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Freight Forwarders:
Agent vs. Principal

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*Informed decision-making comes from a long tradition of guessing
and then blaming others for inadequate results.*

- *Scott Adams*

The global transportation of goods is an inescapable phenomenon of the modern world. Indeed, the contents of a Canadian home may include electronics from Japan, furniture from Sweden and fruit from Mexico. If we cannot domestically manufacture or produce the goods we use and consume, then we must have them transported from other parts of the world. These goods often reach Canadian store shelves after traveling thousands of kilometers through some combination of the major modes of transportation – air, sea and inland transportation including rail and road – and our growing access to international goods is largely facilitated through the careful coordination of these modes of transportation by freight forwarders.

Rather than devote portions of their businesses to dealing with the various international and domestic trade requirements, companies routinely rely on the specialized services of freight forwarders to manage their transportation needs. In this regard, a freight forwarder is traditionally considered a middleman in the transportation chain as its role is often confined to the organization and procurement of the various modes of transportation for goods. The notion, however, that a freight forwarder is merely a middleman is not entirely accurate since the role that it plays, at least from a legal perspective, may differ with each transaction. More specifically, a freight forwarder may act either in the capacity as an agent for the shipper/owner of the goods or as the principal or intermediary contracting carrier. Although the distinction is often a subtle one, it may also attract different consequences.

The purpose of this paper is to differentiate between a freight forwarder's role as agent and as principal and to highlight the legal ramifications for both.

The Role of a Freight Forwarder

Although the specific services of a freight forwarder may vary depending on the company or the transaction, the central mandate of a freight forwarder is to arrange for the transportation of goods from one place to another whether by air, sea, rail or road via another carrier (referred to in this paper as a sub-carrier). The benefit in hiring a freight forwarder to perform this obligation is that a freight forwarder will have particular experience in the different jurisdictional practices, regulations and laws, such as requirements relating to safety or dangerous goods.

A freight forwarder will usually be familiar with the customs procedures ensuring that the proper documentation is presented and that all fees or tariffs are paid upon entry into a different jurisdiction. Moreover, given the volume of transactions that it is involved in, a freight forwarder may have access to cheaper rates for transportation and may be privy to information concerning the reliability of the various carriers.

Many freight forwarders also take on other responsibilities to assist their customers. These other duties may include:

- advising on packaging and labeling of goods, particularly since the different jurisdictions may have distinct packaging and labeling specifications;
- arranging for insurance on the goods due to their experience on available coverage and limitations;
- arranging for storage or other warehousing and distribution needs of the customer;
- consolidating shipments;
- finding alternative modes of transportation in the event of an emergency; and
- assisting in claims processing.

Though the duties and obligations of a freight forwarder may be many, in Canada, freight forwarders are not regulated by any specific statute or governing body. Instead, most freight forwarders belong to the Canadian International Freight Forwarders Association (CIFFA). Members of CIFFA are required to adhere to standard trading practices and responsibilities for freight forwarders.

Agent vs. Principal

A freight forwarder may perform the above duties in two capacities – as agent or as the principal contracting carrier. The distinction governs the contractual relationship between the parties (shipper or owner of the goods, freight forwarder and sub-carrier) and affects the respective liabilities of the parties in the event of a loss.

As agent, a freight forwarder arranges for the transportation of goods by sub-carriers on behalf of the shipper or owner of the goods. The freight forwarder will arrange for contracts between the shipper and the sub-carriers and will not typically handle or take possession of the goods. Depending on its contract with the shipper, the freight forwarder may still perform some of the previously mentioned duties; however, in this situation, the freight forwarder is merely contracting to make transportation arrangements on behalf of the shipper. Thus, in the event of loss of or damage to the goods, the shipper's claim is generally against the sub-carrier directly and not the freight forwarder.

As an agent, the freight forwarder may be liable to the shipper where it fails:

- to act with reasonable dispatch;
- to exercise due skill and care in selecting sub-carriers;
- to follow the shipper's instructions;
- to communicate the shipper's instructions to the sub-carrier(s); or
- to preserve the shipper's interests.

However, if the freight forwarder properly performs the above tasks it will generally be able to avoid liability in the event of loss or damage to cargo. This list is not intended to be exhaustive as the freight forwarder's duties and obligations are often transaction-specific.

