



The US Ocean Shipping Reform Act 2022

A guide for freight forwarders on its key impacts and next steps

Key Takeaways:

- Incomplete invoice or unreasonable detention and demurrage charges? No need to pay.
- Additional compliance for NVOCCs if they impose charges in addition to those originating from ocean carriers and terminals. Therefore, invoice any administrative fees clearly and separately.
- Carrier retaliation is prohibited, new rulemaking on unreasonable refusal to deal or negotiate with respect to vessel space will be out by the end of 2022.
- Is the ocean carrier not responding to shipper concerns? FMC now facilitates dispute resolution.
- Publication of FMC findings on violations of OSRA 2022 will help consolidate evidence of unfair practices by ocean carriers. Encourage your regional regulators to check for similar practices.

Introduction

The United States' Ocean Shipping Reform Act of 2022 ('OSRA 2022'), effective immediately from 16 June 2022, gives forwarders an ideal yet limited time window to strengthen their position in the supply chain. The Act reins in the ocean carriers with increased oversight, with no phase-in period included within its provisions, meaning that any violations by carriers will result in immediate refund orders and even civil penalties. The Act mandates minimum service standards to be provided to the customers of ocean carriers and marine terminal operators.

The OSRA 2022 revises requirements governing ocean shipping to increase the authority of the US Federal Maritime Commission (FMC) to promote the growth and development of American exports through an ocean transportation system that is competitive, efficient, and economical.¹ The Act also emphasises the reliability of the marketplace as one of its purposes.² It also prohibits common ocean carriers, marine terminal operators, or ocean transportation intermediaries from unreasonably refusing cargo space when available or resorting to other unfair or unjustly discriminatory and retaliatory methods.

¹ OSRA, 2022, Sec.2 (2).

² OSRA, 2022, Sec. 2(4).



Key provisions for freight forwarders

1. **There is no obligation to pay detention and demurrage (D & D) charges imposed if any elements of a complete invoice, as defined in OSRA 2022³, are missing.** Mandatory elements to be included on the invoice include: dates of container availability, return date, time allowed in free days, its start and end date, and the applicable FMC demurrage and detention rule on which the daily rate was based amongst others. In this context, some ocean liners have been seeking guarantees to release containers while they assess their charges in compliance with OSRA 2022. Forwarders should note that such guarantees will become unenforceable if the charges are found to be unreasonable.
2. **NVOCC forwarders also need to comply with conditions applicable to ocean carriers, however, there is a safe harbour clause shielding them liability in certain situations.** The safe harbour clause is aimed at protecting NVOCCs in situations where they pass detention and demurrage charges on to their customers, originating solely from carriers and terminals, and over which they have no control. Freight forwarding NVOCCs must also update their billing requirements to reflect the essential elements of an invoice noted in the Act.

FIATA recommends NVOCC forwarders bill their administrative and other such fees, if any, clearly and separately from the carrier's D & D charges, as it may lead to situations of having to defend the reasonableness of such charges before the US-FMC. The FMC rules are based on reasons for delay and whether the shipper had taken sufficient steps to maintain their timelines but could not for reasons beyond their control. In the future, the industry can expect the emergence of a set of instances wherein levying D & D charges are considered on their acceptability.

3. **Carrier retaliation is clearly prohibited**, addressing issues regarding fear of retaliation which has long been an issue for forwarders. Section 5 clearly prohibits carrier retaliation, where refusal of space or even a threat to retaliate is deemed an offense. This is complemented by the fact that now, the burden of proof lies with carriers when complaints are filed against them.⁴
4. **The US-FMC is now equipped with an office of consumer affairs and dispute resolution.** The office will help with mediation, facilitation and arbitration to resolve issues involving cargo shipments amongst other things. It should be noted that the office is limited to non-adjudicative ombudsman assistance, i.e., its findings are not a substitute for a court of law.⁵
5. **Public disclosures outlining all findings of the FMC on false demurrage and detention invoice information and the penalties imposed or even assessed against common carriers, will be published and**

³ Elimination of Charge Obligation, title 46, USC section 41104: Common carriers (f) as noted in OSRA, 2022, Sec. 7.

