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Concerns as to the attribution of liability in Vessel-Operating Common Carrier billing practices

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Introduction

It has been brought to FIATA's attention that certain Vessel-Operating Common Carriers (VOCC) have requested Non-Vessel Operating Common Carriers (NVOCCs), or freight forwarders and groupage operators, to sign Letters of Undertaking (LoUs) in relation to the acceptance of bookings. The terms presented in such LoUs raise serious concerns from a liability standpoint for the freight forwarding community, and attempt to blur the distinction between freight forwarders acting as agents, and their clients, the cargo owners. The effect of this is to extend liability beyond the contractual parties to those who do not have any beneficial interest in the cargo in question.

Such practices fall foul of general and recognized principles of contract law in many jurisdictions. FIATA recommends that freight forwarders are mindful of this to ensure that they do not unnecessarily bind themselves to onerous and far-reaching liabilities.

VOCC attempts to extend liability through LoUs

FIATA notes that VOCCs commonly attempt to extend liability beyond the contractual parties to third-party intermediaries, such as freight forwarders, through broadly defined 'Merchant' clauses. This common phenomenon seeks to attribute joint and several liability to those who do not have any beneficial interest in the cargo in question, despite often not being parties to the contract of carriage and therefore not having consented to such terms and conditions of the bill of lading. This is contrary to the contract law principles of privity of contract.

FIATA has been working closely on this topic to ensure that freight forwarders are made aware of the consequences of such practices. In November 2020, FIATA, through the collaborative efforts of its Working Group Sea Transport and Advisory Body on Legal Matters, submitted [comments to the US Federal Maritime Commission's Notice of Inquiry](#) in the interests of encouraging a level playing field within the supply chain.



The requests made by VOCCs for freight forwarders to sign LoUs as a precondition to the acceptance of bookings appear to take this practice even further in the instance that the freight forwarder is acting as agent. Such broadly worded LoUs would be sufficient to hold freight forwarders liable for a myriad of different aspects, without even needing to invoke reference to the 'Merchant' clause. Regardless of whether the freight forwarder is acting as principal or agent, the LoUs in question require the freight forwarder to assume joint and several responsibility for all obligations to be borne or assumed by the 'Merchant' under the terms of the bill of lading, as well as those of the third-party shipper. This includes full liability on the part of the freight forwarder as to:

- The payment of all freight, charges or costs in respect of the cargo in question without limitation, including in the event of abandoned or uncollected goods; and
- The accuracy and completeness of any and all information provided by the carrier concerning the contract of carriage, and compliance with any applicable legislation or regulations including but not limited to sanctions, Verified Gross Mass (VGM), and dangerous goods.

Such liability is particularly onerous in relation to situations concerning [abandoned cargo](#), as well as [demurrage and detention charges](#), both of which have the potential to rapidly put freight forwarders in precarious positions with gargantuan costs. FIATA has previously provided information on both topics for the benefit of the freight forwarding community.

FIATA recommendations

FIATA considers that such attempts by VOCCs to extend the liability of freight forwarders, far beyond what should be required of them as agents, are contrary to the general principles of law and equity and should not be permitted. FIATA further notes the unequal bargaining power as between the VOCCs and the freight forwarders and other third-party intermediaries, and considers that such practices constitute overreaching on the part of the carriers in a blanket attempt to apportion liability to as many parties as possible so as to extract payment of charges that should never have been the responsibility of those intermediaries in the first place.

Where freight forwarders are acting as agent, FIATA strongly advises against signing any such LoU. In such instances, the shipper and carrier are in a direct contractual arrangement under the bill of lading, which is a contract signed by those two parties. The freight forwarder is not a party to such contract, and as such, cannot be held liable under the terms of the contract under the principles of privity of contract. The imposition of such terms as provided for in these LoUs seeks to change the general principles of law as they relate to the distinction between acting as agent and as principal. Consequently, such third parties will be bound to pay charges that the shipper is unable or unwilling to pay. This may also pose issues for forwarders' insurance policies as it adds a further, probably uncovered, basis of liability.

Such scenario should be distinguished from instances where the forwarder is acting as carrier. In such circumstances, the forwarder is the shipper, being the principal, and therefore a party to the contract of carriage. Nevertheless, it is important to note that signing such LoUs is also not required, and forwarders acting as principal should note that such requests may constitute discrimination where non-forwarder shippers are not required to sign them.



Freight forwarders should therefore be mindful of the terms of their agreements with VOCCs, and should refrain from signing any such LoUs that attempt to assign such extensions of liability to freight forwarders. Where freight forwarders do sign such letters, they should be signed with a caveat that it does not apply if the forwarder is acting as an agent for the customer, who is then in a contractual agreement with the shipping line.

It is underlined that treatment of such liability situations will vary depending on the specific laws of the jurisdiction in question, and it is recommended that freight forwarders seek independent legal advice.

This document was put together by the FIATA Headquarters with the collaboration of its Advisory Body on Legal Matters and Working Group Sea Transport, and is NOT to be construed as providing legal advice. FIATA recommends that readers seek independent legal advice if they have any questions on dealing with their specific circumstances. It is recommended that the reader adjust and implement the recommended measures in accordance with the applicable laws and regulations in their jurisdiction, its corporate structure, business model and risk control requirements in the country or geographic areas where it is operating. FIATA accepts no liability for the consequences of reliance on the contents of this document.