As principal, a freight forwarder assumes responsibility for the carriage whether or not it actually takes possession of the goods. Rather than entering into transportation contracts on behalf of the shipper, the freight forwarder contracts as the actual carrier of the goods. In this scenario, the shipper is in a direct contractual relationship for the carriage of goods with the freight forwarder. In turn, the freight forwarder may either perform the transport of the goods through its own fleet or, alternatively, it may subcontract the carriage to sub-carriers. A key point, however, is that the sub-carriers are not in any direct contractual relationship with the shipper.

In addition to any specific contractual obligations the freight forwarder may have with the shipper, when a freight forwarder contracts as principal, the law will impose other carrier obligations, which are far more burdensome than the typical agency obligations. In particular, where a carrier receives goods in good order and condition, it is responsible to deliver those goods in the same good order and condition. Where there is a loss, the carrier must meet a very high threshold in order to escape liability. As explained by Justice Melnick in *Nabob Food Ltd. v. Harry W. Hamacher Spediteur GmbH & Co*:

A freight forwarder who acts as a principal or freight forwarder contractor is, like a common carrier, responsible for the goods he ships. He is in effect an insurer of the goods, quite apart from any negligence on his part. This is a very onerous standard. ...¹

Consequently, although a freight forwarder's actual duties may not differ whether it is acting as agent or principal, it may potentially have substantially different legal consequences for the parties.

Determining Capacity of the Freight Forwarder

There is no hard and fast rule in determining whether a freight forwarder is acting as agent or principal. The Courts in Canada have consistently held that it is dependent upon a careful analysis of the facts in each particular case. Nevertheless, there are a number of factors that a Court may consider in this determination, which include but are not limited to:

- whether the freight forwarder performed part of the transport using its employees;
- the manner in which the freight forwarder characterizes its obligations in the contract documents;
- the manner in which the parties have dealt with each other in the past;
- whether a bill of lading was issued by the freight forwarder;
- whether the shipper knew which sub-carrier would actually transport the goods;

¹ [1988] B.C.J. No. 250 (Co. Ct.), at pg. 6-7.

- whether the shipper played any role in the selection of sub-carriers;
- whether the shipper received a bill of lading issued by another party; and
- the mode of payment (i.e. how did the freight forwarder charge for its services?).²

It is important to highlight that no one consideration is determinative of the question; instead, these factors offer the Court some general guidelines in its assessment. In addition, the CIFFA's Standard Trading Conditions³ (which are standard terms that CIFFA members may incorporate into their contracts with shippers) recognizes the two roles that a freight forwarder may play and includes its own language on determining whether a freight forwarder is acting as agent or principal.

Importance of Characterization of a Freight Forwarder as Agent or Principal

The significance of the characterization of a freight forwarder as agent or as principal often surfaces where cargo is damaged during transport or where the carrier's freight has not been paid. It may also be important in determining the appropriate limitations of liability for sub-carriers.

Damage to Cargo During Transport

With respect to damage to cargo, the shipper's remedy is often defined by the contractual relationships between the parties. Regardless of whether the freight forwarder acted as agent or principal, the sub-carrier is often looked at to pay for the loss since it had possession of the goods at the time. The situation becomes slightly more complicated where:

1. the sub-carrier does not have insurance;
2. the sub-carrier has insufficient insurance; or
3. the sub-carrier has gone bankrupt.

In either of these situations, the shipper is left to look for compensation from another party, such as the freight forwarder.

Generally speaking, if the freight forwarder acted as agent for the shipper, then the shipper may not have a claim against the freight forwarder provided that it performed its agency duties with the appropriate skill and care. Instead, the shipper's claim will be directly with the sub-carrier since it is in a direct contractual relationship with the sub-carrier. Therefore, where the sub-carrier does not have insurance, has insufficient insurance or has gone bankrupt, the shipper may be left without a remedy.

² *Bertex Fashions Inc. v. Cargonaut Canada Inc.*, [1995] F.C.J. No. 827 (Trial Div.), at paras. 24 and 25.

³ Appendix A

If the freight forwarder contracted as principal, then the shipper may claim directly against the freight forwarder for the loss irrespective of whether or not the freight forwarder was in possession of the goods at the time of the loss. As previously discussed, this is construed in a similar fashion to strict liability since few defences are available. Although the shipper may have a claim against the sub-carrier (e.g. in negligence), it does not have a contractual claim against the sub-carrier. It is important to highlight, however, that because the freight forwarder is in a direct contractual relationship with the sub-carrier, the freight forwarder may also have a claim for contribution and/or indemnity against the sub-carrier.

