Double Brokering in the Canadian Trucking Industry

Canadian International Freight Forwarders Association

April 2023

CIFFA

This White Paper is not intended to be nor is it offered as legal advice nor it is intended to serve as an exhaustive checklist or characterization of industry standard. Particular fact situations or claims should be referred to qualified legal counsel familiar with your business and the laws applicable to it. Further, this White Paper is not intended to define or prove compliance or non-compliance with any legal standard of care of diligence, and it should not be used or relied upon by anyone for such purposes.

Table of Contents

Managing Risk

The practice of “double brokering” can pose potential legal and commercial risk to your business.

You’re a freight broker. Your shipper customer asks you to arrange for a trucking company to carry their freight. The details of your contractual engagement with your customer will dictate whether you are assuming the role of “travel agent” for the cargo, with the carrier issued bill of lading framing the contract of carriage with the shipper. On the other hand you may be seen to have assumed a “principal” mandate with the shipper regarding you as the “contracting carrier”. With the former, your exposure to liability for cargo loss, damage or delay will be assessed along agency law factors: did you effectively follow your shipper’s instructions? With the latter, you will necessarily be seen to have in effect sub-contracted the actual “performing” motor carrier for your own account such that you may face cargo claims liability.

In either case, you have “skin in the game” as concerns the safe delivery of cargo to destination.

Beyond the question of your *agency* or *contract of carriage obligations* owed to the shipper, freight brokers face the potential of *negligence claims* brought by *third parties* alleging injury or loss arising from transportation casualties involving your selected motor carrier. You may now be subject to scrutiny as to whether you took reasonable steps in the vetting and selection of the motor carrier.

The above risks “come with the territory”. They however become more pronounced with the “double brokering” of freight. The practice of “double brokering” is now rampant in the industry.

It is not suggested that double brokering should never be permitted or take place: time, driver and asset demands and constraints sometimes call for flexibility in the movement of freight that the practice may allow. The practice however comes with risk. The carrier you engage may - with or without your knowledge-delegate or “double broker” the load to a third party carrier to perform the move. That carrier might even in turn assign (“triple broker”) the load to yet a different carrier, and so on and so forth.

To a certain degree the further brokering out of freight will compromise the control that you can (and may be expected to assert) in the selection of the performing carrier and the handling of the cargo.

The Potential Perils of Double Brokering

This white paper addresses three areas of enhanced commercial and legal risk where loads are brokered out by your selected carrier and "something goes wrong" during transit or in the freight billing cycle:

1. The shipment may not be safely delivered to destination.

Shippers, freight brokers and carriers are free to negotiate contract terms. Freight brokers must be deliberate - and contractually articulate - with their business model, risk appetite, and the management of the obligations they undertake. Many shippers contractually require freight brokers to take on liability for cargo loss or damage. In that case the prudent broker will seek to pass the same exposure or responsibility to the performing carrier.

For that matter, a court may impose carrier-like liability on a freight broker for cargo loss or damage where on the particular facts of a case the broker is seen to have otherwise undertaken a carrier mandate. Did it for example publish a bill of lading form with its name and logo, making it look like it is an "asset based" carrier? Did the broker in effect promise safe delivery of the cargo? Does its website suggest that the broker has a fleet of trucks, or has the broker held out to the shipper as being responsible for the delivery of the load as opposed to merely *arranging* the same? These and other factual considerations may culminate in a determination that the broker was for all intents and purposes a carrier for the purposes of cargo loss or damage liability.

Current best practices call for the freight broker to vet a carrier's safety rating, insurance coverage and to ensure that the carrier is "real", not being a part of an attempted "identity theft" scam. The freight broker's element of choice, due diligence and control is distilled when the carrier it chooses to perform the load in turn engages a third party. As a broker you want to ensure that the cargo is not unnecessarily exposed to loss or damage. This may happen when the carrier that you selected is not actually handling the cargo. Just who exactly has been entrusted with the load? Are you exposed to criticism (if not potential liability) for not effectively managing the load as expected?

