

Issues of Authority

Welcome to this edition of the Claims Review. The claims examples in this edition are all loosely linked by the theme of authority and we hope that they will prove informative and help reduce the risk of claims against your business. In many cases this is simply the need to stay within the instructions given. However, there are occasions when the issue is whether any authority at all was given. Ship brokers should be aware of the potential liability for breach of warranty of authority and the circumstances described in the claims example "No Principals". The claim "Wrong Terms" highlights the attempts of some shippers to impose their own terms and conditions and illustrates that agents dealing with bookings should be on their guard. Please circulate the Claims Review widely within your firm and should you require further copies these are available on the Club's website or can be sent to you by email or fax.



No principals

A ship broker received an approach from a Chinese broker regarding the possibility of fixing ships to carry steel cargoes on behalf of a well-known local steel mill. The ship brokers approached the representatives of a Greek shipowner. A COA was agreed between the owners and the steel mill covering two shipments, to be performed later in the year. Nothing further was heard from the Chinese broker and the market was falling. The owners became concerned and contacted the steel mill directly. The export department of the steel mill denied having entered a fixture with the owners. They confirmed that they had heard from a Chinese broker who had offered them ships on a voyage basis. They produced copies of the written offers and pointed out they had declined to do business with the Chinese broker who had, by this stage, disappeared.

The owners sued the ship broker for US\$ 850,000 on the basis he had acted in "breach of warranty of authority". The basis of this form of action is that a broker entering negotiations holds himself out as having the authority of his principal to do the business. If for any reason the broker does not have that authority,

then he is liable to anyone who has relied upon his "warranty of authority". The broker does not himself have to be negligent to attract this liability. In this example, the broker dealt in good faith with a Chinese broker. The Chinese broker did not have the authority of the steel mill. The broker accordingly could not have authority when dealing with the owner's representative. Although theoretically the broker would have a right to claim an indemnity from the Chinese broker, the problem was that he had disappeared and did not have any traceable assets. A settlement was agreed.

The potential liability for Breach of Warranty of Authority is greatly increased in a falling market. The fact that a broker can be liable due to a default "down the chain" means that brokers should take particular care when dealing with new contacts, especially those located in emerging markets.

Wrong test used

In many trade contracts, where the specification of the product is important, buyers and sellers will often agree that the quality will be determined by an independent expert and that the expert's findings shall be

"final and binding on both parties save for fraud or manifest error".

In one case, an independent expert was appointed to test an oil product. Part of his instructions was to use a specific testing method (method A) to determine the density of the product. The expert decided not to use the testing method A, but instead substituted a more modern method (method B), which was deemed to be more accurate.

The product was sold on and a dispute arose regarding the specification. Although the expert had produced a report setting out his findings, these were not "final and binding" determinations because the method used did not comply with the contract. The buyers challenged the findings and what should have been a foregone conclusion became a protracted dispute. The seller was ultimately successful but sought to recover his unrecoverable legal costs from the expert who had not followed instructions.

Surveyors and other experts must ensure that they carry out instructions to the letter. If they intend to make changes they must obtain the customer's written authority to do so. If they do not,

then they are likely to face claims for losses caused by their failure to follow the instructions given.

Wrong terms

A forwarder included "all shipments subject to the CMR Convention" in a written booking with a ship agent for line haulage. The agent failed to spot this note and appointed a haulier who contracted under his normal road haulage conditions, which provided for a limit of liability of US\$2,000 per metric tonne. When a container of spirits was stolen the total liability under the haulier's conditions was around US\$40,000, whereas the limitation amount under the CMR Convention (which includes duty and freight) was in the region of US\$ 350,000. The agent was responsible to the ocean carrier for failing to notice the incorporation of the CMR Convention into the inland movement, and thereby allowing it to be incorporated without the ocean carrier's authority.



An agent must take care that he does not accept a booking on terms that his principal has not specifically agreed to. Examples of such attempted terms include the carrier guaranteeing that a cargo will be on a particular ship, or that the ship will arrive at any particular time. When booking cargo care must be taken to accept the booking on the carrier's normal terms. Some large forwarding companies attempt to impose their own terms and conditions on shipping lines, sometimes under the guise of quality assurance requirements.

Wrong ship

The principal of a ship manager had taken delivery of a number of new buildings. Some of the ships were subject to a "sale and charter back" agreement. The principal had indicated he would consider an offer for any of the ships that were not subject to the "sale and charter back" agreement. A potential buyer approached the manager's commercial department. They discussed one particular ship and the manager arranged for an inspection. Representatives of the potential buyer travelled from Europe to Japan to view the ship. Unfortunately, at that point the commercial department realised that the ship in question was one of the ones subject to the "sale and charter back" agreement and was not for sale. The buyer's representatives sent them an invoice for US\$ 12,000 for wasted expenses.

