



## **GENERAL AGENCY AGREEMENT**

### **Explanatory Notes**

#### **Introduction**

In response to the need for up to date provisions covering long-term representation by agents, BIMCO and FONASBA have developed a new General Agency Agreement.

BIMCO would like to thank the following Subcommittee members for their efforts in developing this contract:

**Mr Han van Blanken**, 24 Vision (Chairperson)

**Mr Kyriakos Kourieas**, Interorient Marine Services

**Mr John Foord**, President FONASBA (Kestrel Liner Agencies)

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**Mr Jonathan Williams**, General manager FONASBA

**Mr Simone Carlini**, FONASBA (Multi Marine Services)

**Dr Alexander Geisler**, FONASBA (German Ship Brokers' Association)

**Mr Andrew Jamieson**, International Transport Intermediaries Club (ITIC)

#### **Key principles**

The General Agency Agreement has been developed for the provision of selected agency services over a period of time in a defined territory or area. It is a framework agreement which parties can adapt or amend to suit their individual requirements.

The contract is designed for use in all trades. Tramp operators are likely to focus on arrangements for port agency and ship's husbandry while the more complex needs of liner services are reflected in provisions covering sales and marketing and general agency.

The Agreement is based on contemporary commercial arrangements, in tramp and liner trades, whereby ships are often owned, operated and managed by separate entities. This impacts on agency arrangements and party relationships. An operator might appoint an agent to undertake cargo operations but the operator has no authority to give instructions for other services such as ship's

husbandry. A request for such services from owners or managers can lead to disputes about the extent of the agent's contractual obligations and remuneration.

In order to address the issue, the term "Principal" is used to define the Agent's contracting counterparty. Principal includes owners as well as operators, charterers and managers.

Services (defined as "Activities") to be provided by the Agent are for agreement from a non-exhaustive illustrative list which can be adjusted and adapted to suit parties' needs. The agreed Activities and level of Remuneration form the basis of the parties' contractual relationship. The provision of, and payment for, other or additional services will be for separate agreement.

Unless expressly agreed, the Agent is precluded from representing other shipping companies or undertaking NVOCC or freight forwarding activities which are in direct competition with the Principal's trade as specified in the contract. Equally, the Principal agrees not to appoint any other Agent in the territory or area for any of the agreed Activities unless compelled to do so under the terms of a charter party or other contract of carriage. However, since such services are likely to be narrowly construed, the Agent will be expected to provide any other Activities agreed under the contract.

The scope of agreed Activities may require the Agent to order goods and services on behalf of the Principal. However, third party providers of goods and services are increasingly reluctant to accept the risk of orders placed "as agent only". Nevertheless, the relationship between the Agent and Principal is, at all times, one of agency. The Agent therefore has authority to place orders as Agent for the Principal. An order may be placed with the supplier or service provider either in the name of the Principal (where the Principal will be directly responsible to the supplier or service provider) or in the name of the Agent (in which case the supplier or service provider may look to the Agent for payment).

An Agent appointed to cover an area may not have its own offices or representation throughout the territory. Provision is therefore included for the appointment of sub-agents. According to the parties' agreement, the Agent may be fully responsible for a sub-agent's negligence or default or may have more limited responsibility for failure to exercise proper supervision or, unless nominated by the Principal, for care in the appointment of the sub-agent.

Other provisions include financial arrangements and responsibilities, provision of resources for performance of the Agreement, insurance cover, liability, confidentiality and dispute resolution procedures.

In order to assist users, FONASBA will be developing a series of trade specific clauses. The intention is to address the requirements of different sectors through rider provisions that can be agreed or refined according to individual trade and party needs. Recommended provisions will be made available in due course.

## Detailed commentary

The agreement is divided into two sections. The covering box layout, Part I, is for the insertion of variable information relating to the contract followed by the applicable terms and conditions in Part II.

