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Chartering Shipbroker and Related Issues in China

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Contents

Summary	1
Preface	2
Abbreviations	3
1. Introduction	4
1.1 Background	4
1.2 Research question and research methodology	5
1.3 Delimitation	6
1.4 Scheme of thesis	7
2. Concept of shipbroker	9
2.1 Basic concepts	9
2.2 History of shipbrokerage	10
2.2.1 <i>History of western shipbrokerage</i>	10
2.2.2 <i>History of Chinese shipbrokerage</i>	12
2.2.3 <i>Broker, agent and intermediary</i>	14
2.2.3.1 Agent	15
2.2.3.2 Broker	16
2.2.3.3 Situation in China	17
2.3 Roles and functions	20
2.3.1 <i>In the survey period</i>	21
2.3.2 <i>In the negotiation period</i>	21
2.3.3 <i>In the period of fixture- agreement</i>	22
2.3.4 <i>In the performance period</i>	23
2.3.5 <i>In the period of post- fixture service</i>	24
3. General duties, rights and obligations of chartering shipbroker	25
3.1 Duties	25
3.2 Rights in Chinese legislation	27
3.2.1 <i>Right of claim on remuneration</i>	28
3.2.2 <i>Right of claim on expense</i>	30
3.3 Obligations in Chinese legislation	31
3.3.1 <i>Obligation of acting in good faith</i>	31
3.3.2 <i>Obligation of acting within authority</i>	32
3.3.3 <i>Obligation of damage compensation</i>	33
3.4 Advanced regulation in Anglo-American and Scandinavian legal approaches	34
3.4.1 <i>Claim for remuneration</i>	34

3.4.1.1	The condition to pay remuneration	35
3.4.1.1.1	<i>The broker engaged to act as an intermediary.</i>	35
3.4.1.1.2	<i>A binding contract concluded between the principal and a third party.</i>	36
3.4.1.1.3	<i>Broker's claim for commission conditional upon contract performance</i>	37
3.4.1.2	Situations of breach of contract	37
3.4.1.2.1	<i>Breach of contract for which the principal is to be blamed.</i>	39
3.4.1.2.2	<i>Breach of contract by a party who is neither principal nor commission debtor.</i>	40
3.4.2	<i>Fraudulent misrepresentation and negligent misrepresentation</i>	41
3.4.2.1	Fraudulent misrepresentation	41
3.4.2.2	Negligent misrepresentation	42
4.	Related issues about chartering shipbrokerage in China and adoption of economic model	44
4.1	Business of chartering shipbroker and benefits for principals in Chinese market	44
4.1.1	<i>Business in practice</i>	46
4.1.2	<i>Benefits for principals</i>	46
4.1.2.1	For the shipowner	46
4.1.2.2	For the charterer	47
4.2	Information asymmetry	48
5.	Legal analysis on cases	52
6.	Conclusion: problems in Chinese market and suggestions	55
6.1	Problems	55
6.1.1	<i>The problem on remuneration</i>	56
6.1.1.1	Remuneration when contract rescission	56
6.1.1.2	Remuneration when contract extension/ continuation	58
6.1.2	<i>The problem on privity of contract (contract relativity)</i>	59
6.2	Suggestions	60
6.2.1	<i>Suggestions on remuneration and privity of contract</i>	60
6.2.2	<i>Suggestion on asymmetric information</i>	61
6.3	Conclusion	62
	Supplement A	63
	Supplement B	64
	Bibliography	67
	Table of Cases	70

Summary

This thesis gives a research on one non-negligible role in chartering shipbrokerage, chartering shipbroker, and common occasions happening in his daily work. Author attempts to figure out the problems in Chinese domestic legislation through legal dogmatic approach and other scholars' researches, and give suggestions accordingly by means of drawing lessons from the mature experience of dealing with those disputes in Anglo-American law system states. Additionally, by taking an interdisciplinary method, author would like to apply economic theory to show the important function of chartering shipbroker in such a rapidly developing market but with inherent deficiency, or intrinsic restriction- asymmetric information, which can lead potential legal problems.

For the primarily concern on the fast growing Chinese shipping market with huge amount of business but lacking of systemic regulations, the author hopes to attract attention from Chinese legislators on shipbroker's remuneration and privity of contract, also expects an effectively information-sharing and business-estimating system can be helpful to balance the information resource.

Preface

This thesis is originally based upon the author's personal interest and future career plans, and aims to build informative and complete preparation for preventing the possibilities of making mistakes during work and potential risks to cause losses and damages. Several adjustments have been made to drafts of this thesis to introduce the fresh interdisciplinary and ideas, as well as to improve legally theoretical analysis for adapting academy. I have gained a lot of help giving me new ideas through many discussions with my friends and teacher; of course, the suggestions on weakness of this thesis are so necessary for my improvement. I really would like to thank my friend Ding Mingfa, Laurent Tran and Zhao Can for sharing their experience and knowledge in economic field, and also appreciate Dr. Basu's patient work and inspiring advices for opening a new window for my writing.

The intension of this thesis is that readers are given a general idea of what chartering shipbrokerage is about from a practically legal and, to some extent, theoretically economic point of view. It should be emphasized that this thesis contains no sophisticated description on whole Chinese domestic legislation and every standard contractual form because author believes most readers has legal background and have skills to refer to specialized literatures and other sources for comprehensive information or specific cases. Meanwhile, efforts on description are valuable for precise interpretation and understanding, which is necessary in comparison between different jurisdictions and meaningful to follow historical and current developing tracks of market.

Certainly, this thesis cannot cover all the perspectives of the 'chartering shipbroker' topic and there must be space for development through further researches in future, I shall do my best to achieve that.

Abbreviations

UNCTAD	United Nations Conference on Trade and Development
BIMCO	The Baltic and International Maritime Council
DWT	Dead Weight Tonnage
COSCO	China Ocean Shipping (Group) Company
NYPE	New York Produce Exchange
BALTIME	BIMCO Uniform Time-Charter
GENCON	The Baltic and International Maritime Council Uniform General Charter
FONASBA	Federation of National Association of Ship Brokers and Agents

1 Introduction

1.1 Background

In the shipping market, ‘shipbroker’, as a service provider, is one of the most common roles but has significant function, and also it is the lubricant which oils the wheels of the shipping business. The shipbroker not only acts as liaison between ship owners and charterers by bridging the gap of information with high-quality service, but also contributes to the rapid and healthy development of the shipping industry through its effects on improving efficiency of vessels, controlling the trades cost, balancing and coordinating the relation of supply and demands between shipowners and charterers. Therefore, shipbrokerage is considered as a mature and sophisticated operation within ship chartering industry.

The shipbrokerage industry is originated from England, and has been rapidly developing in powerful marine countries, especially the English law states, due to their advanced legislation and mature operation system. As far as in China, though the marine industry is strong in this competitive market and the government has continuously and heavily invested in Chinese port infrastructures in the previous years¹, compared to the situation in those developed marine countries in the English law system, Chinese maritime legislation and the attention and concern it receives in this field are far from enough. From a legal perspective for this industry in China, there are no specific legislations, but rather very limited amount of shipbrokerage regulations widely scattered in *Chinese General Rules of Civil Law*, *Chinese Contractual Law*, *Chinese Maritime Law* and *Chinese Broker Management Approach*. Therefore, the application of Chinese law in this context has always been a problem. With regards to most of the extent theoretical perspectives on this subject are from the point of economics and

¹ Markus F. Brinkmann, ‘Shipbroker – Is the future fixed?’, pp. 22-23 online at: <http://www.brinkmann.co.uk/download/Shipbroker.pdf>

governmental macro adjustment and control, but legislative study is lack any substantial form of systemic theory.² Moreover, since Chinese shipbrokers mostly are working in mainland domestic port or costal cities (except Hong Kong), many English law cases cannot be legally used as a valid basis of judgment or transferred directly into a totally different law system.

Considering the above facts, a comparative study and contextual analysis of the legislative experience of advanced countries is needed to clarify and define shipbroker's legal issues, such as natures, rights and obligations, legal status within the Chinese marine industry. By analyzing other countries' legislations, provisions and regulations, considering the experience of other countries' mature shipbrokerage operation systems, and subsequently providing some relevant suggestions, the author hopes to make some academic contribution towards possible future reduction of potential risks in Chinese shipbroker's daily work and towards the future development of Chinese shipbrokerage industry.

1.2 Research question and Research methodology

The main research question that the author tries to answer in this thesis is: what is chartering shipbroker and his legal position? In order to achieve this aim, qualitative research method is used in this thesis. Through referring to some domestic laws and regulations, universal standard contracts, and other secondary data mainly including published literatures and research-related documents and articles, both legal dogmatic approach and comparative approach are adopted in this thesis for constructing a unambiguous recognition about: developing skeleton of brokerage, responsibilities of work, and current legal environment for chartering shipbrokerage, especially in China. In addition, one economic theoretical model, the information

² Yu. M, 'Research on Legal Issues of Shipbroker', p9,

asymmetry, is also presented and used to analyze shipbroker's necessity in balancing the status in contractual relationship between shipowners and charterers, as well as the resolution for conflicts of informational resource.

1.3 Delimitation

The scope of this thesis is mainly covering the chartering shipbroker and his brokerage business, as well as the potential threats and risks for shipbroker, which are caused by absence of Chinese domestic laws and regulations. The analysis will concentrate on the negative influence on chartering shipbroker from legal perspective, instead of harms caused by him, which include legal problems and moral hazards. This thesis is written to point out and discuss practical issues in chartering shipbrokerage and the author hopes to provide 'guideline' advices for the fresh brokers, especially the graduated students who just enter into this business, to help them to get known about the frequent practical problems and then build risks reducing system.

Besides, since the author does not have very long time for this thesis and well-built network in chartering shipbrokerage industry, there is not enough primary data collected from fieldwork to support the author's assumption and hypothesis. It is believed that, with support from more statistical data and interviews on insiders, including shipbrokers, shipowners, charterers, and other agents, some argument of this thesis will be much solider and more convenient for readers. Besides, because of the limitation of the author's professional background, the knowledge and use of other subject's theory is not very comprehensive or proficient. Thus there is space to improve this thesis in future.

1.4 Scheme of thesis

In this thesis, the analytical parts and descriptive parts do not have obvious boundary and, in most of the chapters, they are inter-related and mutually supporting each other.

Following with this introductory chapter, Chapter 2 concentrates on the historical development of profession of intermediary, and by means of literature review, the connection and distinction between two major intermediaries, agent and broker, are discussed in this chapter.

In Chapter 3, shipbroker's duties related with his business are listed, and his rights and obligations under Chinese jurisdiction are pointed out. Combining with the lessons draw from some developed western marine countries, some shortages, or missing parts, of legislation in China are found.

Chapter 4 is mainly about shipbroker's generating business, which is a reacting performance of his duties, and what kind of benefit can he create for his principal (shipowner/ charterer), such as interest protection, loss and risks avoidance, efficient and low costing contacting, services in and after negotiation. Meanwhile, the asymmetric information model is introduced in this chapter and it is also used to analyze the chartering market. This model turns out the necessity of shipbroker in balancing the informational resources in this market.

In Chapter 5, the author chooses some case from both Chinese and Anglo-American legislation, and discusses the possible results in opposite situation. Through the legal analysis in this part, the author tries to prove the regulation on chartering shipbrokerage is quite limited and some mature resolution and experience in dealing with disputes can be learnt from western countries.

In the final chapter of thesis, the realistic problems about remuneration, privity of contract and asymmetric information in Chinese chartering market are concluded, and suggestions are given to them accordingly as possible resolutions for the above problems and for steady and healthy progress of Chinese ship chartering market in the future, as well as the improvement for Chinese reputation and her influential power in maritime world.

2 Concept of shipbroker

2.1 Basic concepts

Just as the name implies, ‘shipbroker’ is a kind of broker and working on the business with ‘ship’. As far as the ‘broker’, some scholars believe that a broker is an individual or brokerage firm, which runs business of arranging transactions between sellers and buyers and gains profits from the commission when the deal is executed.³ In addition, a broker should act as his client, a seller or a buyer, to participate a deal with the identity of ‘principal party’ and provides some advantages: better knowledge about market and established relation with prospective accounts.⁴ Through their resources and tools, their clients get opportunity to access to potential sellers/ buyers, and the information would be spread to largest ‘possible’ group of sellers/ buyers. To get those accesses above to customers is a huge test and problem for individuals or companies new in the market.

