

GENERAL CONDITIONS AND RULES FOR DUTCH SHIPBROKERS AND AGENTS

ASSOCIATION OF ROTTERDAM SHIPBROKERS AND AGENTS
(VERENIGING VAN ROTTERDAMSE CARGADOORS)

SHIPPING ASSOCIATION NORTH SECTION SHIPBROKERS
(VAKGROEP CARGADOORSBEDRIJVEN DER SCHEEPVAART VERENIGING NOORD)

ASSOCIATION OF NORTH NETHERLANDS SHIPBROKERS
(VERENIGING VAN NOORDNEDERLANDSE SCHEEPVAARTKANTOREN)

VZC SHIPBROKERS AND SHIPAGENTS ASSOCIATION
(VERENIGING VAN ZEEUWSE CARGADOORS)

Deposited on 1 December 1992 at the Registry of the District Court in Amsterdam, Dordrecht, Groningen, Leeuwarden, Middelburg and Rotterdam and the Chamber of Commerce in Amsterdam, Dordrecht, Groningen, Leeuwarden, Middelburg and Terneuzen.

INTRODUCTION AND COMMENTARY

A shipbroker is an intermediary in maritime (and some cases other forms of) transport who provides professional services to the principal (i.e. the carrier), by concluding agreements or mediating in the negotiation of agreements on behalf of the carrier in one or more ports or transport hubs where the latter is unrepresented or for some other reason leaves these activities to the shipbroker. This also corresponds closely with the task of shipbrokers as it has evolved historically: shipowners had a requirement for trusted agents capable of handling shipping affairs in foreign ports in the same way that the principal would have done had he been established there himself.

The shipbroker's duties naturally also involve performing all sorts of minor activities on behalf of his principal's vessel, master and crew.

The shipbroker's duties involve representing the carrier on the spot, while also being authorized by the carrier to undertake all sorts of local shipping and transport matters on his behalf. The shipbroker can for example engage pilots, tugs and boatmen for his principal, arrange for ship's stores and supplies and bunkers to be delivered, handle inward and outward clearance, arrange moorings, pay harbour dues and other fees, arrange for the vessel to be loaded or unloaded, have the cargo stowed and lashed, handle personnel matters, such as the crew change, accept cargo for shipment and much else besides, subject of course to the proviso that limits may be set on the shipbroker's duties if this is laid down in or arises from the contract entered into with the principal.

Particularly in the case of "tramp vessels", it may not always be easy to establish who the shipbroker's principal is. The shipbroker will where possible seek to be issued with proper instructions, but vessels unexpectedly entering a port after a storm, fog, accident or strike in another port can be a source of problems, particularly if this happens at weekends. In other cases too ad hoc instructions are often received by telephone or by an unsigned, or signed but not binding, fax or telex message. Many vessels also belong to a given legal entity (e.g. a one-ship company) which then leaves the actual operation to a different legal person or managing owner, while other freight agreements can also be concluded.

In the latter case it is possible for there to be more than one shipbroker: one for the shipping company (i.e. owner) and one for the charterer, who - sometimes as the last in a chain of charterers - has disposal over the cargo space.

In such cases the only thing the shipbroker has to go on is the ship's name and the fact that the ship bearing that name does indeed enter the port in question, which may be considered as a confirmation of the instructions by the person authorized to command the ship and the master. If the shipbroker's claim on the ship is recoverable, the ship may then itself constitute a suitable object of recourse.

If the shipbroker acts as the agent for a regular line matters are of course much simpler. In these cases there will generally be a written agency agreement laying down the relationship between the shipbroker and the principal in some detail. Where the shipbroker acts as a cargo-broker this has two special features. In the first place this will not necessarily concern a vessel or other means of transport located at that time at the place where the shipbroker conducts his business. Secondly, the shipbroker acting on behalf of the consignor does not mediate on behalf of the carrier but the counterparty in a freight agreement. These considerations do not, however, impede the (possibly corresponding) application of these general conditions.