### Part I

In addition to boxes for insertion of contracting party details including confirmation, where applicable, of FONASBA Quality Standard Certification, attention is drawn to the following provisions:

*Box 4 Commencement date/Period* and *Box 5 Notice of termination*: see Clause 2;

*Box 6 Territory*: port(s), place(s) or geographic area must be stated;

*Box 7 Trade*: for example type (roro/bulk/container) and geographic routes and/or ports;

*Box 8 Activities*: services to be provided should be set out at Annex C;

*Box 9 Remuneration*: full details to be set out at Annex A;

*Box 10 Funding*: full details to be set out at Annex B;

*Box 11 Liability cap*: if an agreed limit of liability is not stated, the maximum will be ten times the Remuneration in Box 9;

*Box 12 Agent's bank details* and *Box 13 Principal's bank details*: the required information must be set out in full;

*Box 14 Agent contact details* and *Box 15 Principal contact details*: for insertion of names, e-mail addresses and telephone numbers of personnel responsible for the agreed activities; and

*Box 16 Dispute Resolution*: where a dispute is to be referred to arbitration other than under subclause (a) London, subclause (b) New York or subclause (c) Singapore, it is essential for the purposes of subclause (d) that both the governing law of the contract **and** the place of arbitration are stated in the Box;

*Box 17 Additional Clauses*: details to be inserted as agreed.

### Part II

**Definitions** the list is self-explanatory.

**Clause 1** sets out the Agent's agreement to act on behalf of the Principal in the defined Territory.

**Clause 2** in accordance with the parties' intentions, which should be clearly stated in Box 4, the contract runs from the stated commencement date for the agreed period but, if no period has been agreed, until notice is given in accordance with Box 5.

**Clause 3** provides that the agent will not represent other shipping companies or undertake NVOCC or freight forwarding activities in the Territory in "direct competition" with the Principal's trade described in Box 7. This is likely to mean companies operating the same types of vessels or services over the same routes. However, each case will be determined on its own facts and parties should ensure that any agreement is clear as to the extent to which any restrictions (which can be waived by the Principal) might apply.

**Clause 4** precludes the Principal from appointing other agents in the Territory to carry out Activities within the scope of the Agreement unless required to do so under the terms of a charter party or other contract of carriage. However, such appointment applies only to the specific functions of the appointment and other Activities under the Agreement remain to be performed by the Agent.

**Clause 5** provides that the Agent is to be remunerated in accordance with the amount set out at Box 9 and, as appropriate, itemised at Annex A: Remuneration, for the scope of Activities agreed at Box 8.

**Clause 6** sets out the basis of sub-agent appointments:

- Subclause (a) holds the Agent fully responsible for any loss or damage arising from sub-agents' negligent, reckless or wilful acts or omissions; and
- Subclause (b) imposes responsibility if the Agent is negligent in the appointment or supervision of the sub-agent or where the sub-agent is the Agent's subsidiary company.

However, the Agent is not responsible for lack of care in making an appointment if the Principal has nominated the sub-agent.

If the parties fail to choose between the two alternatives, subclause (a) applies by default.

**Clause 7** sets out an illustrative menu of Activities to be agreed between the parties and undertaken by the Agent:

- Subclause (a) Marketing and sales
- Subclause (b) Port agency
- Subclause (c) Husbandry agency
- Subclause (d) General agency
- Subclause (e) Documentation

The examples of services and functions within each category are not exhaustive and can be amended, adjusted or expanded to suit parties' individual needs. Full details of the agreed scope of services should be comprehensively set out at Annex C: Activities.

Where Activities require the Agent to order goods or services, parties are reminded that they should agree whether such contracts are to be placed in the name of the Agent or in the name of the Principal.

**Clause 8** identifies the contact details of personnel engaged in the parties' day to day exchanges for administering and carrying out contractual obligations.

**Clause 9** sets out the Agent's accounting duties and responsibilities including collection of monies due, checking and paying invoices, maintaining financial records, calculating freight charges and remitting payments subject to retaining, or in the event of a debit balance being put in, sufficient funds to cover outstanding Disbursements and Remuneration.

Remittances due to the Principal are to be paid into the account details set out at Box 13. As an anti-fraud device to prevent payments being diverted into accounts set up by criminals, it is expressly provided that any change to or modification of the Principal's bank account details must be set out in a written amendment to the Agreement signed by both parties.

**Clause 10** expressly provides that the Agent's own funds are not to be used to finance the Principal's interests or obligations.

**Clause 11** requires the Principal to put the Agent in funds, as agreed at Annex B. Funding should cover Disbursements and the Agent's Remuneration. Payment is to be made into the Agent's bank account identified at Box 12. As an anti-fraud device to prevent payments being diverted into accounts set up by criminals, it is expressly provided that any change to or modification of the Agent's bank account details must be set out in a written amendment to the Agreement signed by both parties.

**Clause 12** requires the Principal to settle all outstanding Disbursements and Remuneration when the Agreement is terminated whether or not due to the Agent's default.