Shipbrokerage is an activity that forms part of the international shipping industry. Shipbroker plays an important role of specialist intermediaries between buyers and sellers or between shipowners and the charterers who use ships to transport cargo, buyers and sellers of ships. Some scholar states that shipbroker normally appears as the ‘representative’ of the seller/ buyer or owner/ charterer (owner’s broker and charter’s broker).⁵

Therefore, the author believes that: the shipbroker is an individual or a firm that respectively assists seller and buyer in the vessel sale and purchase business, and assist shipowner and charterer in the vessel chartering business. The chartering shipbroker is the latter kind of type, and he should be an intermediary working within the vessel chartering business and help

³ Rosann Spiro, William Stanton and Gregory Rich, ‘Management of a Sale Force’, pp. 134-137

⁴ Ibid.

⁵ Lars. Gorton, ‘Intermediaries in Shipping’, edited in < Intermediaries in Shipping > by Kurt Grönfors, p30.

his principals (mainly shipowners and charterers) to achieve the ship chartering contracts with the other party; also sometimes, he also plays the role of ‘bridge’ between the shipowners and charterers, who are looking for cargos to carry out the carriage business by sea or suitable ships for transferring goods to buyers⁶, and shipbroker usually contributes to introduce business and build a connection between shipowners and charterers, and to try to help them conclude contracts without representation of either of them. Then he has the right to collect remuneration. This thesis will focus mainly on the ‘intermediary’ shipbroker, who represents his principal to conclude contracts.

2.2 History of shipbrokerage

2.2.1 History of western shipbrokerage

The formation of brokerage has three historical reasons. The first one is emergency of professional attorney. In twelfth century, after the ‘Statute of Merton (1235-6)’, appointing attorney was not the privilege that demanded royal grant any more, but given to every common citizen. The 1292 ordinance was also used to regulate the attorney’s behaviors.⁷ The second is development of agency’s concept in canon law. In the word of Maitland, ‘an abbot was sued for the price of goods purchased by a monk and come to use of the convent’, and he also concluded that ‘the legal deadness of the monk favoured the growth of the law of agency’⁸. Thirdly, agency’s instances became ‘unavoidable’ because of the custom of merchants. In 1398, a case was tried at Guildhall in the City of London⁹, and the mayor and aldermen of the City of London decided that the master must pay for the price directly to the seller ‘according to the law merchant and the custom of the city’ as the apprentice had bought the wine ‘for the use and profit of his master’.

⁶ Supplement A, FIGURE 1

⁷ Chen, C. J., <Clive M. Schmitthoff’s Select Essays on International Trade Law>, p315

⁸ Ibid

⁹ *Costace v. Forteneye*, see A. K. R. Kiralfy, <A Source Book of English Law>, p241

The apprentice was set free and so justice done. ‘The remarkable feature’ of the case is that the ‘third party was admitted against principal’¹⁰.

Under the influence of three factors above, agency’s liabilities were legalized, and in seventeenth and eighteenth century, two kinds of independent commercial agency, broker and factor, came into the world¹¹. The history of agency is just the process of brokerage’s starting and developing, and brokerage satisfies the demands of fast growing of market and commercial society. As for the shipbrokerage, it has strong connection with the expansion of the shipping industry and international trades.

In the late Nineteen Century, because of the increasing of shipping business and demands from shipowners and cargo owners, shpbrkerage developed rapidly. Though the formation of London market was for better serving local cargo owners and relative business, along with the business expansion and improvement of legislation, London market attracted a lot of shipowners and cargo owners from other states who would like to find new business and channels, and played a more important role and enjoyed a prominent and dominant position. In 1920, shipbrokerage in London acquired official certification and gained ‘Royal Charter’.¹² Meanwhile, for better conformity with the trend of historical change and market’s development, some organizations emerged in shipbrokerage business. The most representative and prototypical cases are Institute of Chartered Shipbrokers that was set up in 1911 in UK¹³ and Association of Shipbrokers and Agents that is established in 1934 in US¹⁴. Both of them have a number of shipbrokers, ship agencies, shipowners, operators and charterers as their members and have made huge contribution in the aspects of coordinating member brokers, formulating standardized contracts (such as NYPE), and improving recommended terms. Additionally, some other organizations, such as The Baltic Exchange and BIMCO, also play essential roles in the

¹⁰ Chen, C. J., <Clive M. Schmitthoff’s Select Essays on International Trade Law>, p316

¹¹ Huang. Pengfei, <Research on Chartering Shipbroker Legal System>, p10

¹² Yang. Liangyi, <Voyage Charter and Chartering Practice>, p35

¹³ online at <http://www.ics.org.uk/about-us/institute-history>

¹⁴ online at <http://www.asba.org/about/>

development process of shipbrokerage. The Baltic Exchange has a total membership of over 550 companies and 2000 individuals, and the growing memberships not only base on UK, but also extend to USA, Europe and Far East. The shipping market information produced by the Baltic creates benefits for its members. As for BIMCO, which is in Copenhagen, is another important organization dealing with various matters of interest to international shipping. BIMCO's over 2500 members, covering about 550 dwt and 1400 of which are shipbrokers and /or port agents. A number of P&I clubs and ports are attracted to associate with BIMCO¹⁵.

2.2.2 History of Chinese shipbrokerage

Though the chartering shipbroker's practice in world shipping industry can prove that his role is very significant for increasing the using efficiency of ships, saving costs, and balancing the relation between shipowner and cargo owner, in China, for a long period, chartering shipbroker's importance has not attracted enough attention.

Before China's reform and opening, communalism planned economy was the main economic strategy and most of economic activities were arranged and managed by national government. Thus the agency service had no space to develop and even was misunderstood as 'economic exploitation' and 'speculation'.

Although China took a long time to get into market economy, the free trades had existed in Chinese history. Back to the ancient time, a group of people in China ran the similar business as 'broker', and they were called '*Qian Ke*' (掮客) or '*Ya Ren*' (牙人). From the translation, it is easy to tell '*Ya Ren*', whose translation is '*tooth-man*' in English, generally relied on oral skills and worked with the tool of 'communication'. '*Ya Ren*', the oldest mode of Chinese broker, first appeared in Qin dynasty (BC221-BC207), and the main method to profit was to adjust a reasonable and acceptable price of

¹⁵ Lars. Gorton, Patrick. Hillenius, Rolf. Ihre and Arne Sandevärn, <Shipbroking and Chartering Practice>, PP 33-34

horses or cows for both sellers and buyers, then tried to extent possibility of making a deal and prompt transaction.¹⁶ However, according to Gao,¹⁷ their social status is much lower than other service industries, such as traffic transfer and hotel. Until Ming dynasty (AD1386-AD1644), along with the development of trading, ‘*Ya Ren*’ business range became much wider, not only limited in livestock market, but extend to food and clothing market. Some scholar describes this industry as ‘not only the media promoting market, but also gritty sand interfering operation’.¹⁸ Therefore, government did not give supports to this industry until 1397. The related regulations in ‘*Laws of Ming Dynasty*’ showed that the official attitude changed from ‘negative forbidding’ to ‘positive administration’.¹⁹ To be brokers asked some qualifications for application, annual inspection and tests, and registration of information on their client and cargos, but also the government would carry out strict punishment for crimes in brokerage, such as lashing, whipping, exile and banishment.

After the founding of PRC, Chinese government has established some laws and regulations to improve the brokerage industry order.

‘*Measures for the Administration of Brokers*’ stipulates²⁰:

Article 2: *The “broker” as mentioned in the present Measures, shall refer to a natural person, legal person or other economic organization that undertakes intermediation, brokerage, or agency and other brokerage business in economic activities for the purpose of receiving commissions and helping to bring about the deal of others.*

Article 16: *Unless immediate paid, broker shall run business in the scope of written contracts of intermediary, commission and agency with clients, and clarify the major item of business.*

‘*Regulations for Broker in Shanghai*’²¹ stipulates:

¹⁶ Duan. Yucai, <Shuo Wen Jie Zi> (Expanding Simple and Analyzing Compound Characters), p468

¹⁷ Gao, Yehua, <A Study on Broker and Broker House in Ming Dynasty>, pp.63-65

¹⁸ Ren. Fang, <Research on Urban and Town Economy in Lower- Middle Changjiang River >, p280

¹⁹ <*Laws of Ming Dynasty*>, Chapter 10

²⁰ < *Measures for the Administration of Brokers* >, 2004

Article 2: *Broker shall be an individual who legally acquire practice certification of brokerage and runs business in a firm; or a company, partnership, individual proprietorship or other kinds of economic organization, which is established legally and with certification for brokerage.*

'Draft of Broker Law'²² stipulates:

Broker shall be a nature person, legal person or other economic organization, which provides trading opportunities for client or plays the role of media in the trade between client and third party, and shall aim to charge commission.

As the sub-concept of broker, there is no such regulation on chartering shipbroker. In the period of planned economy, ship owners (mainly state owned shipping companies) were divisions within governmental department of traffic and transfer, and their daily business, even the cargo resources, was arranged by superior authority²³. In this period, Chinese shipbrokerage has been at a standstill until reform and opening in late 1980s.

2.2.3 Broker, agent and intermediary

According to Gorton²⁴, shipping intermediary should be a 'root' concept, and broker and agent are 'sub' concepts. Hugo also explains 'agent' covers a vast field of commercial and everyday relationships.²⁵ Broker should also be a kind of agent. In the worldwide shipping information network, shipper, line agent, forward, owner and his broker, charterer and his broker are always connecting with others via the channel of information, and also

²¹ <Regulation for Brokerage in Shanghai>, 1994

²² <Draft of Broker Law in China>, 1996

²³ Sun. Yugang, <Speeding up the Development of Chinese Shipbrokerage Market>, pp. 7-10

²⁴ Lars. Gorton, 'Intermediaries in Shipping', edited in < Intermediaries in Shipping > by Kurt Grönfors, pp.27-29

²⁵ Hugo. Tiberg, 'an Area of Diverse Approaches', edited in < Intermediaries in Shipping > by Kurt Grönfors, p12

inter-influenced in this market (See Picture 3²⁶). But in Continental law system, in the scope of intermediary, broker and agency enjoy the equal status. Meanwhile, shipbrokers, as well as port agent, liner agent and forwarding, are all the various types of shipping intermediaries.

As stated above, in English law system states, broker is one type of agency, and related issues are influenced by basic principles of Anglo-American Law of Agency; in Continental states, brokers and agents, even trustee-traders, are all various types of intermediaries, and enjoy different legal status and are governed by specialized laws and regulations.

2.2.3.1 Agent

In Professor Hugo Tiberg's article, he states that, in England, an 'agent' is anyone who has the power to act on another's behalf, and thus 'agency' covers a vast field of commercial and everyday relationships; in Continental law states, like in Scandinavia, an 'agent' is a commercial representative who has a lasting relationship to his principal and in his relation to a third person acts in the principal's name²⁷. Gorton supports this appointment, and believes agent in Scandinavian law is a particular kind of intermediary for the relation to 'authority' or 'power to bind'²⁸. However, English laws described ship's agent: 'a ship's agent is, in the normal case, the agent of shipowner at particular port and the ship's agent, therefore, at that port stands in the shoes of the shipowner, and it is reasonable to suppose that he has the authority to do whatever the shipowner has to do at that port'²⁹.

There are two main types of ship's agent: the port agent and the liner agent. The duty of ship's agent usually 'divided time-wise', including pre-arrival service, port call and after-sailing service, but in particular occasions,

²⁶ Supplement B

²⁷ Hugo. Tiberg, 'an Area of Diverse Approaches', edited in < Intermediaries in Shipping > by Kurt Grönfors, p12

²⁸ Lars. Gorton, 'Intermediaries in Shipping', edited in < Intermediaries in Shipping > by Kurt Grönfors, p27

²⁹ *Blandy Bros. & Co. v. Nello Simoni* (1963) 2 Lloyd's Rep. 393 at p404

depends largely ‘on the custom of the port’. The remuneration of the ship’s agent is based on a percentage fee plus cost cover³⁰. The task of port agent is to present the owner and assist the vessel for the owner’s account to that the ship will have the best possible dispatch. In tramp shipping, loading and discharging are often for charterer’s account and charterer may prefer to be entitled to nominate port agent for furthering own interests. Another important group of intermediaries, the liner agents, often enters in to written contracts, which the brokers and port agents seldom do so, and its role is like a kind of general agent for the line within a ‘geographical area’. Liner agents represent the owner to have contact with possible shipper and forwarding agents within this area, to procure advertising about departures and arrivals, and to cover all the work for the line ‘otherwise carried out by a port agent’³¹. Usually, the remuneration of ship’s agent is based on ‘a percentage fee plus cost cover’, and local government or a port association establishes the fee and expenses of agents³².