Another grey area relating to the scope of these general conditions needs to be identified. Apart from normal activities a shipbroker can also perform other shipbroking activities, such as storage, stevedoring etc., either himself or by means of a parent, affiliated or subsidiary company. It can indeed be highly practical for these differing services for maritime vessels to be provided by more or less the same person. At the same time, such activities barely constitute a grey area, in that these services are distinct from those of shipbroking and are governed by their own contractual conditions, including the general conditions of the industry in question, such as warehousing or stevedoring conditions.

Delimiting the field in relation to the forwarding agent is more difficult. This does not apply so much if a shipbroker or a parent, affiliated or subsidiary company receives an instruction to transport, put up for shipment or deliver a load. Clearly, this is forwarding agent's work with (unlike the shipbroker) a non-carrier as principal. Such an agreement will also be regulated by its own (generally FENEX) conditions.

The situation with respect to the transportation of general cargo on "liner terms", however, does often cause problems. The carrier will then load or unload the ship or have it loaded or unloaded by a stevedore. But under these conditions the carrier is bound only to load/unload from/to the ship's rail. The shipper or recipient must either deliver for shipment or receive at the ship's rail. Clearly it would be unfeasible or needlessly expensive to transfer the goods to a different crane at the ship's rail. The carrier's crane (or that of his stevedore) transfers the goods to or from the quay or lighter. Port procedures and commercial practice have therefore always provided for the carrier to arrange the entire loading/unloading, including transfer of the cargo to a shed on instruction of the shipbroker, but for the cargo-owner to pay the costs to the shipbroker in accordance with the Port Commodity Tariff, while the shipbroker in turn pays the stevedore. Although the obligation on the part of the principal to pay this share arises from (the conditions of) the contract and the shipbroker will be authorized to collect such payment on the basis of his appointment, there will in fact logically be close contact between the cargo-owner and the latter's forwarding agent and the shipbroker, in which respect reasonable requests must be met in both directions by means of separate agreements. The shipbroker's duties deriving from his contract with the carrier are therefore in addition to those he has assumed in the context of those agreements.

In line with the above, Article 1 of the Conditions stipulates that the conditions apply to every conceivable form of shipbroker's services, while in the event that Forwarding agent's services are provided the relevant forwarding conditions shall also apply, being in most cases the Dutch Forwarding Conditions (i.e. general FENEX conditions) registered with the District Courts in Amsterdam, Arnhem, Breda and Rotterdam on 2 March 1992. In the event that forwarding services have been provided on behalf or to preserve the interests of a cargo-owner, these new FENEX conditions shall prevail over the new shipbroker conditions in accordance with Article 5. This provision draws a much clearer distinction between the regimes applying to shipbroker's services on the one hand and shipping agent's services on the other. From the viewpoint of the cargo-owner, the latter will generally be concerned with only one regime, namely the FENEX conditions. The actual shipbroking services are subject to the regime of the shipbrokers' conditions. Only a very limited category in the grey area can still lead to uncertainty. In these

cases it is stipulated that both sets of conditions shall apply, with the shipbrokers' conditions prevailing. In this grey area the relationship with the cargo-owner arises from the transport agreement, including the aforementioned case of transport on liner terms. In these cases the emphasis is also placed on transport aspects, so that the prevalence of the shipbrokers' conditions aimed at maritime transport is self-evident. In addition, the grey area has been narrowed to such an extent by Articles 1 and 5 of the shipbrokers' conditions and Article 1 of the FENEX conditions that little further consideration is required, especially since the regimes of the shipbrokers' conditions on the one hand and the FENEX conditions on the other do not differ fundamentally.

The new shipbrokers' conditions have been brought into line with the requirements of the New Civil Code, which came into force on 1 January 1992, although it should be noted that those industries already using standard conditions - as was the case with shipbrokers - in fact had until 1 January 1993 to bring their conditions into line. In the interim the existing conditions remained in force.