Who is the agent's principal?

An English port agent was nominated by a charterer with whom they did significant amounts of business. The agent was instructed by the charterer to release a steel cargo without production of the original bill of lading. The charterer, who was also the receiver of the steel, had on-sold it to the ultimate consignee without paying the shipper and without retrieving the original bill of lading. The charterer then went into liquidation. Subsequently the shipper of the steel arrested the ship and commenced proceedings against the shipowner. The shipowner paid US\$ 95,000 in settlement of the shipper's claim and commenced proceedings against the port agent. As the port agent had relied on the particular charterer for business, he had mistakenly believed that the charterer was his principal and entitled to authorize him to release cargo. In fact, although nominated by the charterers, the appointment was to act as the owner's agent. The agent could only release cargo on receipt of authority from the owner. The port agent eventually reimbursed the shipowner.

An article on the appointment of agents entitled "who's agent am I?" was published in the 2002 edition of the *Intermediary* and is available on the Club's website: www.itic-insure.com.

Wrong form

A surveying company recruited a senior staff member from a rival who brought a major client to his new firm. The surveyor used an existing reporting format. Shortly after the surveyor started his new job his employers received a threat of an injunction and a claim for damages from the rival firm. The rival firm alleged that they had developed the reporting format and owned the copyright. The surveyor was advised that there was an argument that the client, and not the rival firm, owned the copyright. The surveyors did not wish to become involved in a protracted legal dispute. They therefore designed a new reporting format to match the client's requirements and gave a formal undertaking not to use the previous format. A small contribution to the rival's legal costs was made by way of settlement.

Forged authority

A Turkish liner agent was requested by the receiver of 12 containers of frozen meat shipped from Denmark to deliver them without original bills of lading. The carrier's bills of lading were consigned "to order" of the Danish shipper and the receiver produced a fax from the shipper, confirming that he was the owner of the cargo and authorising delivery without the original bills of lading. The fax bore the shipper's logo, a transmission record on the top, and appeared to be signed by the same person who had signed the invoices. In view of the perishable nature of the cargo and the contents of the fax, the ship agent released the containers to the receiver. The receiver subsequently failed to pay for the meat and the fax was found to have been forged by a former employee of the Danish shipper. The carrier was liable for the shipper's loss and in turn claimed US\$400,000 from his agent.

It is today a simple task for anyone with access to a scanner and a

computer to duplicate headed paper and signatures, and to forge letters of authority. ITIC has recently seen a spate of release of cargoes against forged letters, which purported to come from the cargo owner (the shipper or a bank). Such documents must NOT be taken at face value. Agents must take their authority to release cargo without bills of lading only from their principals. If a letter is produced which purports to provide an authority to release without original bills of lading, the agent must ALWAYS send the letter to his principal, so that the principal has the opportunity to check with the shipper (or bank) to ensure that the letter is genuine. Cargoes are valuable – do not give them away!

Who pays the stevedores?

A port agent in the Middle East appointed stevedores on behalf of the shipowner. It was only when he sent the invoice to the shipowner that the agent discovered that the cargo had been booked on a "free out" basis (i.e. the discharging costs were for the consignee's account). The shipowner had never asked or authorised the port agent to appoint stevedores. The stevedores, who had relied on the agent's apparent authority to appoint them on behalf of the shipowner, threatened to arrest the ship on its next call at the port. The consignee could not be traced and the agent had to pay the stevedores' bill himself.

It is important that agents are clear about what they are being employed to do. They should not assume that they have authority to order services for their principals.

Settlement without authority

A P&I Club correspondent was requested to attend on board a ship to survey a cargo of 2,000 metric tonnes of bulk fertilizer, which had been contaminated by residues from a previous cargo. The correspondent, having carried out the

survey and after several telephone conversations with the P&I Club, obtained verbal agreement to offer the cargo interests a depreciation allowance of US\$22 per tonne, which was accepted. When the cargo interests submitted their claim for US\$44,000 to the P&I Club, the Club refused to pay, alleging that the correspondent had acted without authority in offering settlement. The consignees therefore sued the P&I Club and the shipowner, and the correspondent was joined in, on the grounds that if the court found that he had no authority, then he would be liable under the doctrine of breach of warranty of authority. The case went to court in London. As the correspondent had no confirmation in writing, the dispute turned on which witness was believed. The court