2.2.3.2 Broker

The shipbroker will normally represent one party, and in the charter deals, chartering shipbroker usually are the representative of shipowner or charter. In the shipping business, an enormous amount of information about ‘positions, time, period of availability, and types of vessels and cargos’³³ would be collected and demanded by shipowners and charterers, and of course, the shipbrokers usually assisted them to involve to this. Sometimes, shipbrokers are more like ‘messenger’ than ‘agent’³⁴. Most of time, shipbrokers do not show up in the line operation, in which the liner agent would represent carriers, but in tramp shipping, shipbrokers play significant role in different stages (those roles will be talked in the following part). As

³⁰ Lars. Gorton, ‘Intermediaries in Shipping’, edited in < Intermediaries in Shipping > by Kurt Grönfors, p34, p37

³¹ Lars. Gorton, Patrick. Hillenius, Rolf. Ihre and Arne Sandevärn, <Shipbroking and Chartering Practice>, PP 44-45

³² Lars. Gorton, ‘Intermediaries in Shipping’, edited in < Intermediaries in Shipping > by Kurt Grönfors, p37

³³ Ibid, p31

³⁴ Ibid, p30

for the remuneration, according to Gorton³⁵, it is usually in the amount of 1.25% based on the purchase price, hire or freight is normal situation.

2.2.3.3 Situation in China

Differing from the situation in Anglo-American law states, there is no specific law or regulation covering shipbrokerage issues. Therefore, for better disputes resolution, it is essential to clarify the differences between shipbroker and agency.

There are some differences in following perspectives:

1. Whether to sign contract in advance?

In shipping business, there are barely written contracts that binding on both sides between principal and shipbroker. The documentaries, such as telegraph and fax, between them can be gist to confirm their relationship and divide responsibilities; there is usually agency contract between principal and shipping agency;

2. Whether to engage commercial activities on principal's behalf?

Shipbroker runs the intermediary business in his own name and does not sign any contract in principal's name with other side; the shipping agency runs business in his own or principal's name, and sign contract with third party as principal's representative;

3. Whether has independent intent indication?

Shipbroker has no independent intent indication and only can seek and provide opportunities to sign contract for principal under principal's demand and instrument; agency can have independent intent indication within the scope of principal's authority, and can represent principal to sign contract;

4. Whether has stable and continuous relationship with principal?

³⁵ Ibid, p33

The relationship between shipbroker and principal is casual comparing with the solid and continuous relationship between agency and principal;

5. How is the remuneration and cost?

Shipbroker hardly asks principal to fund of disbursement in advance, and charges commission in the principle of ‘no cure, no pay’. Only when shipbroker successfully concludes a transaction, he would get the commission. If not, situation will be opposite. As for the necessary brokerage expenses incurred, such as costs of telegraph, fax and traffic, unless otherwise provided for them, those costs above would be paid for by shipbroker. If shipbroker fails to facilitate the formation of the proposed contract, expect the remuneration, principal is required to pay for the necessary brokerage expenses incurred.

In ‘*Chinese Contract Law*’³⁶ Article 426, it is stipulated:

Once the broker facilitates the formation of the proposed contract, the client shall pay the remuneration in accordance with the intermediation contract. Where remuneration to the broker is not agreed or the agreement is not clear, nor can it be determined in accordance with Article 61 of this Law, it shall be reasonably fixed in light of the amount of labor expended by the broker. Where the broker facilitates the formation of the proposed contract by providing intermediary services in connection therewith, the remuneration paid to the broker shall be equally borne by parties thereto. Where the broker facilitates the formation of the proposed contract, the brokerage expenses shall be borne by itself;

Art. 427: ‘Where the broker fails to facilitate the formation of the proposed contract, it may not require payment of remuneration, provided that it may require the client to reimburse the necessary brokerage expenses incurred.’

6. How to assume the legal liability.

Shipbroker independently assumes the legal liability of intermediary. Only on the occasion of malicious collusion with principal or the third party, shipbroker undertakes joint liability with principal or the

³⁶ <*Chinese Contract Law*>, 1999

third party; the shipping agency's liability depends on the type of agency: direct agency or indirect agency. In the scope of direct agency, '*Chinese General Principles of the Civil Law*'³⁷ would be applied, and ship agency does not undertake liabilities.

Art. 63: *Citizens and legal persons may perform civil juristic acts through agents. An agent shall perform civil juristic acts in the principal's name within the scope of the power of agency. The principal shall bear civil liability for the agent's acts of agency. Civil juristic acts that should be performed by the principal himself, pursuant to legal provisions or the agreement between the two parties, shall not be entrusted to an agent.*

In the situation of indirect agency, '*Chinese Contract Law*'³⁸ would be applied. The third party is in good faith or not is essential to judge whether agency shall undertake liabilities.

Art. 402: *Where the agent, acting within the scope of authority granted by the principal, enter into a contract in its own name with a third party who is aware of the agency relationship between the principal and agent, the contract is directly binding upon the principal and such third party, except where there is conclusive evidence establishing that the contract is only binding upon the agent and such third party.*

Art. 403: *Where the agent enter into a contract in its own name with a third party who is not aware of the agency relationship between the agent and the principal, if the agent fails to perform its obligation toward the principal due to any reason attributable to such third party, the agent shall disclose the third party to the principal, allowing it to exercise the agent's rights against such third party, except where the third party will not enter into the contract with the agent if he knows the identity of the principal at the time of entering into the contract.*

Where the agent fails to perform its obligation toward the third party due to any reason attributable to the principal, the agent shall disclose the principal to the third party, allowing the third party to select in alternative either the

³⁷ <*Chinese General Principles of the Civil Law*>, 1986

³⁸ <*Chinese Contract Law*>, 1999

principal or the agent as the other contract party against whom to make a claim, provided that the third party may not subsequently change its selection of the contract party.

Where the principal exercises the rights of the agent against the third party, the third party may avail itself of any defense it has against the agent. Where the third party selects the principal as the other party to the contract, the principal may avail itself of any defense it has against the agent as well as any defense the agent has against the third party.

2.3 Role and functions

Different brokers will specialize in different market, such as a tanker, dry cargo, and reefer cargo. The chartering shipbroker may have a series of roles and wide range of functions in different stage of business. Generally, shipbrokers can be representative of principals or middleman of two parties in chartering contracts. (See Figure 1³⁹)

Nicholas concludes those functions is his article⁴⁰ as: information provider. Commercial adviser, negotiator, drafter, document reformer, provider of post agreement services. As for the process of chartering shipbrokerage business in tramp shipping, Gorton divides it into several stages⁴¹: the survey period, the negotiation period, fixture- agreement, and performance. However, for better satisfying the demands from market, author thinks the after-sale-serves is also significant for chartering shipbrokerage business. In the following part, through combination of these scholars' statements, various roles of chartering shipbroker in different periods will be mentioned.

³⁹ Supplement A

⁴⁰ Nicholas. Gaskell, 'Shipbroker', edited in < Intermediaries in Shipping > by Kurt Grönfors, p45

⁴¹ Lars. Gorton, 'Intermediaries in Shipping', edited in < Intermediaries in Shipping > by Kurt Grönfors, PP. 31-33

2.3.1 In the survey period

Though the owners sometimes sound the market and collect information themselves, in most of time, they prefer to make connection through shipbrokers. As a qualified intermediary, shipbroker should make an excellent performance on possibilities investigation, especially the more detailed and complete information provided, the better position principal takes in a deal. However, what needs to be mentioned is shipbroker does not have such duty unless specifically agreed⁴².

In this stage, chartering shipbroker mainly plays a role of ‘information provider’, as well as an ‘adviser’. As an information provider, ‘shipbroker can facilitate forwarding planning: to ensure that there is suitable future employment.’⁴³ In this market, the less time wasting, the bigger advantage. There is huge amount information, which is miscellaneous, mingling together, time-efficient and demanding professional knowledge about the market. It is very important to identify the valuable information in limited time and report to principals for chartering shipbrokers, because some information on voyage and port, even the unofficial news, can be vital sometimes, and it is not easy to access to and sort all the necessary information for shipowners and charters, even the new technology provides convenience for them. Moreover, the shipbroker should not only be ahead of his principal, but also the market and potential risks. The demands from same market can be totally different and changing much in a short period, and some risks like weather can ruin business.

2.3.2 In the negotiation period

The chartering shipbroker assists principals to participate in the negotiation and discuss on many details of the contracts. Generally, both sides’ brokers (shipowner’s broker and charterer’s broker) are involved in this stage and represent their principals to negotiate on terms of cargo, tonnage, period,

⁴² Lars. Gorton, ‘Intermediaries in Shipping’, edited in < Intermediaries in Shipping > by Kurt Grönfors, p31

⁴³ Nicholas. Gaskell, ‘Shipbroker’, edited in < Intermediaries in Shipping > by Kurt Grönfors, p45

voyage, freight, demurrage and others. The obvious distinction between the chartering shipbrokers and their principals is that the shipbrokers' names usually are known and sometimes may appear as the party, while principals are anonymous ('to be nominated', 'first class charterer/owner', etc.) bound on the contract⁴⁴. Most information is acquired and passed through chartering shipbrokers in negotiation procedure (See Picture 3⁴⁵).

The main duty for shipbroker to do in this period is participate in negotiation as 'negotiator', as well as 'adviser' of the principal. As a negotiator, the shipbrokers need to focus on the commercial aspect, such as assessing freight rates, vessel performance and reliability of the other party. The chartering shipbrokers are expected to use their commercial and legal knowledge to save negotiating time, for instance they would translate the commercial details into contractual terms, although some of them are lack of legal background and which cause some problems. On the other hand, the chartering shipbroker's commercial advices, as well as the legal views on occasions, need to be contemplated, helpful and informative for principals, and advices vary in different formalities in distinct sectors, ' ' from a simple opinion as to a vessel's suitability, to a form of confidential consultancy report on the movement of a market'⁴⁶.

2.3.3 In the period of fixture- agreement

The common situation is 'charterer's broker will draft the final charterparty and the shipbrokers will often sign the documents on behalf of their respective parties'.⁴⁷ Chartering shipbroker, as the drafter in this period, he does not only cooperate with lawyers, other shipbrokers, charterers and shipowners to produce the charterparty, but also makes advices on how to choose various type of charterparty and amend the standard forms.

⁴⁴ Lars. Gorton, 'Intermediaries in Shipping', edited in < Intermediaries in Shipping > by Kurt Grönfors, p32

⁴⁵ Supplement B

⁴⁶ Nicholas. Gaskell, 'Shipbroker', edited in < Intermediaries in Shipping > by Kurt Grönfors, p45

⁴⁷ Lars. Gorton, 'Intermediaries in Shipping', edited in < Intermediaries in Shipping > by Kurt Grönfors, p32

There are two kinds of languages that are worthy to mention here. One is 'legal language', which should be comprehensible, non-repetitious and irredundant. Although most shipbrokers will be in better position than many experienced lawyer to explain and understand the basic charterparties since these are their dairy work that the shipbrokers are handling everyday and familiar with the typical problems in them, it will be a better situation that shipbrokers use legal words or particular words which cause less misunderstanding and courts might understand and prefer. However, due to the legal training and limited time available for opinion exchange with lawyers, some terms of charterparties, which are obscure and have no certain meaning, are easy to cause potential problems.⁴⁸ The other type is 'uniform and general language'. Nicholas introduces that there is possibility that UNCTAD may decide to raise again the question of mandatory forms and shipbrokers form Committee of BIMCO are also working on producing new clauses⁴⁹. This kind of language that shipbrokers can achieve common understanding is helpful for their negotiations and practices, as well as the clear rights/ liabilities and contracture relationship with the principals.

2.3.4 In the performance period

Braekhus provides a list of duties as suggestion for shipbrokers to follow in this period:⁵⁰

- A to take care of the interests of the parties;
- B not to act outside the scope of his instructions;
- C to obtain and distribute information;
- D to suggest a solvent and reputed party
- E not to conceal personal interests in the deal he is putting forward- apart from his interests in the brokerage

⁴⁸ Nicholas. Gaskell, 'Shipbroker', edited in < Intermediaries in Shipping > by Kurt Grönfors, PP 48-50

⁴⁹ Ibid, p50

⁵⁰ BIMCO 5733 ff

F not to receive other than usual compensation- although I believe the level may vary somewhat. Address commission etc.

G loyalty, to keep secret certain information.

H to take part in performance of contract, cash freight, demurrage, etc.

In addition, in a time charterparty, the shipbroker may still expect to perform some service during the charterparty, such as arranging for bunker at ports of call at a small charge.

2.3.5 In the period of post- fixture service

Theoretically, in this period, what chartering shipbrokers need to do is only to collect their commission after they finish main duty to bring parties together. However, the practical way is not like this. In the commercial industries, the service providers must satisfy the customers as much as they want so that a solid relationship with loyal customers and trustable foundation for next brokerage can be produced. Apparently, chartering shipbrokerage, as a type of commercial service, required shipbrokers perform a variety of supplementary services.

