



## **AGENCY APPOINTMENT AGREEMENT**

### **Explanatory Notes**

#### **Introduction**

In response to the need for up to date provisions for agency representation, BIMCO and FONASBA have developed a new Agency Appointment Agreement for “one-off” port calls.

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 Ltd

**Mr John Foord**, President FONASBA (Grange Shipping,)

**Mr Fulvio Carlini**, Chairman FONASBA Chartering & Documentary Committee (Multi Marine Services)

**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 Ltd (ITIC)

#### **Key principles**

The Agreement provides a set of standard provisions for appointing an agent for a “one-off” port call. It is therefore expected to be used mainly in tramp trades for agency representation or where ship-related services are required.

The content takes account of the move towards separation of functions where ships today may be owned, operated and managed by separate entities. This has had a significant impact on agency arrangements and relationships. An operator might appoint an agent to undertake commercial functions but has no authority to give instructions for other services. However, a request during the port call from owners or managers for ship’s husbandry can lead to disputes about the extent of the agent’s contractual relationship, obligations and remuneration.

In order to address this issue, the term “Principal” is used to define the Agent’s contracting counterparty. Principal includes owners as well as operators, charterers and managers. Services to

be provided, as the basis of the relationship, are for agreement from a non-exhaustive list together with the agent's remuneration. The provision of, and remuneration for, additional services will be for separate agreement between the parties.

Nevertheless, a Principal is not required to use the Agent for other services. This situation might arise, for example, at a terminal or wharf where an in-house agent is nominated for cargo handling operations. However, the Principal is not prevented from entering a separate agreement with a different agent for ship's husbandry or protecting services. Equally, an Agent appointed by an operator for cargo handling matters might receive a separate appointment from the owners or managers for vessel-related functions.

There is an increasing move away from acceptance by suppliers and service providers of orders placed "as agent only". Nevertheless, the relationship under the Agreement 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).

Other provisions in the Agreement include financial arrangements covering agent remuneration and payment of disbursements, respective party responsibilities and obligations, liability and dispute resolution procedures.

### **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:

*Boxes 4-7:* vessel and port call details;

*Box 8 Services:* functions to be agreed;

*Box 10 Remuneration:* details to be set out at Annex A;

*Box 11 Funding:* details to be set out at Annex B;

*Box 12 Agent contact details and Box 13 Principal contact details:* for insertion of names, e-mail addresses and telephone numbers of personnel responsible for the agreed activities; and

*Box 14 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.

## **Part II**

### **Definitions**

The list includes illustrative examples of specific services which may be provided but parties are free to agree the scope according to their individual requirements.

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

**Clause 2** provides that the Agent acts in that capacity and has authority to place orders on behalf of the Principal.

**Clause 3** services, as agreed in Box 8, are to be carried out with due dispatch. However, the Agent is not liable for loss or damage which could not reasonably be prevented.

**Clause 4** sets out the Agent's obligation to liaise with and keep the Master and Principal up to date with all matters surrounding the services being provided.

**Clause 5** states the Agent's obligation to maintain contact with administrative and regulatory authorities and service providers and give or pass on all notices and information. Nevertheless, responsibility for the accuracy of information being supplied rests with the Principal; the Agent's function is to ensure that it is passed on without delay.

**Clause 6** provides that the Agent is to encourage port authorities and service providers to submit their invoices promptly, take action to obtain any that remain outstanding, check the content and make timely payment.

**Clause 7** provides that the Agent is to be remunerated in accordance with Box 10 (with payment details itemised in Annex A: Remuneration) for the services listed in Box 8. Remuneration for any services in excess of those agreed and stated will be for separate agreement between the parties. The Principal is not required to use the same agent for such other services.

**Clause 8** where, within the scope of the agreed services, unexpected events cause additional work, the Agent is to be reimbursed for any actual costs arising and remunerated accordingly for the resulting extra work.

**Clause 9** provides that where a prospective port call is cancelled, the Agent is to be reimbursed for any actual costs arising and remunerated accordingly for work undertaken.

**Clause 10** makes it clear that a proforma disbursement account is an estimate and expressly provides that the Principal's obligation is to pay the actual disbursements incurred.

**Clause 11** requires the Agent to be put in funds in accordance with Box 11 (with full details itemised in Annex B: Funding). If the Principal fails to meet its payment obligations, subclauses (a) to (d) set out the Agent's options to secure settlement.

**Clause 12** entitles the Agent to claim interest at 2% above LIBOR during any period when the Principal has failed to meet its payment obligations.

**Clause 13** expressly provides that any amount due to the Agent may be deducted from sums held for the Principal's account.

#### **Clause 14**

##### *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 negligence or wilful default. Unless such loss or damage results from the personal act or omission of the Agent (i.e. deliberate action of the controlling mind), liability for negligence is capped at ten times the level of Remuneration set out in Box 10.

##### *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 15** 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 14.

**Clause 16** confers authority on the Agent, subject to the Principal's consent, to appoint sub-agents. The Agent is responsible for sub-agents' actions.

**Clause 17** provides that the Agent is discharged from all liability unless suit is brought within one year of a claimed act or default.

**Clause 18** 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 14. The final sentence provides that English law and London arbitration will be the default position if the parties fail to make a positive choice.

**Clause 19** is a standard clause whereby neither party is forced to act in contravention of its own national laws.

**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](#).