The New Civil Code has set limits on the scope for an appeal to general conditions. This limitation is at its most marked when a shipbroker is dealing with a consumer who is a natural person and who is not acting in the course of carrying out a business or professional activities. Such instances will however be extremely rare: some consumers will for example wish to transport household effects or a car, so-called "personal effects", for which purpose they will negotiate a freight agreement with a maritime carrier or through a forwarding agent. The carrier may be represented by a shipbroker, but there is unlikely to be a direct contractual relationship between this consumer and the shipbroker.

In many cases the shipbroker will be dealing with a foreign principal, in which case consumer protection will not apply at all. In the other cases the shipbroker's counterparty also enjoys only limited protection if it is a company that publishes annual figures and has 50 or more employees. Clearly, it will be difficult in everyday shipbroking practice to determine these matters. In many cases it will simply not always be feasible to check on the Trade Register by telephone. It is, however, clear that the number of cases of enhanced protection of a shipbroker's principal will be extremely limited. Since these will be cases in which the principal is established in the Netherlands, the shipbroker will often be a participating interest of the principal, so that the legal relationship is determined by the group relationship, rather than the shipbroker's conditions.

In the vast majority of cases, the protection of the shipbroker's principal will remain unchanged upon the introduction of the New Civil Code: he will only be able to contend that an appeal to one or more of the general conditions is at variance with reasonableness and fairness. For this reason there was no need for any radical amendment of the shipbrokers' conditions with respect to the exclusion and limitation of the shipbroker's liability. The various parties concerned have become familiar with the liability regime. This is also consistent with the practice elsewhere in maritime transport, although there are countries with a different shipbroker's liability regime. The liability insurance arrangements protecting the shipbrokers and maritime carriers are accordingly based on these exclusions and limitations. It did not appear sensible to interfere with those arrangements on behalf of an exceptionally limited residual group of principals established in the Netherlands who do not publish annual figures and who have fewer than 50 employees.

With a view to the reasonableness and fairness of these exclusions and limitations it may also be noted that the shipbroker receives an extremely modest remuneration for what he adds to the services of the carrier and in some cases the cargo-owner in the port in question. This can lead to circumstances in which the courts decide to moderate an outstanding claim for loss.

This limited remuneration is therefore also an argument for the validity of the aforementioned exclusions and limitations.

Also relevant is the fact that, with a few exceptions, two interested parties have effective insurance covering all or virtually the risks at issue when it comes to marine transport, namely carriers with their liability insurance (generally placed with Protection and Indemnity Associations)

and hull insurance, and cargo-interests with their cargo policies.

Enlarging the liability of shipbrokers and similar intermediaries, and the consequent necessity on the part of such individuals to take out more extensive insurance against the liability risks, will only have the effect of increasing costs, without a corresponding decline in the premiums for P and I insurance and transport insurance, since the latter premiums are determined on the basis of international indemnity statistics. A small shift in the liability of the intermediaries in the Netherlands will be of no consequence. Article 8 of the shipbrokers' conditions has consequently been retained, subject to the proviso that the period of limitation and expiry dates will be considerably extended in accordance with Article 21 of the new FENEX conditions.

With respect to the conditions regulating aspects other than liability, the following principal amendments (disregarding editorial changes) may be noted:

In Article 12 the regulations of Article 18(2) of the new FENEX conditions have been adopted in respect of overdue payment.

In Article 27 a regulation more in line with practice has been included with the intention of protecting as far as possible the shipbroker who to the best of his knowledge solves the puzzle of the correct name of his principal.

In line with the jurisprudence of the highest court in the Netherlands, a more satisfactory indemnity arrangement has been included in Article 30 to cover the termination of a long-term agreement between the principal and shipbroker.

