Legal Eagles...

Do you have a burning legal question for the HFW *Shipping Network* team? Email legaleagles@ics.org.uk for them to answer your question in the next issue of the *Shipping Network*. Questions should be of a general nature and not specific to a particular live issue.

Holman Fenwick Willan's crack team of specialist shipping lawyers answer your legal questions

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Q As a chartering broker I find I am having to 'translate' my principal's requests in negotiations as English is not their first language. What liabilities might I face if my translation is incorrect?

A When negotiating a charterparty on behalf of your principal, it is important to ensure that the fixture ultimately agreed reflects your principal's instructions, and also that you have not passed inaccurate information to your principal's counterparty. Otherwise, you will potentially expose your principal to liability and in turn also be at risk of claims yourself.

You owe a duty to your principal to use reasonable care and skill when carrying out the services you provide. This duty may be expressly set out in any written terms and conditions between you and your principal but, even if it is not or there are no written terms in place, the duty is implied by English law. A failure to use reasonable care and skill can also form the basis of a non–contractual claim for negligence. If you are not sure what your principal is requesting but act on your own interpretation of his request without first checking the position, this could amount to a failure to exercise reasonable care and skill.

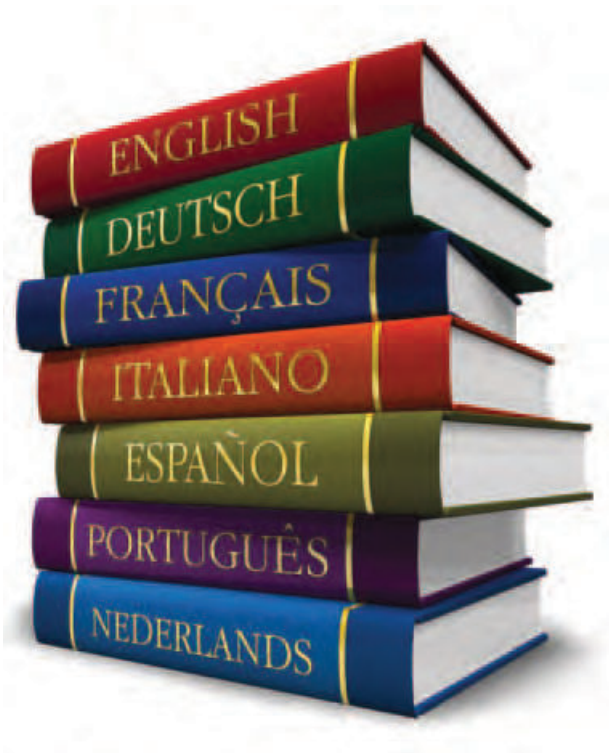
In addition, as agent of your principal, you owe a duty to act in accordance with his instructions. If you interpret those instructions incorrectly, you might bind your principal to a contract which does not reflect his commercial requirements.

In such cases, your principal may claim against you for any additional cost of performing the charterparty contract. However, if your principal is unable or unwilling to perform the contract, they will face liabilities for breach of contract and may well claim against you to recover their losses. Mistakes in 'translation' can, therefore, result in both direct and indirect claims against you by your principal.

Brokers can also be directly liable to their principal's counterparty. If you pass on a request from your principal but 'translate' it incorrectly, then this may amount to breach of warranty of authority as you may be putting forward terms your principal has not, in fact, authorised you to propose. Alternatively, misstatements of fact during negotiations could give the other party a claim against you for misrepresentation.

Examples of mistakes which could give rise to claims include an owner's broker passing on inaccurate information as to the characteristics and description of a vessel or the daily rate of hire requested by the owner, or a charterer's broker misunderstanding the information provided by his principal about the nature of the cargo to be carried.

If your principal's instructions are ambiguous and you have interpreted them in good faith, then you may have a defence to some of the above mentioned claims. However, if you are in doubt as to what your principal has said but proceed with the negotiation or fixture anyway without checking back, then you are unlikely to be able to rely on this defence.



Brokers must use their judgement when 'translating' charterparty terms

Damages awards in such cases are generally aimed at putting the principal or counterparty in the same position as he would have been in if the mistake had not occurred. The broker's financial liability for such claims will depend on the nature and consequences of the mistake, and could be considerable.

Therefore, although you may be under pressure to get the deal done, it is important wherever possible to confirm your understanding of your principal's instructions in writing. Further, best practice is to ensure that there are written terms and conditions in place between you and your principal, which can include provisions limiting your liability in the event of a claim in relation to the services provided. Of course, ideally, it would be best to involve a fluent English speaker from the principal's office in the exchanges, where there is such a person. ***SN***

While every care has been taken to ensure the accuracy of this information at the time of publication, the information is intended as guidance only. It should not be considered as legal advice.

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Spell it out

HFW advises how to avoid ambiguity in contracts and prevent associated headaches

It is important to take particular care when committing an agreement between principals to writing. What may appear at the time to be straightforward and clear provisions may become headaches later on down the line. In particular, one potential pitfall of imprecision – namely, ambiguity – could have serious repercussions.

A relatively recent Commercial Court case provides a textbook example of how the interpretation of important correspondence between parties can be materially affected by ambiguity. In this illustration, it was the use of abbreviations at the root of the issue.

Abbreviations can mean different things to different people

In *The Zenovia* , an arbitration tribunal considered a notice of redelivery as follows: "approximate notice of redelivery for the *MV Zenovia* at DLOSP 1 sp China on about 06 Nov 2007 basis agw, wp, wog, uce..." The arbitrators found that "wp" in this sentence meant 'without prejudice'. The commonly–held interpretation of 'wp' in this context – that is, 'weather permitting' – had not been considered. In so doing, the tribunal arguably altered the charterers' intended meaning of the notice.

On appeal, the tribunal's conclusion on this term was doubted seriously by the judge in the Commercial Court, Mr Justice Tomlinson. However, he did not feel obliged to depart from this finding.

In *The Zenovia*, the case happily did not stand or fall on the interpretation of one abbreviated term, nevertheless, it does serve as a useful warning. While parties – including their brokers – may use terms such as abbreviations that have (what they may perceive to be) well–settled meanings, they may also unwittingly invite ambiguity into their negotiations. Any party who intends to rely solely on abbreviations to a certain extent thereby becomes a hostage to fortune.

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Impact in practice

Where this issue is of significant practical importance is in relation to the brokers' transposition of a short form recap into a full form charterparty, without re–stating abbreviations in their full wording. Often, mainly due to time pressures, abbreviations and shorthand terms are transferred directly on to, or annexed as riders to, standard form agreements.

Two interlinked problems could arise from failure to take due care in this regard. The first is that, as a general rule, where two terms are in conflict, a clause typed over or onto a standard printed form will prevail. This may be contrary to the parties' intention (especially if they have taken care over which standard form to use). The second, and potentially more important, problem is that expounded in *The Zenovia* – namely, the use of undefined abbreviations opens previously uncontroversial terms up to unnecessary ambiguity.

It is also essential to note that, where ambiguity exists, it could fall to the Court or arbitration tribunal to decide the meaning of a clause or term in a charterparty (especially if the ambiguity results in a dispute). A common principle of construction used in the face of ambiguous terms is the 'contra proferentem' rule, that is, construing any ambiguity in a clause against the person for whose benefit the clause operates.

So, for example, time bar provisions or exceptions clauses which are loosely–worded or ill–defined could work directly against those who seek to rely on them. Clearly, therefore, it is in the best interests of all to make sure that any wording incorporated into agreements (on your behalf or your principals') are as clear as possible. ***SN***

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