According to Gaskell⁵¹, after the charterparty contract being agreed ‘shipbrokers must draw up the charterparty, or memorandum of agreement and check them’ as documentation service, but also provide principals some financial after-sale service, for example, shipowner’s chartering shipbrokers will ‘perform the function of preparing time sheets and sending demurrage statement to charterer’, as well as the charterer’s shipbrokers ‘may collect freight from the charter and remit this, less commission, to shipowner’.

⁵¹ Nicholas. Gaskell, ‘Shipbroker’, edited in < Intermediaries in Shipping > by Kurt Grönfors, PP 51-52

3 General duties, rights and obligations of chartering shipbroker

3.1 Duties

In general chartering shipbrokerage business, shipbrokers have the duties of representing principals in charter negotiations and working for and protecting principals' interests as following described by some scholars⁵²:

- (1) The shipbroker should keep continuously informing his principals, both the owner and the charterer, about the situation of market in the perspective of market development and business trends, available cargo proposals and shipment possibilities, and also shipbroker should try his best with skills and professional knowledge to cover the market for given position and orders respectively and provide services to principal in reasonable time. Chartering shipbroker does not only have the duty to avoid the 'negligent' situation that he fails to provide the principal with enough market information gained from all reasonable and relevant channels, but also to make sure about the 'promptness', which demands shipbroker's efficient and fast work.
- (2) The shipbroker should act strictly within given authorities by principal in connection with the negotiations. Sometimes the broker will have a fairly wide discretion, within which to work when carrying out the negotiations, with an absolute limit, which must not be exceeded. Therefore, it is necessary to make sure whether he has authority to conclude a fixture for chartering shipbroker.

⁵² Lars. Gorton, Patrick. Hillenius, Rolf. Ihre and Arne Sandevärn, <Shipbroking and Chartering Practice>, p 42, also see Nicholas. Gaskell, 'Shipbroker', edited in < Intermediaries in Shipping > by Kurt Grönfors, PP 62-69

- (3) The shipbroker should in all respects work loyally for his principal and should carry out scrupulously and skillfully the negotiations and other work. For the loyalty to principals, shipbroker must protect the trust of principal and avoid any conflict of interests. Thus, shipbroker must not reveal his principal's business 'secrets' and not act to the advantage of the counter party in the negotiations in order to reach an agreement. Furthermore, shipbroker must not make secret profits overlaps with the personal interests, which means he should not act as a principal himself when performing on behalf of the principal, nor take bribe or extra commission from other party. Unless the shipbroker can show that the other commission is from another separated transaction or he 'contracts otherwise than as an agent'⁵³. In addition, though shipbroker needs to supply some information about his principal to the other party or shipbroker, he must make sure the confidential information, which is sensitive, would not leak out. It is essential for shipbroker to keep away from 'Disclose personal interest', 'secret profits' and 'non-confidentiality' to be loyal to principal.
- (4) The broker has a duty to take an active part in the negotiations and give advice and recommendations with respect to appropriate offers, proposals and compromises. As well, the shipbroker may not withhold any information from his principal nor give him wrong information. For better the advice providing and trades reminding, shipbroker should try his best to be careful in the areas that he is 'ignorant' and make sure about the information he provides is correct and true. The case *Arta*⁵⁴ indicates the extent of care that must be taken with prefixture enquires and that the obtaining of a fixture at any cost with risks.
- (5) The shipbroker should prevent the situation of 'delegation'. Generally, shipbroker has no reason and right to sub- delegate without the permission, or implied authority, from his principal, because it may cause

⁵³ *Powell and Thomas v. Evan Jones* [1905] 1 KB 11

⁵⁴ *Arta*, [1983] 2 Lloyd's Rep. 405, 409

a problem that the sub- broker actually has no authority from the principal and the sub- broker is liable to a third party for breach of a warranty of authority.

(6) The shipbroker should remind himself to protect principal's interests and not provide shipment or vessel proposals to his principal if business is not seriously founded or if there may be doubts about the other party's honesty or solvency, and the shipbroker should also protect his principal's interests by preventing wrongfully worded or incomplete orders from being sent until they have been corrected or completed although the fast deal can lead shipbroker the same or more profits form the deal in a shorter period. This is not only good to preserve his principal's reputation, but also his own in this industry. Furthermore, the shipbroker should also try to find out as much as possible about activities of competitors in order to secure as many advantages as possible for his principal. A 'mailbox' broker who can only delivery information, offers and counter offers without judging and processing them can hardly receive a high degree of appreciation form the principals and expand his business range and client circle.

For better and active completion of the duties above, shipbroker need to comprehend clearly about his rights and obligations and deal with the business in differently regional market. In the following part, the legislation on shipbroker's rights and obligations will be introduced and analyzed.

3.2 Rights in Chinese legislaton

In China, due to chartering shipbroker's character of 'intermediary' and contractual relationship with principal, some related provisions in specific Chinese laws have made explanation and provide protection on shipbroker's rights.

3.2.1 Right of claim on remuneration

In chartering shipbrokerage, shipbroker usually gets paid and benefits in the form of ‘remuneration’, and in practice, chartering shipbroker does not sign another ‘intermediary’ contract. However, the terms of ‘remuneration’ in chartering contract cover their commission relationship and give detailed and specific agreement.

In ‘*Chinese Contract Law*’⁵⁵, there are some provisions on broker’s remuneration:

Article 422: *Where the commission agent has completed the entrusted matter or has partially completed the entrusted matter, the principal shall pay the appropriate remuneration thereto. Where the principal fails to pay the remuneration within the prescribed period, the commission agent is entitled to lien on the entrusted item, except as otherwise agreed upon by the parties.*

Art. 426 (1): *Once the broker facilitates the formation of the proposed contract, the client shall pay the remuneration in accordance with the intermediation contract. Where remuneration to the broker is not agreed or the agreement is not clear, nor can it be determined in accordance with Article 61 of this Law, it shall be reasonably fixed in light of the amount of labor expended by the broker. Where the broker facilitates the formation of the proposed contract by providing intermediary services in connection therewith, the remuneration paid to the broker shall be equally borne by parties thereto.*

In ‘*Measures for the Administration of Brokers*’⁵⁶, the provision on ‘remuneration’ is stipulated:

Art. 14: *Broker obtains lawful remuneration through engaging in lawful brokerage activities and shall not violate state laws and regulations*

Therefore, chartering shipbroker has the right to collect commensurate remuneration since he provides the brokerage services for principal. The

⁵⁵ <*Chinese Contract Law*>, 1999

⁵⁶ <*Measures for the Administration of Brokers*>, 2004

principle pay shipbroker remuneration only when the broker facilitates the formation of the proposed contract by providing intermediary services, which means shipbroker can enjoy the right for remuneration only in the situation his principle and the third party matches with each other under shipbroker's service and introduction, and then sign contract successfully.

Additionally, there is a practical situation that shipbroker is not a party in the chartering contract though the contract is coordinated and signed within shipbroker's work. Generally, there is no specific written document or agreement on the remuneration. The shipbroker thus has some problems to claim right when principal act to delay to pay or avoid to pay the remuneration. 'Chinese Contract Law' has regulation to deal with such situation:

Art. 64: Where the parties agree that the obligor shall perform the obligations to a third party, and the obligor fails to perform its obligations to such third party or its performance of the obligations is not in conformity with the agreement, the obligor shall be liable to the obligee for breach of contract.

If the principal does not pay the shipbroker's remuneration and breach the brokerage contract, shipbroker (creditor) cannot claim his remuneration directly from shipowner (debtor), but when charter decides to sue the shipowner for breach of contract, shipbroker can claim right to get remuneration.

However, in a special situation, in which the shipbroker provides the intermediary service and try his best to match his principle with a third party but a contract does not achieved successfully, how should shipbroker claim his right on remuneration? This will be discussed in another charter later.

3.2.2 Right of claim on expense

About the cost, there are some specific regulations in ‘*Chinese Contract Law*’⁵⁷ to be applied in different situations.

Art. 426 (2): *Where the broker facilitates the formation of the proposed contract, the brokerage expenses shall be borne by itself.*

Art. 427: *Where the broker fails to facilitate the formation of the proposed contract, it may not require payment of remuneration, provided that it may require the client to reimburse the necessary brokerage expenses incurred.*

Who will pay for the brokerage expense depends on whether the formation of proposed contract is facilitated, which means shipbroker only enjoy this right on occasion of ‘failure’. However, the international practice is different from Chinese domestic law.

In GENCON 1994⁵⁸, the expense is regulated like below:

Clause 15: *In case of non-execution 1/3 of the brokerage on the estimated amount of freight to be paid by the party responsible for such non-execution to the Brokers as indemnity for the latter's expenses and work. In case of more voyages the amount of indemnity to be agreed.*

We still need to pay attention on one point, which is there is no explicitly certain regulation on the time limit to pay for the expenses for parties involved in chartering shipbrokerage. Thus the parties should deal an agreement on this or supplements to make sure the expense payment will be made in a certain period.

⁵⁷ <*Chinese Contract Law*>, 1999

⁵⁸ GENCON, 1994

3.3 Obligations in Chinese legislation

The chartering shipbroker takes the commission from principal as his work and then he should work carefully and cautiously, stick on honesty and trustworthiness, try best to handle responsibilities, protect principles interests, and complete principal's commission.

3.3.1 Obligation of acting in good faith

The chartering shipbroker's main intermediary business includes informing the principal (shipowner/ charterer) about the opportunities to form contracts and providing the intermediate services, so shipbroker must act in good faith.

According to '*Chinese Contract Law*'⁵⁹, shipbroker's obligation of acting in good faith is regulated in Article 425 (1):

The broker shall provide true information concerning matters relevant to the conclusion of the proposed contract.

In practice, such things like the potential possibilities to conclude a contract, intention and condition to sign contract, and counter party's bank credit, and financial status can be considered as '*information concerning matters relevant to the conclusion of the proposed contract*'.⁶⁰ The case of *Dampskibsselskab Halla v. Catsell & co.*⁶¹ also proves shipbroker has the same obligation on Anglo- American law system.

Therefore, according to Chinese law and regulations, shipbroker should offer his principal the shipping market situation, developing trend, and the possibility of contract accomplishment, as well as keep informed on market

⁵⁹ <Chinese Contract Law>, 1999

⁶⁰ Chen. Yunjie, <Research on Chartering Shipbroker's Practical Business and Legal System>, p16, 2007

⁶¹ *Dampskibsselskab Halla v. Catsell & co.*, [1928] 30, Lloyd's Rep. 284

and delivery offer and counter-offer. As soon as shipbroker acquires information that may influence negotiation, he should notify his principal immediately. Shipbroker should neither transfer the incomplete or false information to his principal, nor counter party. Nevertheless some doubt on counter party's good faith, financial situation and solvency may lead the failure of negotiation, shipbroker must inform principal the truth. Additionally, shipbroker must work with good faith as principle and keep principal's privacy and commercial secrets from a third party and public, and should not limit in the contract period. According to Chen⁶², in some area's practical business, for breaking away from the controlling of powerful trader/ retailer, and contacting then making deals with end clients, manufacturer may require shipbroker keep the clients' information as secret.

3.3.2 Obligation of acting within authority

Shipping market is a global market, which is always changing all the time, shipbroker, principal, and a third party in transaction may locate in different countries and regions, and in different time zones. For quick respond to offer/ counter-offer, saving time and communication cost, efficient and successful negotiation, principal usually give his shipbroker a wide range of authority for convenience. However, the practical problem is to define and prove the authority and its range is difficult, because some authorities are often given via oral way or telephone, but not documentary.

According to '*Chinese Contract Law*'⁶³,

Article 48: *A contract concluded by an actor who as no power of agency, who oversteps the power of agency, or whose power of agency has expired and yet concludes it on behalf of the principal, shall have no legally binding force on the principal without ratification by the principal, and the actor shall be held liable.*

⁶² Chen. Yunjie, <Research on Chartering Shipbroker's Practical Business and Legal System>, p25, 2007

⁶³ <Chinese Contract Law>, 1999

The counterpart may urge the principal to ratify it within one month. It shall be regarded as a refusal of ratification that the principal does not make any expression. A bona fide counterpart has the right to withdraw it before the contract is ratified. The withdrawal shall be made by means of notice.

Article 49: *If an actor has no power of agency, oversteps the power of agency, or the power of agency has expired and yet concludes a contract in the principal's name, and the counterpart has reasons to trust that the actor has the power of agency, the act of agency shall be effective.*

Though Chinese law and regulations do not use the same words, such as ‘real/ actual agent authority’, ‘apparent agent authority’ and ‘estoppel agent authority’, to describe the authority and agent relationship between principal and shipbroker, Chinese legislation does share the same principles with Anglo-American law system in this perspective⁶⁴. As an intermediary, shipbroker must have authority from his principal (shipowner/ charterer) so that the principal can be also bound by intermediary activities. However, in practice, it is difficult to perform the burden of proof to show there is authority for shipbroker because many parties are involved in chartering business usually and one big issue is lack of direct connect between two sides principals and documental authority for shipbrokers.