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1. The term "services rendered by the shipbroker" in these Rules shall mean:
"Services performed in an enterprise the object of which is to attend to and to transact the ship's business on behalf of shipowners, carriers, time charterers or masters of sea-going vessels, to deliver the incoming cargo and to receive the outgoing goods, which shall comprise all that is to be performed by him in respect of or for the shipping business in the widest sense, which shall include acting as customs agent and also attending to and transacting on behalf of others, notably receivers and shippers of cargo, all that is related thereto in any respect, and also acting as intermediary for entering into contracts of affreightment or charter, other contracts of carriage, agreements with respect to the use of containers and the like, insurance agreements and contracts of sale and purchase, as broker or otherwise, all this insofar as a sea-going vessel or other means of carriage is directly or indirectly involved."
2. The appointment of or the instruction to a shipbroker to render his services in that capacity to any ship, including crew and cargo, in a Netherlands Port, shall confer upon the shipbroker authority to carry out and perform all such work and services as it is customary to carry out or perform in the shipbrokering trade, where appropriate in his own name, to conclude agreements on behalf of his principal without, however, his being bound to perform all and sundry work on behalf of that ship, her crew and cargo by reason of the mere fact of such appointment or instruction.
3. If in the case of any contract of charter between charterer and shipowner it has been agreed that the shipbroker appointed by the charterer shall act as the ship's agent, both the charterer and the ship owner shall be severally liable as principal towards the shipbroker according to the terms of these rules.
4. All offers made by the shipbroker shall be deemed to be without engagement unless the contrary has been expressly stated therein.
5. All work performed by the shipbroker which does not come within the scope of the work and services generally performed by a shipbroker (such as stevedoring, forwarding, operation of warehouses, superintendence, etc.) shall also be governed by the conditions customary in the branch of trade concerned or filed and/or laid down by the organization of the branch of trade. In the event of these conditions and the conditions herein contained being contrary to each other the former shall prevail, but solely if and insofar as those activities have been carried out on behalf or to preserve the interests of

the cargo-interest. In all other cases the present conditions shall prevail.

6. The shipbroker may cause work entrusted by him to third parties for his principal to be performed with or in the execution of his duties make use of equipment of third parties on the conditions customary in the branch of trade concerned or fixed by such third party itself for its business.
7. In all cases where the shipbroker receives cargo for shipment he shall be deemed to have these goods in his charge and to render his services in relation to these goods as authorized agent to the shipper until such time as the ship shall have taken over the same, unless prior to receiving the goods the shipbroker has expressly declared and stated to act as representative of the carrier.
In the aforementioned cases the cargo shall remain at the full risk and expense of the shipper and consequently all expenses such as dock dues and demurrage charges in respect of lighters, demurrage on wagons, unloading of lighters and wagons, superintendence, weighing, expenses for night-work or overtime and the like shall be for account of the shipper.
8. For damage or losses arising or resulting from non-performance or improper performance of the instruction given to him, the shipbroker shall be liable to the principal only if the latter proves that such damage or loss has been wilfully caused by or has arisen from gross negligence of the shipbroker or persons for whom the shipbroker is responsible. However, the liability of the shipbroker shall not exceed an amount equal to the remuneration which would be due to the shipbroker for the proper execution of the relative instruction, and shall cease entirely after six months have elapsed since the loss or the damage arose. None the less, the shipbroker shall in no event be liable for damage to or loss of goods handed over to him for handling or placed in his custody. Any claim against the shipbroker shall be suspended after the expiry of 9 months and shall lapse after the expiry of 18 months, these periods to be determined from the final day of the event giving rise to the liability.
9. The shipbroker shall provide his services in return for expressly agreed fees, or, in the absence of such an agreement, according to his published charges or those quoted to the principal in question. However, if the performance thereof shall require any special work or unusual extremely time-taking or strenuous work, an extra remuneration may be charged, such remuneration to be determined in fairness which, failing agreement, shall be determined by means of arbitration in accordance with the rules of procedure of the Stichting Transport and Maritime Arbitration Rotterdam-Amsterdam (TAMARA)
10. The shipbroker may either before, during or after the performance of his duty demand a security for the payment of the sum due to him by his principal. He shall not at any one time be under obligation to make any payment whatsoever on behalf of his principal as long as he shall not have received the necessary security of funds for that purpose. The shipbroker shall be entitled to charge the principal an advancing fee of 1 per cent on the disbursements made by him.
11. He shall be entitled to retain the goods and moneys intended for or received from his principal in his keeping until security shall have been given for the payment of the sum due to him. The shipbroker shall have a lien on all goods and moneys he has in his custody on behalf of his principal for all claims which the shipbroker may have from any cause whatsoever against his principal. The shipbroker shall be entitled to set off and to deduct the sum due to him against and from moneys owed by him to the principal and to sell the goods on which he has a lien either publicly or with Court authorization privately if the principal has failed to give a security or to settle the claim of the shipbroker after more than 30 days having elapsed since the despatch of a summons by registered mail.
12. In respect of outstanding accounts of the shipbroker which are not settled within 14 days after invoice date, the legal interests shall be due from that moment without summons being required. If in the event of payment being overdue, collection by judicial action or in another way will be proceeded to, the amount due shall be increased by 10 per cent for administrative expenses, whilst the costs incurred in and out of Court shall be for the