**Clause 13** preserves party rights accrued prior to termination of the Agreement.

**Clause 14** requires the Principal's funds to be accounted for separately from the Agent's funds.

Separation of accounting is not the same as a separate client account but is a means of distinguishing and identifying the parties' respective funds. Even if a separate client account is maintained, variations in national insolvency legislation offer no guarantees that such funds will be protected from creditors or liquidators in the event of financial failure. Parties may, therefore, wish to consider any potential risks and, as necessary, seek advice about possible means to protect their interests.

**Clause 15** subclauses (a) to (d) list the Agent's options, including termination of the Agreement, if the Principal fails to meet its financial obligations.

**Clause 16** requires the Agent to provide resources necessary for the performance of the contract. This will be case-specific but, depending on the scope of the parties' agreement, is likely to include office accommodation, staff, communications and transport.

**Clause 17** expressly provides that the Principal's software remains its property and is to be used only for the purposes of the Agreement.

**Clause 18** sets out the parties' respective obligations to maintain defined levels of insurance and, on request, provide each other with proof of such cover. The Agent may terminate the Agreement with immediate effect if the Principal defaults on its insurance obligations.

## **Clause 19**

### *(i) Liability to Principal*

The basic premise is that the Agent has no liability to the Principal for loss, damage, delay or expense unless solely due to the Agent's (and if subclause 6(a) applies, a sub-agent's) negligence or wilful default. In the event of negligence, liability is limited unless the loss or damage has been deliberately or recklessly caused by the Agent or sub-agent. The Agreement offers parties a choice for determining the limit of liability.

Under subclause (a), the maximum is set at ten times the Remuneration level stated in Box 9.

However, the formula in subclause (a) will not necessarily be appropriate where remuneration is determined by, for example, *per capita* container payments or individually set amounts for husbandry or other functions. Accordingly, under subclause (b) the parties are free to agree an amount to reflect the nature and value of the particular services being provided. If agreed, the figure **MUST** be stated in Box 11.

If Box 11 is left blank, subclause (a) will apply by default.

### *(ii) Himalaya*

In order to prevent third parties attempting to circumvent limits of liability by taking direct action against employees or subcontractors, the Himalaya Clause extends defences available under the contract to the Agent's employees and subcontractors. However, while the clause operates as intended in many jurisdictions, it may not be universally effective. Advice should be taken in the event of any doubt.

**Clause 20** the Principal undertakes to indemnify the Agent, its employees, agents or subcontractors against actions or claims in excess of the Agent's liability under Clause 19.

*Note: the indemnity wording differs from the parallel provision at Clause 15 of the Agency Appointment Agreement. This reflects the fact that parties to the General Agency Agreement may choose not to include a defined cap on liability.*

**Clause 21** provides for immediate termination of the Agreement if either party becomes bankrupt or, other than for the purposes of company reconstruction or amalgamation, is subject to winding-up, liquidation or otherwise ceases normal trading.

**Clause 22** the Principal must provide the Agent with its internal policies and procedures which are likely to include health and safety, alcohol and substance abuse, smoking, anti-corruption and protocols covering on-board attendance.

**Clause 23** this is a standard “non-waiver” provision.

**Clause 24** the Agreement may not be novated without the counter party’s consent.

**Clause 25** subject to certain defined exceptions, the terms are private and confidential for the duration of the contract and for two years following termination of the Agreement.

**Clause 26** is a standard clause whereby neither party is forced to act in contravention of its own national laws.

**Clause 27** is a standard provision for giving and exchanging notices.

**Clause 28** any dispute is to be determined in accordance with the BIMCO Dispute Resolution Clause 2016 which has been incorporated into the Agreement by reference. (The full version of the Clause can be viewed at the BIMCO website [www.bimco.org](http://www.bimco.org).) The first sentence acknowledges the parties’ agreement to refer disputes to arbitration and apply the Dispute Resolution Clause. The second sentence identifies the chosen law and jurisdiction (London, New York, Singapore or as agreed and stated) which must be entered in Box 16 in Part I. The final sentence provides that English law and London arbitration will be the default position if the parties fail to make a positive choice.

### **Copyright and availability**

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Sample copies of the contract may be downloaded free of charge from the BIMCO website at [www.bimco.org](http://www.bimco.org) or the FONASBA website at [www.fonasba.com](http://www.fonasba.com).

Editable Word copies can be accessed via BIMCO’s online contract editor IDEA.