3.3.3 Obligation of damage compensation

On this obligation, ‘Chinese Contract Law’ stipulates in Article 425 (2):

Where the broker intentionally conceals any material fact or provided false information in connection with the conclusion of the proposed contract, thereby harming the client's interests, it may not require payment of any remuneration and shall be liable for damages.

According to Yu⁶⁵, in these situations, shipbroker is required to take the obligation of compensation:

1. Principal suffers the damages on his interests for shipbroker’s fault or failure to act reasonable care;

⁶⁴ Huang. Pengfei, <Research on Chartering Shipbroker Legal System>, p26, 2003

⁶⁵ Yu. Miao, <Research on Shipping Broker’s Legal Issues>, p 26, 2007

2. Principal suffers substantial damages because shipbroker breaches the duty of disclosure;
3. Principal suffers loss due to the rescission of contract that caused by shipbroker;
4. Principal suffers the infringements upon his interests since shipbroker intentionally conceals material facts relating to the conclusion of the contract or supplies false information, and then shipbroker has no rights to require remuneration and shall be liable for damages.

3.4 Advanced regulation in Anglo-America states and Scandinavian legal approaches

UK has been a powerful marine state since 16 century, and US is playing the important role of 'shipping center' in maritime world. As well as in the Scandinavian states, shipping industry has always been their traditional strength and focus for development. They have valuable experience and successful resolution on issues of shipbroker's rights and obligations. In this section, comparing with the regulations in Anglo-American law and Scandinavian law, some issues that have no specific regulation in Chinese law will be discussed.

3.4.1 Claim for remuneration

In the chartering contract, whose formation is facilitated by shipbroker, there is usually a clause on remuneration. In chartering business, shipbroker plays the role of intermediary of shipowner or charterer and remuneration is the main channel to get paid. Shipbrokers usually are entitled to remuneration, which is a percentage of freight, unless there is demurrage or damage for detention (except the expressly statement agreed)⁶⁶.

⁶⁶ Lars. Gorton, Patrick. Hillenius, Rolf. Ihre and Arne Sandevärn, <Shipbroking and Chartering Practice>, P. 233

In GENCON 1994⁶⁷, which is used often in chartering shipbrokerage business, it is stipulated like below:

Clause 15: *A brokerage commission at the rate stated in Box 24 on the freight, dead-freight and demurrage earned is due to the party mentioned in Box 24.*

In case of non-execution 1/3 of the brokerage on the estimated amount of freight to be paid by the party responsible for such non-execution to the Brokers as indemnity for the latter's expenses and work. In case of more voyages the amount of indemnity to be agreed.

A crucial factor in the construction of contract is often ‘the relative significance assigned to the wording of contract’⁶⁸. In English law, to consider the contract and the disputes as unique is one common approach. To achieve this, the judge usually resorts to a literal construction of the wording.⁶⁹

This principle is precisely stated by Lord Russel of Killowen in the case of *Luxor (Eastbourne) v. Cooper*⁷⁰:

‘No general rule can be laid down by which the rights of agent or the liability of the principal under commission contracts are to be determined. In each case these must depend upon the exact terms of the contract in question, and upon the true construction of those terms.’

3.4.1.1 The condition to pay remuneration

3.4.1.1.1 The broker engaged to act as an intermediary.

The broker cannot represent the parties in a potential deal, so he can only ask for remuneration if he has been requested to act as or accepted as an intermediary by one of the parties, ‘the principal’.

⁶⁷ GENCON, 1994

⁶⁸ Sjur. Brakhus, ‘The Shipbroker’s Right to Commission’, edited in < Intermediaries in Shipping > by Kurt Grönfors, p168

⁶⁹ Ibid, p168-170

⁷⁰ *Luxor (Eastbourne) v. Cooper*, [1941] A.C.108 at p.1

The request sometimes can be made in written documents, but for the convenience and efficiency, in most cases, the shipbroker's engagement in chartering is established in an informal way. The shipowner and the charterer usually prefer to start a negotiation on a certain deal through broker. In general, shipowner and charterer often receive unsolicited information from a number of brokers in the chartering market and they can also act on such information without engaging any of brokers. However, if either party decides to ask one of the brokers for further information, or he asks the broker to delivery an offer to the other party in the potential deal, that means this party is likely to give the shipbroker authority to enter into this deal, which may result in a contract being concluded, and he is bound to pay a remuneration for shipbroker's services.⁷¹

3.4.1.1.2 A binding contract concluded between the principal and a third party.

Unless the efforts of the broker lead to a positive result, the formation of a contract between principal and a third party, the chartering shipbroker has no right on remuneration can be claimed. In the situation of positive result, which is led to by shipbroker's effort and a contract binding upon the shipowner and charterer, is conducted, shipbroker can enjoy the commission as remuneration. In some case, both shipowner and charterer may loss interest in a contract and then agree that 'there has been no consensus'⁷², for claiming the commission, shipbroker has to be able to prove the opposite. Therefore, in practice, it is decisive to prove the opposite situation for the broker's claim for commission.

⁷¹ Sjur. Brakhus, 'The Shipbroker's Right to Commission', edited in < Intermediaries in Shipping > by Kurt Grönfors, pp170-171

⁷² Ibid, p178, 179

3.4.1.1.3 Broker's claim for commission conditional upon contract performance

There is one situation is that regular performance of the negotiated contract is prevented by occurrences, and none of the contracting parties can be blamed. Brakhus gives a example⁷³: *a three years time charter becomes frustrated after one year of trading under charter, because war breaks out between owner's and the charterer's states. Can the broker claim commission on the estimate amount of charter hire rate that have been earned in the outstanding two years of the charter period, if the charter had not been frustrated?*

According to Brakhus⁷⁴, in many cases, solution is found in the brokerage clauses or commission letter, but sometimes the clauses may be 'silent or unclear on this particular point'. There are also some cases where broker has been engaged in the contractual negotiating process to act as an intermediary, but where nothing has been agreed as to his remuneration. The general principle in chartering business is that 'the shipbroker carries the risk of conclusion, but not the risk of performance'. The chartering shipbroker's task is to procure a binding contract. Once he achieves this goal, he earns his pay. Therefore, the performance of the contract is the concern of the contracting parties, such as the shipowner and charterer, but not the broker.

3.4.1.2 Situations of breach of contract

There are several reasons, which may cause the cancellation of chartering contracts, such as failure of purchase/ sales contracts, vessel absence in period of loading, and breaking out a war. However, chartering shipbroker does spend a lot of energy, labor and time on boosting the formation of contract and it is reasonable for shipbroker to get remuneration or the compensation for remuneration.

⁷³ Ibid

⁷⁴ Sjur. Brakhus, 'The Shipbroker's Right to Commission', edited in < Intermediaries in Shipping > by Kurt Grönfors, pp178-180

GENCON 1994 and BALTIME 1939 both have some clauses on this.

GENCON Clause 15:

In case of non-execution 1/3 of the brokerage on the estimated amount of freight to be paid by the party responsible for such non-execution to the Brokers as indemnity for the latter's expenses and work. In case of more voyages the amount of indemnity to be agreed.

BALTIME Clause 25 (2):

Should the parties agree to cancel the charter, the owner to indemnify the brokers against any loss of commission but in such case the commission not to exceed the brokerage on one year's hire.

Even if the principals try to avoid the shipbroker's remuneration in bad faith, the case of *Broad v. Thomas*⁷⁵ still provides support to shipbroker to claim for that according to the intermediary contract between principal and shipbroker. In the situation mentioned in 3.2.1, in Chinese jurisdiction, although shipbroker cannot sue the shipowner directly due to lack of written agreement of remuneration, the shipbroker can only claim right when charter sues shipbroker. The English law seems to offer some convenient resolution for the similar case⁷⁶. In 'Contract Act 1999'⁷⁷, shipbroker, as beneficial party in contract, can sue the shipowner directly and offers protection on shipbroker's right to claim remuneration.

However, the shipbrokers in Asia prefer to avoid the situation to sue his principal in consideration of lack of well-established legislation, possibilities for future cooperation with principal, and his own reputation in this business⁷⁸. Therefore, to draw advanced lessons from developed powerful shipping states is beneficial for shipbroker to prevent risks and protect the legal right in practice.

⁷⁵ *Broad v. Thomas*, [1983] 7, C.F

⁷⁶ *White v. Turnbull, Martin & co*, (1898)3, Com,Cas,183

⁷⁷ <Contract Act 1999>, Chapter C31, 1999, Right of third to enforce contractual term: "subject to the provisions of this Act, a person who is not a party to a contract (a 'third party') may in his own right enforce a term of the contract if (a) the contract expressly provides that he may or (b) subject to subsection (2), the term purport to confer a benefit on him."

⁷⁸ Chi. Chao, <Research on Shipbroker's Legal Status, Functions and Liability>, 2003, p18

3.4.1.2.1 Breach of contract for which the principal is to be blamed.

When one principal, who is also the remuneration debtor, ‘willfully or negligently’, has broken the negotiated contract, he must incur liability towards the other contracting party for the loss that the other party suffers as a result of this breach. The broker’s claim for commission can invoke the same principal so that the broker would be protected, because one contracting party (shipowner or charterer), in whose interest a contractual condition has been stipulated, is playing the role the commission debtor, and tries best do what he can to make the condition fulfilled. If he is blamed for breach of the contract in relation to the other contracting party, and leads that contract to result in non- performance, he will be in breach of his duties towards the broker, giving the broker a claim for compensation for the loss of commission at the same time⁷⁹. The case of *Alpha Trading v. Dunn-Shaw- Patten*⁸⁰ can prove English law is in conformity with this.

There is a possible situation, in which the contract is cancelled by agreement between the two contracting parties, is that the parties to the contract intentionally lead the contract to an end and deprive the shipbroker’s commission in the reason of the performance of contract. Therefore, whether this can be considered a breach of contract of agency, and entitle the broker claim against damages for the loss of commission?

On one hand, it is important to figure out the ‘voluntary cancellation’ is different form ‘a breach of contract’. Sjur defines⁸¹ a breach of contract is ‘an undesirable occurrence, which should be sanctioned by holding the party in breach liable of brokerage’. Cancellation by agreement is ‘a sensible arrangement, serving rational business purposes and should not bring about

⁷⁹ Sjur. Brakhus, ‘The Shipbroker’s Right to Commission’, edited in < Intermediaries in Shipping > by Kurt Grönfors, pp184, 185

⁸⁰ *Alpha Trading v. Dunn- Shaw- Patten*, [1981]1, QB290, at P304 A

⁸¹ Sjur. Brakhus, ‘The Shipbroker’s Right to Commission’, edited in < Intermediaries in Shipping > by Kurt Grönfors, p186

sanction'. On the other hand, if either party makes the contract, which is a intermediary one between principal and broker, conditional for his own interests and willfully prevents the condition, which means the performance of the negotiated contract, from being satisfied, then the party should incur liability towards the other party in this contract. The case of *French v. Lesston*⁸² proves that English law also adopts this theory.

When the contract is fulfilled, the principal ought to take into consideration that broker's economic interests- the remuneration, even the situation negotiations concerning cancellation exists, otherwise, if the principal disregards the interests of the broker, the principal possibly needs to give a reasonable compensation for shipbroker's loss of commission.

When drafting the brokerage clause, the principal and the broker can also be free to choose a solution for the situation contract is not fulfilled. As an example, BALTIME 1939 clause 25, the second paragraph⁸³ states:

'Should the parties agree to cancel the charter, the owner to indemnify the brokers against any loss of commission, but in such case the commission is not to exceed the brokerage on one year's hire.'

3.4.1.2.2 Breach of contract by a party who is neither principal nor commission debtor.

Traditionally, the law on remuneration obligations only offers a very limited protection against a third party who destroying a broker's prospect of claiming for remuneration when broker's obligation fulfilled. Under English law, it is clear that the broker cannot claim commission or compensation for the loss of his commission for a contracting party who is neither his principal nor a commission debtor. The '*manifest Lipkowy*'⁸⁴ is a typical

⁸² *French v. Lesston*⁸² [1922]1 A.C. 451

⁸³ BALTIME 1993

⁸⁴ '*Manifest Lipkowy*' [1989] 2 Llyod's Rep. 138 C.A

case. There is either not specific regulation or law in China for this situation for the same reason- one foundational principle in classic contract law theory- the privity of contract, which will be discuss in Section 6 of this thesis.

3.4.2 Fraudulent misrepresentation and negligent misrepresentation

3.4.2.1 Fraudulent misrepresentation

In Chinese legislation, the regulations on related issues can be found in ‘*Chines Contract Law*’⁸⁵.

