurisdictions, findings have been in favour of the freight forwarder, either because they were not deemed to fall within the definition of 'merchant', did not have knowledge of the bill of lading terms and conditions, or did not become party to the contract of carriage. In other jurisdictions, where it was clear that the freight forwarder was an intermediary and acting as agent, it was held that the agent cannot be liable as agent. Nevertheless, such defence would often have to be established in litigation as the carriers have tended to continue to look to the freight forwarder for these claims, in the event that the other parties have disappeared or refused to pay.

Where demurrage and detention charges are concerned, the cost of litigation is often a consideration in the ability to successfully oppose such wrongful attribution of liability. Accordingly, carriers are generally successful in exerting commercial pressure on the forwarder to pay the sums to continue doing business, whether or not they are legally entitled to do so. As the FMC has previously noted in its Final Rule on Demurrage and Detention however, the total sum of such charges is enormous.

It has further been brought to the attention of FIATA that ocean carriers often try to force freight forwarders into signing letters which state that the freight forwarder agrees to be bound by the contract of carriage and to be jointly and severally liable for all costs and damages in connection to the contract of carriage. Concerns have been raised that some carriers even refuse to deliver the cargo or the bill of lading to a freight forwarder without having signed such a letter.

Such practices are illogical and would seem contrary to legal principles, effectively subjecting an unrelated party to charges by 'association'. In addition, a linked issue is recalled in relation to situations of illegal liens operated by shipping lines. In instances of abandonment or other charges, the shipping line has the power to freeze credit on any other shipments in the forwarder's possession in the event of a dispute. Though illegal, the need to unfreeze credit combined with the cost of getting a Court injunction often means that the shipping line wins by force. Accordingly, the imbalance in power as between the carrier and the third-party intermediary often puts the third party in a precarious position through which carriers are able to hold them liable for any and all charges under the 'Merchant' clause.



Conclusion

Based on the foregoing comments and example clauses, FIATA considers that this is an important topic of concern for freight forwarders, supply chain operators, and other third-party intermediaries involved in the handling and transportation of the goods. As noted, it has become common and widespread practice in recent years for 'Merchant' clauses to (1) include catch-all wording that targets third party intermediaries and agents, (2) subject them to joint and several liability, and (3) enforce such clauses via undue commercial pressure and illegal means. FIATA welcomes the work of the FMC in conducting this inquiry, and encourages it to take FIATA's comments into account for the interests of a fair and level playing field.