account of the debtor up to the amount paid or due by the shipbroker.

13. All expenses incurred in connection with the remittance of moneys of, to or in behalf of the principal shall be for account of the principal.
14. If the sum due by the principal to the shipbroker be expressed in a foreign currency, the shipbroker shall at his option be entitled to demand payment either in the foreign legal tender concerned or in a first rate bank cheque or in Netherlands currency at the Netherlands Bank rate of exchange ruling on the day the instruction was given or the highest rate at the date of his account, or the highest rate on the day of payment, at the option of the shipbroker.
15. The shipbroker shall never be liable for any loss on exchange in respect of amounts which he has in his keeping on behalf of his principal or which he is to collect or pay on the latter's behalf. Freights and other accounts expressed in foreign currency which are to be collected or paid by him, may be accepted or paid by him in Netherlands currency at the Netherlands Bank rate of exchange ruling on the day of payment.
16. All information and communications, such as for inst. information and communications concerning port facilities, despatch, cost and expenses, progress of loading and unloading, arrival and departure, strikes, etc. etc., nothing excepted, shall be given and made by the shipbroker to the best of his knowledge and ability, but he shall not be responsible for the correctness thereof.
17. The calling forward of cargo by a specified date by the shipbroker is done always subject to alteration of the date so mentioned in connection with unforeseen circumstances or changes in the sailing schedule.
18. The shipbroker does not accept any liability for the collection of the amounts to be cashed on delivery of goods shipped on C.O.D. terms
19. The shipment of cargo may be refused without any reason being given, even after the shipbroker has taken them into his charge.
20. In case the shipbroker has cargo or other matters in his custody he may terminate said situation by notifying the principal thereof by telegram or registered letter, such notice to be sent to the last-known address of the principal.
If the relevant cargo and other matters have not been disposed of within the reasonable period specified in the said notice the shipbroker may in his discretion store the goods and sell them with judicial authorization in accordance with the provisions of book 8 Article 491 of the Civil Code and Article 632 of the Code of Civil Procedure.
Of such intended sale by him the shipbroker shall give notice by telex, fax message or registered letter, such notice to be sent to the last-known address of his principal. The shipbroker shall also be entitled to set off and deduct the sum due to him by the principal against and from the proceeds of the goods.
21. 21. The risk of mutilation of any communication or interruption of the transmission of communications through the use of the post, wireless, telephone, telex, fax equipment and telegraph and the like shall be for account of the principal.
The shipbroker shall not be liable for misunderstandings arising or resulting from the use of a language other than the Netherlands language.
22. The shipbroker shall never be bound to give guarantees or security on behalf of his principal to third parties. In respect of all guarantees or securities given by him by order of his principal a commission in line with that customarily charged by Dutch commercial banks shall be payable to him by the principal on the maximum amount for which the shipbroker may be held liable under the guarantee or security given by him.
23. The shipbroker shall not be bound to effect any insurance.