Art. 425: *The broker shall provide true information concerning matters relevant to the conclusion of the proposed contract.*

Where the broker intentionally conceals any material fact or provided false information in connection with the conclusion of the proposed contract, thereby harming the client's interests, it may not require payment of any remuneration and shall be liable for damages.

Art. 42: *The party shall be liable for damage if it is under one of the following circumstances in concluding a contract and thus causing losses to the other party:*

- (1) pretending to conclude a contract, and negotiating in bad faith;*
- (2) deliberately concealing important facts relating to the conclusion of the contract or providing false information;*
- (3) performing other acts which violate the principle of good faith.*

Therefore, the constitutive elements of ‘being fraudulent’ are: (1) purpose on fraud- bad faith; (2) activity of fraud- deliberately concealing facts; (3) consequence led by fraud- causing losses. Once the shipbroker violates his obligations, the results will be (1) no remuneration and (2) compensation.

Supreme Court of UK defined the characters of ‘fraudulent’ in the case of *Derry v. Peek*⁸⁶ as: (1) knowingly; (2) without belief in its truth; and (3) careless whether it be true or false. In practice, the misrepresentation is not

⁸⁵ <*Chinese Contract Law*>, 1999

⁸⁶ *Derry v. Peek*, [1989]14, App. Cas. 337

limited in wording or literal, but extends to act and omission, and content of representation includes facts, but also opinion, prediction, intends.

In the situation of fraudulent misrepresentation, victim can cancel the contract, and meanwhile he can also claim chartering shipbroker to be liable for the compensation of damage. When principal and shipbroker are in collusion, the principal shall hold jointly liability. Though the principal is in unwitting, as far as the shipbroker's activities are in the scope of principal's authority, the principal ought to be liable for broker's fraudulent representation.

From the comparison with English law above, we can figure out that the missing element of fraud in Chinese law is broker's 'careless/ reckless attitude', and it is good to well protect parties in chartering business when there are specific regulations on 'cancellation' and 'jointly liability'.

3.4.2.2 Negligent mirepresentation

Negligent misrepresentation often occurs when the broker carelessly or recklessly makes a representation while having no reasonable basis to believe a fact is true. This type of misrepresentation is a different situation with fraud. It was first seen in the case of *Hedley Byrne v Heller*⁸⁷ where the court found that a statement made negligently that was relied upon could be actionable in tort. Lord Denning in the case of *Esso Petroleum Co. Ltd. v Mardon*⁸⁸ transported the tort into contract law, stating the rule as:

'If a man, who has or professes to have special knowledge or skill, makes a representation by virtue thereof to another...with the intention of inducing him to enter into a contract with him, he is under a duty to use reasonable care to see that the representation is correct, and that the advice, information or opinion is reliable.'

⁸⁷ *Hedley Byrne v Heller*, [1964] A.C. 465

⁸⁸ *Esso Petroleum Co. Ltd. v Mardon*, [1976] Q.B. 801

In 1980s, in one typical case, the *Markappa Inc. v. N.W. Spratt & Son Ltd. (The Arta)*⁸⁹, the shipowners had successfully sued charterers because the charterers failed to satisfy any part of the reasonable judgment. The judge held that the shipowner's broker was negligent in failing to convey information to his principals, and that if the shipowner had known about the real the financial standing and reliability of the charterer were not as the shipbroker had said, they would have repudiated the charterparty. Therefore, negligent misrepresentation can cause suits for damage or compensation for damage.

However, there is no relevant regulation on 'negligent misrepresentation', and this missing part in legislation should have played a significant role in preventing the potential risks in chartering shipbrokerage business.

⁸⁹ *Markappa Inc. v. N.W. Spratt & Son Ltd. (The Arta)* [1985]1, Lloyd's Rep. 534 C.A.

4 Related issues about chartering shipbrokerage in China and adoption of economic model

4.1 Business of chartering shipbroker and benefits for principals in Chinese market

The huge chartering market in shipping industry is composed by big shipbroking companies/firms, shipowners, charterers, individual shipbrokers and agents, and they are giving a concentrated picture of prevailing situation. By comparing the conclusions made in various reports with one's own judgment of the situation, it is possible to form a fairly accurate picture of the market in the sectors of particular interest. A comprehensive market report (See Picture 1⁹⁰) contains comments on (primarily) the largest markets, dry cargo and tanker. Often the market development within the different areas is commented on separately, for example, in different areas or for different commodities. Generally the different tonnage sizes are also dealt with separately.⁹¹

4.1.1 Business in practice

The chartering shipbroker's daily work in Chinese market mainly includes:

1 Customer reception and development

Generally, shipbrokers have their own customer groups and rely on them to carry out business. But some new clients may also ask for shipbroker's

⁹⁰ Supplement B

⁹¹ Lars. Gorton, Patrick. Hillenius, Rolf. Ihre and Arne Sandevärn, <Shipbroking and Chartering Practice>, p 32

intermediary services, as well as some potential customers need exploration. The shipbrokers thus need to try best to maintain their existing customers, and also develop the new ones via telephone or visit.

2 Inquiry and quote

Shipbrokers usually send the information on ships or cargos to the whole market and collect replying information for principals. The experienced shipbrokers and big shipbroking firms have more efficient channels and wider connection, so that they can send principal's offer and get count offer from market and other shipbrokers in a short period.

3 Negotiation

After robust selection of the reacting information, initial contact with purchaser with intention, and reporting to principals, shipbroker will enter into the stage of negotiation as principal's instruction. Negotiation is mainly focus on the specific contractual terms and initial agreement may be achieved as requested by clients, then shipbroker will start to draft a fixture note; if there is failure to make the initial agreement, which is far away from client's expectation, shipbroker will inform client and give advices.

4 Signing contract

When shipowner and charterer confirm and agree on the fixture note, shipbrokers then proceed to form the charterparty. If the charterparty shares conformity with fixture note and there is no addition or modification need to make, then the charterparty is ready to sign.

5 Assistance for contract performance

For well and smoothly performing the contract, shipbrokers often offer assistance to principals. For example, before loading, shipbrokers will require the information on ships from shipowners and inform charterers, so that charterer can arrange cargos and coordinate with local authorities conveniently; after loading, shipbroker will assist shipowners to calculate

freight and sent invoice to charterer; after discharging, shipbroker still need to pay attention on issues of demurrage charges and dispatch money.

4.1.2 Benefits for principals

4.1.2.1 For the shipowner

1 Protection of middle or small-size shipowner's interests

In global chartering market, big-size shipowners and charterers are always occupying advantages and a powerful position in negotiations, while the middle and small sized ones have to be disadvantaged, even suffering the pressure of crackdown. Through the shipbroker, those middle or small-size shipowners can acquire more profits in negotiation, on the other hand, they can avoid to be in the situation of disordering the market and unreasonable pricing, which will produce negative influence for the future business.

2 Coordinating with other shipowners to avoid loss

Shipowners are in competition relationship and barely have business contact with each other. Once there is an emergent occasion, for example shipowner has no other ship as replacement while time of loading period is running out, then he has to rely on other shipowners to avoid damages for charterer and compensation, shipbrokers play the role of best media for contacting 'competitor' in limited time.

3 Preventing risks

Because shipbrokers' business is complex and wide-ranged, they have sufficient information on most charterers' background, reputation, and even bank credit. All the information can alarm shipowners in negotiations if there are potential risks and losses. For example, if the charterer has negative reputation or bad history in freight paying, some strict terms on freight may be added into contracts so that shipowners will get paid and shipbroker will also collect remuneration as early as possible.

4.1.2.2 For the charterer

1 Prevent confidentially commercial plan and arrangement from spreading

If a charterer would like to charter a vessel before or after formulating the purchase and sales contract by himself, he has to offer every shipowner that he contact with the detailed information about himself and the sales contract, and this may lead charter a negative position in other chartering negotiation and even expose the commercial plan and secrets; if the charterer does not follow the principle of good faith and hide some details, it may cause shipowner doubtful about the cargos and this chartering business. However, when the shipbroker sent a simple inquiry without many details and charterer's name, it is still acceptable for shipowners because it is business custom and professional request in chartering industry.

2 Touching most shipowner with minimum cost

Where the shipbrokers provide chartering services, charterer does not have to spend a lot of money and time to develop and maintain relationship with shipowners, and it is more beneficial for the charterers who has limited amount of business. Once the charterers have the demand of chartering, shipbrokers, who have more access to market, will contact as many shipowners as possible, and charterer can choose the most suitable shipowner to make a deal with.

3 Assistance in negotiation

Most charterers, who concentrate more on good purchase and sales, have less knowledge about the shipping market than shipbrokers. Because of the rich experience and professional knowledge on chartering business, shipbrokers can offer a reasonable price for the principals. Besides, with the advices and assistance from shipbroker, the charterers can get more protection and beneficial position while negotiating charterparty.

4 Post-contractual- services

After formulating the charterparty, shipbrokers usually provide some other 'after-sale' services, such as notices of bill of lading, coordination for

discharge, calculation on demurrage. In such way, charterers will deliberate from the unfamiliar work and improve the efficiency of transport and transaction.

4.2 Information asymmetry

Information asymmetry models assume that at least one party to a transaction has relevant information whereas the others do not. Some asymmetric information models can also be used in situations where at least one party can enforce, or effectively retaliate for breaches of, certain parts of an agreement whereas the others cannot. In economics and contract theory, information asymmetry deals with the study of decisions in transactions where one party has more or better information than the other.

As the consequence of asymmetric information, adverse selection always appears in risk management. Adverse selection refers to a market process in which "bad" results occur when buyers and sellers have asymmetric information (i.e. access to different information): the "bad" products or services are more likely to be selected. In ship chartering market, it may manifest itself in the following way: there are good-quality and bad-quality goods (chartering service) in the market, and various goods ask for different prices. The market only accepts the average price due to asymmetric information, in which insufficient information is available on goods provided in this market. It is obviously not fair for 'good-quality' owners because of the unreasonable and avoidable loss, while the 'bad-quality' owners gain extra profits as his expected price of goods is than market price. As a result, the 'good-quality' owners have to quit this market and the 'bad-quality' ones flood the market. Consequently in this situation, clients cannot buy anything except 'bad-quality' in this market and at an unreasonable price. Therefore, clients will refuse to consume any more in this market, and finally, the market collapses. (Also see Figure. 2⁹²) For avoiding the

⁹² Supplement A

situation of adverse selection, it is important to deal with the problem of asymmetric information.

In the chartering market, this asymmetric information phenomenon is common and also a problem that shipowners and charterers often deal with. Generally, shipowners clearly know about their ships' condition, sailing behaviors and costs, but do not have enough information on charterers' bank credit, financial situation, and ability for freight and rent. The charterers also suffer from asymmetric information. Meanwhile, it will incur a significantly giant cost, not only financially but also time-wise, to collect all the information from market and identify the reliability of each party. However, chartering shipbrokers usually have access to information and provide services to match demands and supplies as much as possible. On the other hand, due to lack of confidence on whether the other party can perform the duties and obligations as agreed in contracts, as well as sufficient knowledge on market and relevant regulations in other states, chartering shipbrokerage is a good measure to improve efficiency of business and transaction. In other words, shipbrokerage is a feasible countermeasure to stride over the barrier of information asymmetry.

When there is asymmetric information, the risk premium, which is one important component-concept of remuneration, creates a large inter-influence with market. According to William F. Sharp⁹³, 'an equivalent definition of a risk premium is: the expected excess return on a security or portfolio, where excess return is the difference between an actual return and that of a riskless security.' In simpler terms, a risk premium is the minimum amount of money by which the expected return on a risky asset must exceed the known return on a risk-free asset, or the expected return on a less risky asset, in order to induce an individual to hold the risky asset rather than the risk-free asset. Thus it is the minimum willingness to accept compensation for the risks. In the ship chartering market, the shipbroker, as a party

⁹³ online at http://www.stanford.edu/~wfsarpe/mia/prb/mia_prb2.htm

engaging in ship chartering business with his own reputation and information resources instead of ships or cargos, has to take certain risks (e.g. his favourable reputation gained from the trustworthy performance on business involved before in this market) and therefore charges more for taking higher risks.

The author believes that shipbroker's remuneration should include two parts: price for risks and fair price. The former is closely related with risk premiums, and the latter usually consists of general price/ average price, which is dependent upon the market situation and includes the components of expense, labor, time and other costs. The shipbroker's remuneration is included in the goods' price and indirectly influences the sales of goods. From a macro-economic perspective, excessively high prices for goods, which are lead by high remuneration, negatively impact the development of the market. In practice, delays in contract performance by principals (shipowners or cargo owners) and fraudulent chartering contracts may cause harm on chartering shipbrokers' reputation, which can be considered as a risks for shipbrokers.