The importance of the characterization of a freight forwarder is highlighted in the case of *Bertex Fashions Inc. v. Cargonaut Canada*⁴. There, the plaintiff imported blazers from a manufacturer in Bulgaria. The plaintiff made arrangements with the defendant, a freight forwarder, to transport the goods to Quebec. The defendant issued a bill of lading to the plaintiff. The defendant then engaged the services of road and ocean carriers to perform the carriage without the plaintiff being privy to those contractual arrangements. Upon arrival in Quebec, the plaintiff discovered that many of the blazers were either missing or damaged and the plaintiff commenced an action against the defendant.

The issue before the Court was whether the defendant was acting as agent for the plaintiff or whether the defendant was contracting as principal or carrier. If the defendant was contracting as principal (i.e. as carrier), then it would be held liable for loss regardless of the fact that other sub-carriers were engaged in the transportation. If it was contracting as agent, then the plaintiff's claim should be made against the subcarriers.

After considering the relevant factors, the Court held that the defendant had contracted as carrier and therefore was liable for the loss. The Court found the following points significant in its determination:

- the defendant issued a bill of lading, which on its face would lead a shipper to believe that the defendant undertook the carriage;
- the bill of lading contained no language suggesting that the defendant was acting as agent for the shipper;
- the defendant charged the plaintiff an all-inclusive figure, which the Court held was more in the nature of freight as opposed to a commission;
- the contracts of carriage with the road and ocean sub-carriers were not provided to the plaintiff; and
- the plaintiff was never provided with any document explaining the nature of the services provided by the defendant.⁵

⁴ *Ibid.*

⁵ *Ibid.*, at paras. 27-32.

Non-Payment of Carrier Freight

The characterization of the freight forwarder as agent or principal becomes important in situations where the shipper has paid the sub-carrier's freight charges to the freight forwarder and the freight forwarder fails to remit payment to the sub-carrier e.g. where the freight forwarder misappropriates the funds or where the freight forwarder becomes bankrupt. There, the sub-carrier will usually look to the shipper for payment and the resolution of this dilemma is contingent upon the capacity that the freight forwarder was acting in. In other words, the subcarrier may look to the shipper for payment of its freight if it has a contractual relationship with the shipper (i.e. where the freight forwarder acted as agent for the shipper). Where the freight forwarder is acting as principal, it is contractually responsible for the payment of the sub-carrier's freight since the sub-carrier is not in a contractual relationship with the shipper.

In practice, freight forwarders, whether as principal or agent, often process the payment of the carrier's freight in order to allow for a smooth transaction. In certain circumstances, freight forwarders may establish a credit relationship with the shipper or the sub-carrier to avoid the complications associated with delays in payment to the sub-carrier or the conversion of currency.

The issue of non-payment of freight has been brought before the Courts on several occasions with the primary question being, "Who, between the freight forwarder and the shipper, is contractually responsible to pay for the sub-carrier's freight charges?" As discussed above, the categorization of the freight forwarder is necessary to understand the various contractual relationships between the parties. In *C.P. Ships v. Les Industries Lyon Corduroys Ltée*⁶, the Court held:

Where a debtor [the shipper], instead of paying his creditor [the carrier], he chooses to pay a third party [the freight forwarder], he does so at his peril. Where the money is not turned over to the creditor [the carrier], the onus is then on the debtor [the shipper] to establish either:

1. that the creditor actually authorized the third party to receive the money on his behalf, or
2. that the creditor held the third party out as being so authorized, or
3. that the creditor by his conduct or otherwise induced the debtor to come to that conclusion, or
4. that a custom of the trade exists to the effect that in that particular trade and in those particular circumstances, both the creditor and the debtor normally would expect the payment to be made to the third party.

Based on this test, where the freight forwarder is acting as agent for the shipper, the shipper remains contractually obligated to pay for the sub-carrier's freight, despite any arrangement the shipper has with the freight forwarder. In other words, the payment to the freight forwarder will not relieve the shipper of its obligations to pay the sub-carrier's freight.

⁶ [19830 1 F.C. 736 (Trial Div.), at pg. 3.