Consider just a few examples of possible "disconnect" that may come with the further brokering out of freight:

- Were there special environmental control requirements imposed by the shipper?

- Were there special cargo securement and equipment requirements for the shipment?

- Was the load to be delivered on a specified date and for a specific purpose?

While the above (or other) instructions may be diligently provided by your company to your carrier, will they find their way to a "downstream" third party carrier? Will you face contractual

liability (as a principal) or "errors and omissions" liability (as an agent) on the facts of the case if cargo is lost, damaged or delayed?

As addressed below, what about if the performing carrier gets into an accident and causes injury or death to a third party or damage or loss to their property? As a matter of cargo claim risk management you should be vetting your selected carrier to ensure that it has adequate motor carrier legal liability insurance for cargo claims. Will it in turn be making sure that a "second generation" carrier has coverage? If you (as a principal) or your shipper (if you were an agent) file a cargo claim against your selected carrier, will it have coverage for cases when it parted with the possession of the goods to a third party?

The need for carrier selection due diligence includes confirming that the carrier you engage is "real" and is not a fraudulent operation. Situations unfold daily where a "rogue" entity posing as a carrier fools a broker into thinking that it has assets and a driver available to haul freight. The freight broker provides a carrier or rate confirmation sheet to the "pretend" carrier, who attends at origin to pick up the shipment to complete the theft of goods. You may have done this diligence in the selection of your carrier. But will it have done the same vetting of "its" carrier?

At a minimum, your obligation as a freight broker is to follow your shipper customer's instructions and to fulfill your mandate in facilitating delivery to destination. Things can go wrong in a number of ways with the involvement successive participants in the delivery chain.

2. The performing carrier is involved in a serious motor vehicle accident causing harm to persons and/or property may be an unsafe or questionable operation.

The perils of "double brokering" may come into play by your losing control over the selection of and instruction of the performing carrier. You should be prepared to defend your selection of a carrier. Best industry practice in Canada suggests that *at minimum* the "reasonable" selection of a carrier involves ensuring that the carrier is properly licensed, maintains at least a "satisfactory" safety rating and is adequately insured. You want to ensure that the carrier handling the freight is not an unsafe carrier.

You may reasonably believe that you have selected a *safe* carrier. Were it to broker the load out to a third party carrier, will it take the same vetting steps? What is your exposure in the equation?

American courts have been dealing with arguments by plaintiffs' counsel attempting to place liability on freight brokers in connection with a carrier's driver's negligence and/or equipment malfunction causing harm on the basis of different legal theories such as "broker negligent selection", "vicarious liability" or "joint venture". Juries in the United States have entered staggering awards against freight brokers in personal injury actions arising out of motor carrier accidents in recent years. Plaintiffs typically advance a variety of theories against freight brokers, ranging from claims that are based upon vicarious liability (arising from alleged control being

exercised over the motor carrier) to claims sounding in negligence (in the selection of or retention of a given motor carrier).

While not yet the subject of Canadian case law, it is a question of "when", and not "if" these issues will be faced by a Canadian freight broker in the context of litigation. What risk is there to your business if you in effect set the carriage wheels in motion where an unqualified or unsafe carrier hauling the load causes an accident?

This is of concern where your selected carrier actually performs the carriage mandate. The risk may even be more pronounced in cases where there has been double-brokering. While you might defend your choice of a carrier, did you foresee or permit its engagement of a third party carrier that you have not vetted? Can it be said that you fell short in managing or limiting the risk of harm to third parties?

As mentioned, there is no established case law precedent for this specific factual context in Canada. Your liability exposure might however not wait for this body of law to evolve. You may face the trending American analysis mentioned above:

- You may tender a load to a motor carrier that is involved in an accident in the United States, resulting your being named as a defendant in litigation in the United States. In that case you may face the American "negligence" based arguments of liability.

- A lawsuit may be brought against you in Canada, involving a casualty claim occurring in the United States or Canada. The Canadian court may be persuaded to "evolve" Canadian case law by applying some or all of the aforesaid American theories of liability.