⁴ OSRA, 2022, Sec.10.

⁵ OSRA, 2022, Sec.17.



listed by each ocean carrier company. This exercise, published and updated annually, will help build the evidence that other jurisdictions can use as a lead to assess similar practices in their own territories.⁶

6. **The FMC will retain its broad temporary emergency powers until the end of 2023** wherein it can start investigations, public consultations, and pass emergency orders to improve the fluidity of the supply chain.⁷ However, the changes on requirement for imposing D & D charges, as well as the FMC's power to require essential elements of service contracts to make them mutually enforceable, are amongst the permanent benefits of this Act.

In addition, there are provisions directing authorities to examine the situation to improve chassis availability, increase technological capabilities at ports and improve inland ports to reduce congestions in the future.

Much like the emergency powers, many topics under the Act have clear deadlines and budgetary outlays for limited time culminating latest by 2026. Therefore, it is imperative for the freight forwarding and logistics industry to participate in the rulemaking consultations and provide timely input to ensure a more fair, resilient, and sustainable supply chain for the future.

Next steps to look out for

Circa. 1 August 2022: FMC to initiate further rulemaking under section 41102(c) of title 46 on assessment of detention and demurrage charges. Final rule on this is to be made within a year of the OSRA, 2022, i.e., mid-June 2023.⁸

Mid-August 2022: Further rulemaking on unfair or unjustly discriminatory methods (no later than 60 days from enactment under section 41104 a (3) of title 46)⁹

Call for public comment on the maritime crises.¹⁰ The consultation will explore whether congestion of the carriage of goods has had a substantial adverse effect on the competitiveness and reliability of the international ocean transportation supply system, and whether an emergency order, the scope of which is open for discussion, under this section can alleviate the situation.

End 2022 Rulemaking on unreasonable refusal to deal or negotiate with respect to vessel space, under section 41104(a) 10 is expected with similar timelines and a final outcome is expected by the end of 2022.¹¹

⁶ OSRA, 2022, Sec.6.

⁷ OSRA, 2022, Sec.18.

⁸ OSRA, 2022, Sec.7 (b) 1.

⁹ OSRA, 2022, Sec.7 (c).

¹⁰ OSRA, 2022, Sec.18 (b) 1.

¹¹ OSRA, 2022, Sec.7 (d)



Conclusion

FIATA remains keenly observant of the situation. The scope for redefining the relationship between freight forwarders and carriers is limited and therefore, there is a need to engage significantly now to produce worthwhile results. It should be noted that the OSRA 2022 did not address competition aspects or ocean carrier use of their antitrust immunity, despite public concern about dramatic price increases, expansion of ocean carriers to provide end to end inland services, the need to protect the supply chain as a whole, and ensure a balanced and level-playing field for all specific actors. OECD-ITF's latest report clearly explains how regulatory intervention favouring certain actors of the supply chain exacerbated regional problems which became global shocks.¹² In the US and the EU there is continuing review of the need for carrier antitrust immunity by the US Congress and the European Commission that goes beyond the steps taken in OSRA 2022.

FIATA seeks to help the forwarding industry understand this law and make the most of the opportunity it affords customers of ocean carriers to negotiate fair terms in the 'new normal'. FIATA remains ready to facilitate the participation of its members in stakeholder inputs to regulators as well as to start dialogue with ocean carriers to seek balanced solutions, such as enforceable contracts, as recommended by the FMC. FIATA also welcomes the OSRA 2022, despite its limitations, as strong precedent for future crises as it sets the tone for rapid action by regulators in future and calls for regulators across all regions to engage in consistent and regular dialogue to develop harmonised approaches.

¹² Olaf Merk and Antonella Teodoro, ITF Report on Performance of Maritime Logistics, July 2022.