The manager placed an order for various repairs with a German shipyard, but erroneously did so in the name of the shipowner company. The total repair cost was US\$ 4.5 million, of which US\$1.3 million was paid by the bareboat charterers before the ship left the repair yard. When the next instalment of US\$1 million was not made, the yard, believing it had contracted with the owners, arrested the ship and obtained security of US\$1 million. The bareboat charterers went into liquidation. The owners rejected the claim on the grounds that they had not authorised the managers to contract in their name. The technical managers were faced with claims from the repair yard for the balance of the repair bill (US\$3.2 million) and from the shipowners for



eventually found that the correspondent had been authorised to make the offer. If the correspondent had not made a convincing witness, and had not kept contemporaneous notes, he would have had to pay the claim, plus interest, plus the costs of some of the other parties involved, and would have faced a liability in excess of US\$100,000.

Repairs in the wrong name

Scandinavian ship managers were appointed as technical managers of a tanker owned by a K/S limited partnership. The management agreement was originally between the ship managers and the shipowner company but was subsequently replaced by an agreement with the bareboat charterers, another K/S limited partnership.

wanting that they had authority to order repairs on their behalf. Although German lawyers confirmed that the repair yard was entitled under German law to look to the ship managers for payment, there was no doubt that the repairs to the ship had benefited the owners. The ship manager eventually contributed US\$300,000 to the settlement.

Damages bill

While berthing at a UK port, a Turkish owned ship struck the jetty. The agents passed the port's repair bill of GB£37,850 to the owners. Nothing further was heard from the owners for a period of months. The port repeatedly pressed for payment and alleged that the agent was also liable for the bill. The port agent then settled the account with the port. The Turkish owners then advised that they disputed part of the claim and wanted

to offer GBP 25,000 to the port. When the agent pointed out that, hearing nothing for a period of months, they had ultimately settled the bill, the owners refused to pay them the full amount. Following negotiations by ITIC with the owners and their P&I Club, the sum of GBP 30,250 was reimbursed by the owners leaving the agent to bear the shortfall.

Not up river

A commercial manager in Germany was instructed by the owners of a ship under management not to fix cargo for this ship for voyages up the River Rhone. This followed previous bad experience of a sister ship having been delayed in transiting the river due to high water levels following a period of heavy rainfall. Unfortunately, the commercial manager subsequently fixed the ship for a cargo of steel from Genoa to Lyon and overlooked the owner's instructions not to transit the River

Rhone. This was only realised when in a period of high water, the ship became stuck at Bollene and the owners held their commercial manager fully responsible for all costs and consequences which had arisen from their having acted without authority to fix the ship to this particular destination. Costs and expenses of US\$ 75,000 were incurred.

One booking or three?

A German agent for Chinese shipping company received an enquiry regarding the shipment of steel rails in three consignments from Hamburg to Huangpu. The agent's principal quoted a price of US\$65 per tonne and this was passed to the shipper. The first consignment was shipped at that rate but the principal refused to the second and third consignments at the same rate. The freight market had risen and the principal maintained he had only accepted the

first booking at the original rate. The agent had (incorrectly) assumed the acceptance was for all three consignments. The shipper eventually paid (under protest) considerably more to ship the first two consignments, and claimed most of the difference from the German ship agent, who had confirmed a rate on behalf of his principal without having authority to do so. The shipper could equally have demanded that the Chinese shipowner carry the rails at the price agreed with his agent, in which case the agent would have been facing a claim from the shipowners for acting without authority.

See this Claims Review and other loss prevention documents in the publications section of our website: www.ITIC-insure.com.

All ITIC literature is available in an online and downloadable format.

forum2004 the mutual link

Dorchester Hotel, London - 28th & 29th September

We would like to invite you to ITIC's Forum 2004, a series of workshops for Members of ITIC, being held at the Dorchester Hotel in London on Tuesday 28th and Wednesday 29th September.

This event has been organised solely for you as an ITIC Member and will be attended by ship managers, ship agents, ship brokers, marine surveyors and other transport professionals. The Forum will allow you to discuss topics of interest as well as providing a training and learning opportunity for you and your staff. You can find out more about the Forum workshops by visiting www.itic-forum.com.

This event will also provide you with a unique opportunity to network with other companies across the ITIC membership. For further information about the networking and entertainment features of ITIC Forum 2004, visit our website.

Places are limited and we therefore suggest that you make your reservations as soon as possible. You can book on line using the reservations form on the Forum 2004 website: www.itic-forum.com.

www.itic-forum.com

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