Canadian courts have held that a party who engages the services of an *independent contractor* will not be liable to third parties for the negligence of that contractor. This is however only a general rule. There may be exceptions. In contexts unrelated to the road carriage of goods, Canadian courts have held that a person engaging the services of an independent contractor cannot simply "delegate" an inherently dangerous activity to a third party and expect to avoid any liability on the basis of the wrongdoer's "classification" where there was a negligent selection and/or instruction of at fault contractor that leads to some type of casualty.

Extended to our context, it may be asserted that even though a road carrier might as a factual (and perhaps contractual) matter be classified as an independent contractor, that the broker has to be reasonable and diligent in that carrier's selection and instruction to the extent that the mandate is considered inherently dangerous or poses foreseeable risk to the public.

The above risks become more pronounced with the loss of control that you as the broker have when your carefully selected carrier brokers loads out to an unknown performing carrier.

The following considerations may be said to *include* best practices for carrier vetting by brokers in Canada. A freight broker should at minimum ask the Carrier for its "information package" which typically would include:

- Sufficient information for the broker to confirm that the entity it is dealing with is a bona fide carrier entity.

- Name, address and telephone numbers for the Carrier.

- Copy of current insurance certificate.

- Copy of various provincial safety fitness certificates, and, if applicable, U.S. operating authorities issued by the Federal Motor Carrier Safety Administration.

- Copy of applicable workers compensation coverage.

The diligent broker must bear in mind the reasons for the above steps being taken – ensuring that a safe and qualified carrier is engaged. This puts into sharp relief the risks that may come with “double brokering”.

3. The payment of freight charges might not find its way from the paying shipper to the performing carrier.

There is yet a further potential negative dynamic that must be reckoned with: are you subjecting your shipper customer, or a consignee (which might be your customer’s own customer) to a claim by a carier for unpaid freight charges? This risk comes with the following sequence of “double brokering” events:

- Your shipper engages your services to arrange a carrier to haul freight. You plan on invoicing your shipper for the freight and your mark-up.

- You engage your carrier. You expect to be invoiced by the carrier, with the usual “proof of delivery” in due course.

- That carrier double-brokers the load. It in turn expects to be invoiced by the third party “performing” carrier.

- The performing carrier delivers the freight and issues an invoice to your intended (now the “middle-man”) carrier.

- You are invoiced in turn by your intended carrier. You invoice your shipper customer.

- Your shipper customer pays you and you pay your intended carrier.

- What if your intended carrier fails to pay its performing carrier for some reason?

With each added layer in the logistics equation there is increased risk that there will be a failure in payment.

What are the performing carrier's rights in terms of getting paid? Can the unpaid carrier go after the consignee who received the shipment for payment? This unintended development (assuming that we are not dealing with an intentional "collect" shipment situation) can cause serious legal, economic and commercial interest strain on your company and your shipper customer.

The carrier might demand payment from the shipper who tendered the cargo at origin. The carrier might demand payment from the buyer consignee that it delivered the cargo to. The consignee then will complain to your shipper customer, who complains to you that it expected your company to arrange seamless delivery.

On what basis might an unpaid carrier claim against a consignee, with whom it has no dealings? A consignee may be liable for payment of freight charges through statutorily imposed liability. The Canadian federal *Bills of Lading Act* provides as follows:

> *Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes on or by reason of the consignment or endorsement, has and is vested with all rights of action and is subject to all liabilities in respect of those goods as if the contract contained in the bill of lading had been made with himself.*

Accordingly, not every consignee may attract liability for the non-payment of freight charges by the party instructing a carrier - only the consignee who is named in the bill of lading to whom property in the cargo passes by virtue of the transfer of the cargo from the shipper. This statutory provision may affect the consignee given the standard presumption in Canadian law that property passes to the consignee once goods are tendered to the carrier for carriage on the basis that the shipper has parted with possession of same. There are of course exceptions, and each case is fact specific given the often nebulous concept of "title". The best protection is for the broker to be pro-active in prohibiting the "double brokering" of freight, and with that, the incidence of payment failure.