The four exceptions from *C.P. Ships* essentially arise when the freight forwarder is acting as principal. This is because the sub-carrier does not have a contract with the shipper. In these situations, the usual arrangement is that the freight forwarder will collect payment from the shipper and distribute the same to the sub-carrier(s). As a result, the sub-carrier may be without a remedy if the freight forwarder goes into bankruptcy.

Limitation of Liability for Carriers

Depending on how a freight forwarder is characterized, a sub-carrier may be entitled to rely on contractual provisions between the freight forwarder and the shipper to avoid or limit its liability in the event of loss of or damage to cargo, or delay in its delivery. These protections often arise in the form of a “Himalaya” clause found in the freight forwarder’s contractual documents, whether in a bill of lading or not.

Briefly, a Himalaya clause is a contractual provision that attempts to extend the benefits of the carrier’s contractual limitations to sub-carriers or other third parties engaged by the carrier to assist in the transportation of goods. Historically, these types of clauses were not enforced because of the lack of privity of contract between the shipper and the sub-carriers or other third parties. In other words, courts refused to enforce the protections or limitations vis-à-vis third parties because they were not parties to the original agreement.

In *New Zealand Shipping Co. v. A.M. Satterthwaite & Co.*⁷, the Judicial Committee of the Privy Council accepted the argument that a Himalaya clause may be effective against third parties on the basis that the contracting party was acting as agent for the third parties in respect of the limitations. The Court gave effect to the language of the contract finding that both parties knew that third parties would be engaged and that this was a standard practice in the industry. The Court concluded that it would not be unreasonable to hold that the contracting party was acting as agent for the third parties for the purposes of the contract. Himalaya clauses have since been accepted as forming a part of Canadian law.⁸

A sample Himalaya clause in a freight forwarder bill of lading is as follows:

The Shipper undertakes that no claim or allegations shall be made against any person or vessel whatsoever, other than the Carrier, including, but not limited to the Carrier’s servants or agents, any independent contractor and his servants or agents, and all others by whom the whole or any part of the Carriage, whether directly or indirectly, is procured, performed or undertaken, which imposes or attempts to impose upon any such person or vessel any liability whatsoever in connection with the Goods or the Carriage; and if any claim or allegation should nevertheless be made to defend, indemnify and hold harmless the Carrier against all consequences thereof. Without prejudice to the foregoing every such person and vessel shall have the benefit of all provisions herein benefiting the Carrier as

⁷ [19750 A.C. 154 (P.C.).

⁸ See *ITO-Int’l Terminal Operators v. Miida Electronics*, [1986] 1 S.C.R. 752.

if such provisions were expressly for his benefit and in entering into this contract the Carrier, to the extent of these provisions, does so not only on his own behalf but also as agent or trustee for such persons and vessels and such persons and vessels shall to this extent be or be deemed to be parties to this contract.⁹

Given the comprehensiveness of Himalaya clauses, it may be in the best interest of the sub-carrier to have the freight forwarder classified as principal in order to protect itself in the event of loss or damage to cargo. This is particularly beneficial to the sub-carrier where:

- the freight forwarder's contract with the shipper has extensive limitations of liability provisions that are more onerous than the sub-carrier's limitations; or
- the sub-carrier is not able to limit its liability e.g. by failing to properly issue a bill of lading.

In the second situation, if the sub-carrier was contracting directly with the shipper, it may be liable for the full amount of the loss. If, however, the freight forwarder contracted with the shipper as principal and included a Himalaya clause in the contractual documents, then the sub-carrier's liability may be limited notwithstanding its failure to properly issue a bill of lading during the transport.

Conclusion

Freight forwarders play an integral role in the modern logistics industry. The knowledge and expertise that they bring to the table are essential to facilitating the efficient transportation of goods across the world. While freight forwarders perform many tasks for both shippers and sub-carriers, one must not overlook the legal capacity in which freight forwarders act i.e. as agent or as principal.

Awareness of the distinction between a freight forwarder's role as agent and as principal becomes particularly important when a transaction goes awry. Not only does this role define the legal relationship between the parties, but it may also establish the various liabilities and defences available for the parties. Equipped with this understanding, shippers, sub-carriers and freight forwarders may appropriately arrange their affairs (whether by adjusting freight charges or obtaining additional insurance coverage) to ensure that they are protected in the event that a transaction is not performed as contemplated.

For more information, please visit our website at www.whitelawtwining.com or contact:

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⁹ Appendix B