Throughout the analysis above, the author assumes that the remuneration will be different:

1 In different countries. Legislation and legal development of different states must naturally vary. In the legally well-developed countries, adequate and strong legal institutions provide comprehensive protection from potential problems and strict regulations on compensation for breach of contract, so the shipbrokers can run their business in a safe environment with low risk and accordingly charge less on risk price; In opposite national contexts, due to the possible losses caused by wrong information from contractual parties and their escaping from agreed duties and obligations, chartering shipbrokers have to take more risks to facilitate the forming of contracts and maintain their reputation. Shipbrokers will thus prefer to charge a higher price as a form of financial self-protection.

2 For different shipbrokers. Shipbrokers' remuneration varies depending on their scales and reputation. In practice, big ship chartering firms or companies with impeccable credit usually ask for higher remuneration, because (a) good reputation is worth a higher price, which can be treated as a guarantee; (b) the information about a big amount of shipowners and cargo owners through responsible research and due diligence, as well as the rich experience on cooperating with some of owners, can ensure professional and safe service.

Due to a lack of statistical data, there are not sufficient proofs to support the author's assumptions. Thus how best to identify the difference of remuneration among countries and shipbrokers requires further field-based or quantitative/ qualitative study.

5 Legal analysis on cases

Through analysis in chapters above, we can tell that, due to lack of enough developing experience in chartering business, China, as a Statutory Law state, does not have such complete legislation can effectively prevent all the common risks and deal with disputes caused by them. Therefore, in this chapter, some cases will be used to check imperfection.

In one typical British case, *Allan v. Leo Lines, Ltd*⁹⁴, The court, considering whether an estate agent was entitled to his commission, emphasized the importance of the mere introduction of a buyer. In this case, the most significant role of the plaintiff was ‘the effective cause of the introduction’, and whether plaintiff had this function was ‘a very important consideration in determining who is the cause of the sale because in these matters the introduction is perhaps often the main difficulty.’ Negotiations and efforts by the buyer personally did not displace the causative effect of the introduction, which was the effective cause of the sale. If a broker effects an introduction and is willing to go on with the usual business negotiation, it hardly lies in the mouth of an owner who takes it out of his hands to say that he has made no further contribution. The key element in such disputes is investigation of the subject matter, which is shipbroker’s effort in negotiation for facilitating the formation of charterparty.

Although this case did not happen between chartering shipbroker and his principal, the occasions are common in the whole shipping brokerage industry. This principle can also adopted to deal with the disputes between chartering shipbroker and his principle. If we image this case happen in Chinese legal system, since the essential element for remuneration collection is to confirm whether shipbrokers facilitate the formation of contract, and principals only perform their duty to pay the remuneration as agreed. Result attract much more attention than efforts, so there are

⁹⁴ *Allan v. Leo Lines, Ltd*, [1957]1, Llyod’s Rep. 127

difficulties for shipbroker to ask for commission for his work, and this kind of problems, which will be discussed in the next chapter, have been existed in Chinese brokerage industry for a long period.

In another different Chinese case about claims for remuneration, *COSCO Logistics (Guangzhou) Co.,Ltd. & China Ocean Shipping Agency Guangzhou (Zhongshan Branch) v. Shanghai Rainbow Logistics Co.,Ltd*⁹⁵, two plaintiffs COSCO Guangzhou and Zhongshan Branch claimed right of remuneration based on four charterparties proposed by them. There was an oral ‘agreement’ between plaintiffs and defendant. However, this agreement was signed after four charterparties, and the term of remuneration stated, within 5 bank days after ship delivery, payment should be accomplished. The fact is that this agreement was achieved after deadline for payment. Therefore, Shanghai Maritime Court reasoned that the agreement was irrelevant with remuneration for those four charterparties. Also, Court believed Zhongshan branch was commissioned by COSCO Guangzhou to perform operation in intermediary contract but not a party of the contract, so it has no right to claim remuneration for intermediary contract. From the judgment of Shanghai Maritime Court, we can realize that the contractual relation between shipbroker and principal is essential, and the privity of contract always limits shipbroker when there is disputes between he and his principal. The oral agreement and commission terms in charterparty are common practices in chartering shipbrokerage market, and shipbroker does not have an explicit position in charterparty, or direct evidence for his contractual relation with his principal. As a result, in Chinese market, privity of contract has become a negatively influential fact when shipbroker tries to protect his legal right. Nevertheless, under British jurisdiction, the situation is different within the influence of ‘*Contract (Right of Third Parties) Act 1999*’. This act confirms that shipbroker, as a third party of contract, still has right to claim his benefits directly upon the charterparty. The real difficulty is how to prove the authority, which is the key point to define shipbroker as a third party, without a written agreement or

⁹⁵ online at http://www.lawbook.com.cn/cpws/cpws_view.asp?id=200401467055

independent brokerage contract. Due to the missing part of a third party's direct claim right, shipbroker in Chinese market has been expecting the similar protection under British judicial system.

Due to the relatively short history of maritime development and slow updating frequency, chartering shipbroker's legal rights cannot be well protected while he is facing the unlawful infringement. Through the juristic situation exchange above, it is not hard to see Chinese legislation is far from perfection, and it has space to improve and draw experience from western countries. In the last chapter of this thesis, some relevant problems on "remuneration" and "privity of contract" happening in Chinese chartering market will be discussed and some advices will be made.

6 Conclusion: problems in Chinese market and suggestions

In practice, many problems are caused by various facts, such as the use of new technology, shipbroker's neglect, habitual thoughts, and handover of work. The solutions for problems above do not need legal approaches. However, for other problems, which will be discussed in this chapter, to strengthen legislative and regulatory frameworks and administration is necessary and essential.

6.1 Problems

6.1.1 The problem on remuneration

How to confirm whether shipbroker facilitates formed of contract

In the shipping market, most of the principals, shipbrokers and a third party in transaction can comply with the market rules and fully take the responsibilities in the contracts. However, there are still some situations, in which the shipbrokers are expelled from contracts and do not get remuneration as agreed. Generally, as far as shipbrokers finish facilitating contractual formation, they have legal right to collect remunerations as the pay for their work. Therefore, to confirm whether shipbrokers facilitate the formation of contract is essential for remuneration collection.

'*Chinese Contract Law*'⁹⁶ Art.426:

Once the broker facilitates the formation of the proposed contract, the client shall pay the remuneration in accordance with the intermediation contract.

⁹⁶ <*Chinese Contract Law*>, 1999

*Measures for the Administration of Brokers*⁹⁷ Art. 15:

The commission that broker acquires from his brokerage activities is legal. Broker has the right to collect commission as agreed in contract, after he has done performed his work. Broker's commission shall not be against national laws, regulations and policies.

According to the law and regulation above, as far as shipbrokers facilitate contract formation, principals should perform their duty to pay the remuneration as agreed. Yet, about the confirmation of contractual formation is facilitated by shipbroker or not, there is no specific regulation in China.

On the other hand, Anglo-American countries do only require shipbroker's substantial contribution (effective cause) in contract formation, but not only refer to his efforts. In the case of *Allan v. Leo Lines, Ltd*⁹⁸ discussed above, the judge believed a negotiation, which was not complex or had to rely other person's personal qualities or personal efforts to achieve, could have the same result on through shipbroker's work. Even the coming-after negotiation is the key and effective reason for facilitating contract's forming, the defendant had liability because the shipbroker had been deprived the opportunity to participate in negotiation, which shipbroker was able or willing to participate in. The shipbroker thus has substantial contribution on the transaction, mainly the facilitation of contractual formation, even principal deprived shipbroker's chance to be part of the negotiation after shipbroker introduced his principal to the other side in contract and was willing to perform and provide service in negotiation.

6.1.1.1 Remuneration when contract rescission

In practice, charterparties may be rescinded for many reasons, such as the cancellation of charter's purchase and sales contract, and breaking out a war. In this case, the contractual relation between shipowner and charter may be ended, but the shipbroker did contribute his energy, labor and time

⁹⁷ *< Measures for the Administration of Brokers >*, 2004

⁹⁸ *Allan v. Leo Lines, Ltd*, [1957]1, Llyod's Rep. 127

on facilitating contract formation and shall receive the rewards or compensation for his work. However, about how to pay shipbroker when charterparty is rescinded, there is no related regulation in China.

In some clauses of standard contract of charterparty, there are agreements can be referred to cope with this situation.

GENCON 1976⁹⁹, Art.14:

In case of non-execution, 1/3 of the brokerage on the estimated amount of the freight and dead-freight to be paid by the owners to the brokers as indemnity for the latter's expenses and work, In case of more voyages the amount of indemnity to be agreed.

GENCON 1994¹⁰⁰, Art.15:

In case of non-execution, 1/3 of the brokerage on the estimated amount of the freight to be paid by the party responsible for such non-execution to the brokers as indemnity for the latter's expenses and work. In case of more voyages the amount of indemnity to be agreed.

This kind specific agreed clause on amount and paying method of remuneration is an effective measure to prevent potential risks and disputes. Meanwhile, in the practice of vessel chartering, there are occasions in which the parties in charterparty agree to cancel the contract before the agreed terminating date between them. One example is the contract is cancelled due to charterer's early redeliver, which is charter's early return of the ship before the agreed termination date and cancellation of contract in advance. When there is a big change on the market, comparing with in the previous market environment, making a new ship chartering contract cost less and is more beneficial for charter's interests, charter may tend to early redeliver. There is stipulation in BALTIME 93, Clause 25 (2)¹⁰¹ on the situation of agreed contract cancellation:

Should the parties agree to cancel the Charter, the Owners to indemnify the Brokers against any loss of commission but in such case the commission not to exceed the brokerage on one year's hire.

⁹⁹ GENCON 1976

¹⁰⁰ GENCON 1994

¹⁰¹ BALTIME 1993

Nevertheless, when principal(s) would like to rescind the contract in bad faith, shipbrokers still can collect remuneration according to the agreement in that rescinded contract. The case ‘Inre Marine Chartering Co. Inc. v. Tokai Shipping Co.’¹⁰² explains that the rescission of contract is invalid if the principal(s) sign a new contract only or mainly for avoid the duty to pay remuneration.

6.1.1.2 Remuneration when contract extension/ continuation

About the remuneration on continuation of previous charterparty, there is lack of specific regulations in Chinese legislation, and in practical chartering business, it is difficult to estimate whether the ‘new’ contract is the ‘extension/continuation’ of the previous one and is directly related with remuneration.

The verdict on contract is new or continuation shall not be produced only upon some factual act, such as principals’ purpose on rescission, document of redelivery, compensation of the damages on ship during chartering period and etc. From the case ‘James L. Parsons, Inc. v. Welsh Shipping Co.’¹⁰³, to judge a contract is new one or continuation one, court believed, as the core of a chartering contract, the contractual terms, performance period, charter rate are different form the previous one, then it is a new contract.

Otherwise, in the continuation of previous contract, shipbrokers can claim on commission of charterparty. In NYPE 93 Clause 43¹⁰⁴, it is stated as below:

Commission of ...percent is payable by the Vessel and the Owners to ... in hire earned and paid under this Charter, and also upon any continuation or extension of this Charter.

¹⁰² *Inre Marine Chartering Co. Inc. v. Tokai Shipping Co.*, SMA, 1991(1): 2625

¹⁰³ *James L. Parsons, Inc. v. Welsh Shipping Co.*, AMC, 1987(2): 576

¹⁰⁴ NYPE 1993

6.1.2 The problem on privity of contract (contract relativity)

‘Doctrine of privity of contract’ has been the unshakable credendum of the classical contract law and has been treaded as the great blackstone of the contract theory and system and observed seriously by both continent law system and Anglo-American law system. As a foundation of the contract institution, in China, privity of contract is a significant principle of jurisdiction and justice practice as well. According to this doctrine, the contract or agreement binds only the parties who have signed. However, with the development of economy and market, the system of right of the third party becomes a major breakthrough against the doctrine of privity of contract.

In most cases, shipbrokers usually make independent remuneration contracts with parties in ship purchase and sales business and the independent contracts can be important basis for lawsuit about remuneration disputes. As far as the ship chartering contracts, especially the ones with small amount, parties usually prefer to make agreement on remuneration with shipbrokers in chartering contracts, instead of concluding an independent remuneration contract with shipbrokers. Therefore, chartering shipbrokers cannot paly the role of ‘party’ in chartering contracts. In Chinese legislation, about the performance of obligations to a third party’s interests, there is regulation in ‘*Chinese Contract Law*’¹⁰⁵ Article 64:

Where the parties agree that the obligor shall perform the obligations to a third party, and the obligor fails to perform its obligations to such third party or its performance of the obligations is not in conformity with the agreement, the obligor shall be liable to the obligee for breach of contract.