24. The shipbroker shall not be answerable for the due payment of amounts outstanding in the Netherlands, if the granting of credit is customary or in the interest of an effective performance of his duties and if the debtor was to be deemed solvent, all this in his absolute discretion. He shall never be answerable for the due payment of amounts outstanding abroad. Nevertheless the shipbroker shall be authorized by his principal to demand payment of outstanding sums both in the Netherlands and abroad in his own name and to institute legal proceedings to that end.
25. The shipbroker shall be entitled to deliver the cargo against a proper security if the receiver is not in possession of bills of lading. As proper security shall be regarded inter alia a banker's guarantee on the form as recommended by the aforementioned shipbrokers' associations to which the shipbroker belongs.
26. The principal shall be liable to the shipbroker for all engagements entered into towards the shipbroker by the Master of the ship to which the shipbroker renders his services on behalf of the principal and for all instructions, whether emanating from the Master or from the office of the principal or from their subordinates or written on their letter-paper, even if the Master or the person by whom such instruction has been given on behalf of the principal has exceeded his powers, unless the principal is able to prove that the shipbroker was aware that he had exceeded his authority or would have been able to establish this straightforwardly and in good time, without need for further investigation abroad.
27. The shipbroker who uses the name of his principal or adequately identifies the principal among interested parties in marine commerce by the use of abbreviations or otherwise or by referring to the name of the ship shall not on his own account be liable for the payment of orders or instructions which he has placed with or given to third parties in the name or on behalf of his principals, neither shall he be liable when not having expressed when placing the order or giving the instruction that he was acting as agent. Each payment in respect of such order or instruction made by the shipbroker shall be deemed to be an advance which at all times can be claimed back as long as the shipbroker has not himself received the amount concerned from his principal.
28. The shipbroker shall not be liable in any respect whatsoever for the consequences of war, danger of war, riots, labour strikes, slow down strike, lockout, boycott, sabotage, any Port being overburdened and the like, which may affect or interrupt the regular course of his business.
In the event that cargo cannot be delivered in connection with one of the circumstances mentioned in the preceding sentence or other circumstances constituting force majeure, the shipbroker shall nevertheless be entitled to payment of shed-hire and/or storage charges up to the point of time of the delivery, according to the applicable tariff rates.
29. The principal shall hold the shipbroker harmless in all cases where the shipbroker is personally liable to third parties in respect of acts he performs on behalf of the principal, which shall include his being indemnified in respect of any fine imposed upon him, in particular in the event of the shipbroker having acted in his capacity of licensed customs agent.
30. If the agreement between the principal and shipbroker is by way of a long-term agreement the principal shall, save in the event of serious non-performance by the shipbroker, be required to give a reasonable period of notice in the particular circumstances of the case before terminating the agreement, while the shipbroker shall, in the event that he is not reasonably and fairly held harmless upon observance of that period of notice and a possible goodwill payment, be entitled to an indemnity to be determined on the basis of reasonableness and fairness in respect (amongst others) of investments, selling costs, advertising expenses and extra costs arising from the discharge of redundant personnel incurred on behalf of the principal.
31. Netherlands law shall be applicable to the legal relation between principal and shipbroker and the question whether the shipbroker has correctly performed any legal transaction on behalf of his principal shall also be judged in accordance with the views

obtaining in and the law of the Netherlands. The shipbroker shall not be liable for errors on his part as to foreign law or conditions abroad.

32. All disputes arising between principal and shipbroker under a contract entered into on the basis of these General Conditions and Rules shall be subject to arbitration in Rotterdam or Amsterdam under the TAMARA Rules, which shall be supplied by the shipbroker on request.

With prejudice to the provisions in the previous paragraph the shipbroker shall be at liberty to submit to the ordinary court demands for payment of outstanding amounts liability for which has not been contested by the counterparty within four weeks of the invoice date.

33. These General Conditions may be obtained either in Dutch, English or German upon application from the aforementioned shipbrokers' associations.

In the event of any discrepancies between the Dutch text of these General Conditions and Rules and that in any other language the Dutch text shall prevail.

If these Conditions and Rules are amended the new conditions, provided they are registered promptly and correctly, shall replace the previous conditions without the need for any further legal action

34. These Conditions and Rules may be cited as the "General Conditions and Rules for Dutch Shipbrokers and Agents".