It should be noted that while such a problem might still occur even where there is no "double brokering" of freight there is a measure of protection available to the freight broker to the extent that it enters into a written broker-carrier contract with a carrier: the carrier might be asked to waive the right to claim payment of freight charges from parties other than its instructing broker. Canadian courts have upheld such waiver clauses and this remains a point of contracting diligence that freight brokers should consider in striking contract terms with carriers.

Managing Risk Considerations

Using best efforts to maintain "control" in the equation is what this discussion is all about. Control in the selection of who the performing carrier will be and in the invoicing for services is critical in managing business risk. The following are a few practical suggestions that should be considered:

1. Be deliberate in the first place with formulating and articulating your business model. Are you accepting cargo loss and damage liability? Note should be made of the need for effective contract terms on point clarifying matters. A nice example is found in CIFFA's Standard Trading Conditions which feature very effective language spelling out exactly when the member service provider is acting as a "principal" with cargo delivery responsibility as opposed to being an "arranging" agent not bearing that liability risk.

2. Where possible, engage a carrier with a conventional broker-carrier contract containing a clear prohibition on double brokering. This would involve language to the effect that there will be no sub-contracting or assignment of any duties absent your written agreement. (Of course, one might "never say never" as situations arise that might call for your carrier engaging the services of another party). Be deliberate. For that matter, even if the only writing is by way of a standard rate or carrier confirmation sheet, be deliberate in your prohibition.

3. If circumstances require you to allow your carrier to "double broker", where you have a written contract with your carrier you should aim to impose the requirement that any carrier it engages will abide by the terms and conditions set out in your written contract with your carrier. Contractual indemnities are important when contracting service providers – perhaps all the more important when they themselves might be engaging third parties.

4. If you permit double brokering, does your initial intended carrier have sufficient contingent cargo insurance or other such coverage that permit your shipper to claim against it in the event of cargo damage? Does your selected carrier have sufficient liability insurance coverage should you need to enforce an indemnity against it or a claim for a breach of contract that it "double brokered" a load where it was not supposed to?

5 For that matter, is your company insured for cargo claims or negligence claims in "double brokered" situations resulting in loss, injury or damage?

6. Use unambiguous language if you intend to prohibit or at least regulate double brokering. If you want to preclude that, say it in clear terms. Avoid terms like "*Unauthorized double brokering will void this contract*" or "*Unauthorized double brokering will waive our liability to pay your freight bill*". The former is unclear as to its effect. The latter might be said to permit double brokering, only being triggered if there is a claim by the performing carrier against your for non-payment. If your intent is to simply not allow double brokering, say it clearly. Neither such phrase shows the rest of the world that you were intending to keep things to the involvement of your selected "known and safe" carrier.

While the practice of “double brokering” can pose potential legal and commercial risk to your business, the management and consideration of the risks involved can help mitigate these.

Control in the selection of who the performing carrier will be and in the contractual relationships is critical in managing business risk, and following the practical suggestions above will go a long way in resolving any concerns.

CIFFA History

Whatever your role in the movement of goods, the Canadian International Freight Forwarders Association is important. For freight forwarders, freight brokers and dray carriers, we offer support, advocacy and the stature of our world-class CIFFA brand. To a shipper or importer, we provide a list of highly professional freight forwarding companies, all of whom operate using Standard Trading Conditions. To the providers of goods and services and to carriers in all modes, we facilitate access to some 300 regular member firms.

The Canadian International Freight Forwarders Association was founded September 1948 in Montreal. It was started by a small group of freight forwarders who saw a need to create an industry association to meet the professional demands of its members. Their original goals were simple:

- To support and protect the industry and its workers with uniform trade practices and regulations
- To establish rules for proper arbitration between members and others
- To deal with all questions affecting the interests of foreign freight forwarders at large
- To represent the industry in Parliament

While we have certainly grown and evolved, those founding principles still remain today.