

Should Agents act as “ad hoc” Delivery Agent for others?

1. In our role as consultants to various shipping companies, we have been asked by our clients to comment on the risks involved for them to act as delivery agents for shipments by third party intermediaries on an ad-hoc basis either directly (global company having own / subsidiary offices in various ports) or through their agents. This article discusses the issues which may arise, the risks involved and possible solutions.
2. Contracts are signed between Principals (the carrier and cargo interests) and the role of an agent is to facilitate this process either for the formation of the contract of and / or for the fulfilment of the contract. Under English Law, the Agent does not bear any personal liability unless there is some personal fault / negligence of the agent and in which case, parties could pursue the agent for recovery of their loss. In shipping context, the carrier (Principal) may engage agents to canvass cargo (Booking Agent) and to assist in the operations including the documentation process (Port Agent). Either of these agents would be involved in releasing Bills of Lading for outbound cargo. However, after conclusion of carriage, cargo is generally released to cargo interests on presentation of Original Bills of Lading by the port agent (this specific role is generally known as Delivery Agent).
3. Many a times, other third party operators (hereinafter known as “TPO”) would request contractual carriers (who may be the actual / performing or transport intermediaries such as NVOCC’s and hereinafter known as “OC” i.e. Overlying Carrier) if they could use their / OC’s agents as delivery agents i.e. they will list the name of the OC’s agent as delivery agent in their Bills of Lading and the cargo interests (consignee) will approach the OCs agent for delivery. This is often seen in the consolidation business especially for cargo co-loaded and which may happen when a consolidator does not have sufficient cargo ‘to form a box’ and therefore loads with other friendly consolidators having sufficient cargo ‘to form a box’. The reasons why this practice emanated is to perhaps avoid double Delivery Order fees at the time

of delivery, operational issues and / or for the reason that the TPO does not have any agent at the destination and by using the OC, he is able to extend his coverage to other ports.

4. The next question we have to ask is as to what are the potential risks in agreeing to allow a TPO to use the OC's office / agent as the delivery agent. Some of the risks appear to be as follows:

- i) Liability to custom authorities due to incorrect filing of import manifest and which may arise due to the differences in the description of the cargo shown in the TPO and the OC's B/L's. We understand that in some jurisdictions, the Customs Act provides for the Agent to be liable for the loss in custom revenue which they would have realised if the cargo declared was either not mis-declared or short shipped.
- ii) Liability for wrongful release / release against a fraudulent Bill of Lading: Agents would generally have a standard operating procedure (SOP) for their regular Principals. In case of such Ad hoc arrangements, agents may not have a SOP to conduct proper scrutiny of the B/L being submitted by the cargo interests, particularly when they have only been provided a unsigned / unauthenticated B/L or only the Bill of Lading no by the OC/TPO.
- iii) Liability to the actual / performing carrier when the agent seeks delivery of the cargo (see English COGSA 1992 (S3)). Liability could include unpaid charges such as detention, demurrage, etc.
- iv) Liability to the Agent due to the provisions of law in some jurisdictions. Under some jurisdictions, agents are liable for cargo damages which occurred during the sea transit as is provided under their relevant legislation / code.
- v) Agent being pursued as the defendant in actions related to cargo claims due to the being agent readily available in the jurisdiction of the

cargo interests and which makes it convenient for them to initiate action against them. Even if the Agent has a defence to the claim, there would be cost exposures for successfully defending any action and which may be substantial.

- vi) OC being pursued by TPO due to the wrongful release / release against a fraudulent Bill of Lading by their agents.
5. One of the duties of the Principal would be to indemnify their agent against claims, liabilities and expenses incurred in discharging their duties assigned by their principals. Accordingly, if a liability arises due to the agent following instructions of their Principals, the agent should be able to seek indemnity from their principals for defending any actions initiated together with any judgements provided by the courts. In turn the Principal (the OC) could pursue the underlying carrier/TPO (who had issued the Bill of Lading to the cargo interests) and any successful recovery would depend on whether the TPO is good for the liability (is not impecunious for the claimed amounts), jurisdictional issues, etc.
 6. The delivery agent may be insured for his role as an agent (as would generally be provided in Agency Agreements which would require them to take Error & Omissions Cover / Professional Indemnity) and may engage his policy to defend any potential action. However, it is conceivable that the Agents Insurers would in turn wish to seek recovery from the OC either under the terms of the Agency Agreement or under the general terms of Agency Law.
 7. The OC may also be covered with Insurers for their Transport Liability Risks. If the OC has declared their operations and risks and sought an appropriate cover, then this may also fall for coverage under their liability policy. However, as this request to act as delivery agents is generally on an "ad hoc" basis, we believe that this may not be declared to the liability insurers such that any additional risk arising may not fall for coverage under the policy and therefore the OC may need to deal with the matter by themselves.

8. Bearing in mind the potential risks and exposures, OC must consider whether it is absolutely essential to act as a delivery agent for a third party. If this is something which is essential, then the OC could consider mitigating their risks by
- i) Ascertaining the details of their customer and whether they are good for the liabilities (Know your customer).
 - ii) Seek a properly worded letter of indemnity in which the TPO agrees to indemnify both the OC and their agents for any liabilities which arise due to their acting as delivery agents.
 - iii) Ensure that the TPO provides a copy of the B/L issued to the cargo interests (together with the signature) and this is forwarded to the delivery agent with strict instructions that cargo should only be delivered on presentation of the TPO's B/L.
 - iv) Declare this activity to your liability Insurers together with the risk management process in place and seek coverage for this activity.
9. In conclusion, prior to agreeing to act as a Delivery Agent, the OC must carefully consider the risks involved and ensure that they are properly managed (as mentioned in 8 above). What would be a good risk management process would depend on the circumstances and we at NAU are available to assist should you wish to consider this further.