¹⁰⁵ <*Chinese Contract Law*>, 1999

But there is no specific regulation, which can be used as basis for t third party to sue contracting parties.

In Anglo-American Law states, the rule of the doctrine of privity, that a third party could not benefit from the terms of a contract, also had been widely criticized by lawyers, academics and members of the judiciary. Hence, China can learn some successful and referable experience from them. After ‘ *Contracts (Rights of Third Parties) Act* ’¹⁰⁶ coming into force in 1999, this Act allows third parties to enforce terms of contracts that benefit them in some way, or which the contract allows them to enforce. It also grants them access to a range of remedies if the terms are breached. The Act also limits the ways in which a contract can be changed without the permission of an involved third party. There is also another standard contract ‘ *FONASBA International Broker’s Commission Contract*’¹⁰⁷, which can help shipbrokers to avoid the problems on privity of contract.

6.2 Suggestions

6.2.1 Suggestions on remuneration and privity of contract

China, as a statute-law country, barely uses precedents and cases to solve the disputes on shipbroker’s remuneration, so it is better for shipbrokers to conclude independent brokerage contracts, within which the agreement on remuneration has been specified, between shipbrokers and principals, when shipbrokers work in the stage of planning to facilitates chartering contracts; on the other hand, the Chinese Supreme People's Court should also introduce some judicial interpretations to break out the limitation of doctrine of privity of contract, and clearly and explicitly stipulates on what occasion chartering shipbrokers can protect their legal right on remuneration by

¹⁰⁶ <*Contracts (Rights of Third Parties) Act*>, 1999

¹⁰⁷ https://www.bimco.org/en/Chartering/Documents/Ship_Management/FONASBA_International_Brokers_Commission_Contract.aspx

means of bringing lawsuit against remuneration debtors, the principals, according contractual relation between them. Meanwhile, both Chinese governmental administration, shipbroker associations and shipbrokers themselves should draw lessons and advantages from those international standard chartering contracts, especially the ones used in developed shipping states in Anglo-American law system, and promote the use of the fairly sophisticated and complete standard contracts. Also they could try to form one new, unified and more detailed standard contract, which can better suit Chinese chartering market and provide comprehensive protection from most common risks, and then encourage the expand of using of this contract.

6.2.2 Suggestion on asymmetric information

Firstly, it is necessary to improve domestic legislation and enhance governmental supervision. With more specific laws and strict control, owners would further regulate their behaviors and business activities more consciously in such environment under rules and legalization. Secondly, governmental administration should adopt modern technical measures to provide the service of information inquiry and try to increase the efficiency of information communication. For example, to release information on ship's and cargo's daily movement on governmental website, to build up database, which contains shipowners registered capital, business scope, and operating performance. Last but not least, shipbrokers should spontaneously form scaled associations and organizations, and share the information resource. Combining with sufficient feedbacks from business of different shipbrokers and officially published information, shipbrokers can make reasonable and accurate judgment on potential customers' credit and then decide whether to provide services and with what price. Such credit rating system can help shipbrokers to avoid potential risks making deals with bad-performance principals and suffering the damages caused by breach of the contracts between them.

6.3 Conclusion

The author uses both comparative approach and dogmatic approach to analyze and answer the question: what is shipbroker and his legal position in China. Not only shipbroker's role and functions within the scope of business, but also his duties in different stages, rights and obligations are discussed. Additionally, the author chooses two cases from China and UK and analyzes what different results will be led if in the other legal system. Through the above qualitative study and some secondary data, the author points out three main problems, which are closely related with chartering shipbroker's business, on remuneration, privity of contract and asymmetric information in Chinese shipping market. Also at the end of this thesis, the author gives some suggestions from the perspectives of prompting legislation and encouraging industry internal administration and communication.

Enlightened of the various points of research and analysis explored in this thesis, it is clear that there remains a number of significant challenges in resolving the issues related to shipbrokerage in the Chinese context. While the Anglo-American and other countries' law system and experience serve as useful and interesting points of comparison, it is important to note that such cross-national comparisons serve only as principle guiding points for future potential development and improvement in the Chinese law system.

It is the author's hope that above outlines suggestions related to shipbroker can contribute to the further advancement of related legal discourses both in China and other related national context, Clearly, further researches will be required to offer more substantial and tangible insights and provement.

Supplement A

FIGURE 1

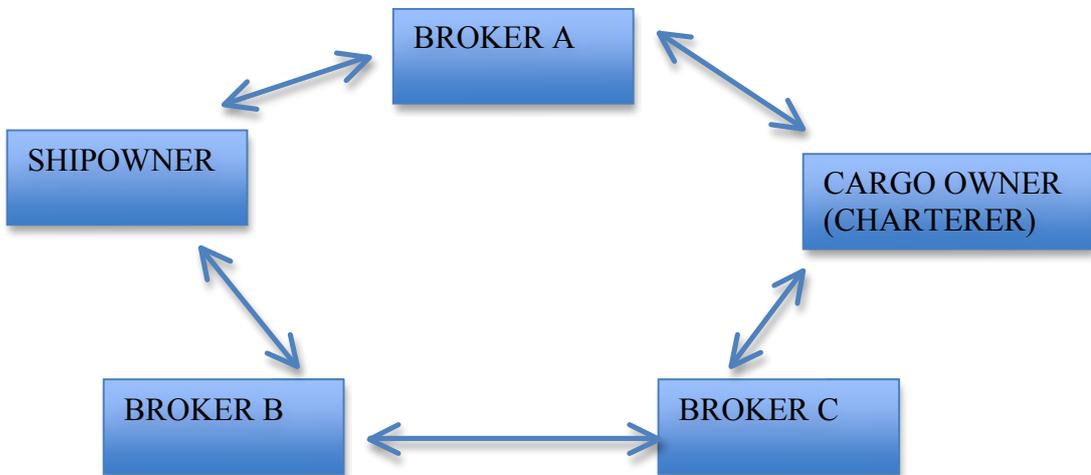


FIGURE 2



Supplement B

PICTURE 1¹⁰⁸

156

FREIGHT CALCULATIONS

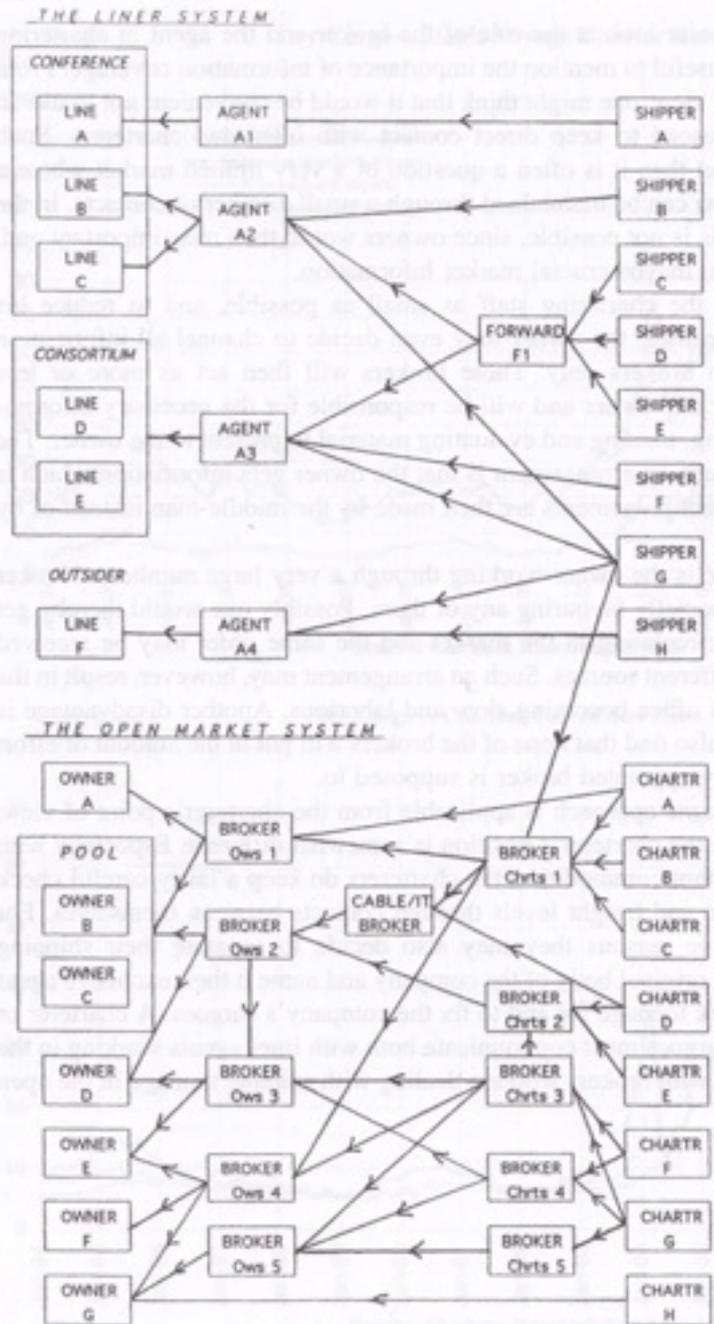
Fig. 34. A weekly market commentary (12 September 2008)

CAPE SIZE		
<p>An extremely tough week for owners with rates tumbling in both the Atlantic and Pacific, the average of the four timecharter routes having shed over \$31,000 through the week. There has been precious little transatlantic enquiry to give the market much needed support, leaving fronthaul to bear the brunt and consequently rates have suffered. Earlier in the week a 171,000-dwt built 2003, open in the UK, agreed \$145,000 daily for a trip via Brazil to China and subsequently a 14 year old 150,000 tonner accepted</p>	<p>\$95,000 daily for a similar run. Voyage rates have also fallen, a Korean charterer is trading Ponta Da Madeira/China around \$55, a drop of about \$10 since early this week, although lower bunker costs have softened the blow. In the East, there has been no shortage of activity but owners have been unable to make any headway and rates here have also slumped. West Australia/China has been traded at \$21 and subsequently a charterer bid \$18. Earlier a 177,000 dwt, open north China, agreed a lower \$95,000</p>	<p>daily however this was quickly overtaken by events as a similar size newbuilding accepted \$79,000 for a round via Australia.</p> <p>A bright spot lies in the period market, where charterers do not appear to be deterred in looking forward, a 170,000-dwt fixed a year with a Chinese charterer around \$130,000. Also for the longer term 180,000-dwt secured \$87,000 daily for five years with delivery later this year.</p>
PANAMAX		
<p>The Pacific has fought hard to improve however with capes struggling. Panamax in turn were restrained, a 2 year old 76,000-dwt, open south Japan fixed a round voyage via New South Wales at \$34,500 daily. Short trip activity includes a 74,000-dwt in</p>	<p>China fixing a trip via Indonesia back to China at \$28,000 daily. Backhaul levels were also not very exciting a modern 75,000, open China, agreed \$24,250 daily for a trip to the US east coast. The Atlantic has struggled to maintain impetus although rates remain</p>	<p>appreciably higher than the Pacific, a 75,000 tonner, open Continent, obtained \$70,000 daily for a trip via Baltimore to Japan. Short haul activity includes a 73,000-dwt, open in the UK, fixing a trip from the Baltic Sea to the Continent around \$57,500 daily.</p>
HANDY/ SUPRAMAX		
<p>A week of sharply declining rates in the Atlantic as tonnage lists continued to grow. One sector that was previously bucking the easier trend was the East Med/Black Sea area but even here conditions became much more difficult. It was reported that the 2004 built 50,619 dwt RM Power was booked with spot delivery at Canakkale for a trip via the Black Sea to Pakistan at \$40,000 daily; although in mitigation it was thought that the vessel only had about 40 days remaining on the balance of her charter. Across the pond it was</p>	<p>thought that a 2008 built 56,000 dwt vessel in ballast from the East Med had been booked delivery North Coast South America mid September for a trip to Spain at \$59,000 daily.</p> <p>It was also thought that the vessel may have to wait a few days before going on hire. In the Far East, the market also looked easier, however with a reasonable amount of enquiry in the North Pacific area, owners were having more chance of offering some sort of resistance. One report suggested that a 2001 built 50,200 dwt</p>	<p>vessel open North China spot had been booked for a long duration trip to West Africa at \$33,000 daily.</p> <p>The Indian Ocean however was proving to be a graveyard and although a few cargoes were now being quoted, the Charterers were able to take their pick from a large number of available vessels. Earlier in the week, the 2002 built 50,200 dwt Legend Phoenix was booked for a trip from Chennai to China at \$22,000 daily.</p>

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¹⁰⁸ Lars. Gorton, Patrick. Hillenius, Rolf. Ihre and Arne Sandevärn, <Shipbroking and Chartering Practice>, p 156

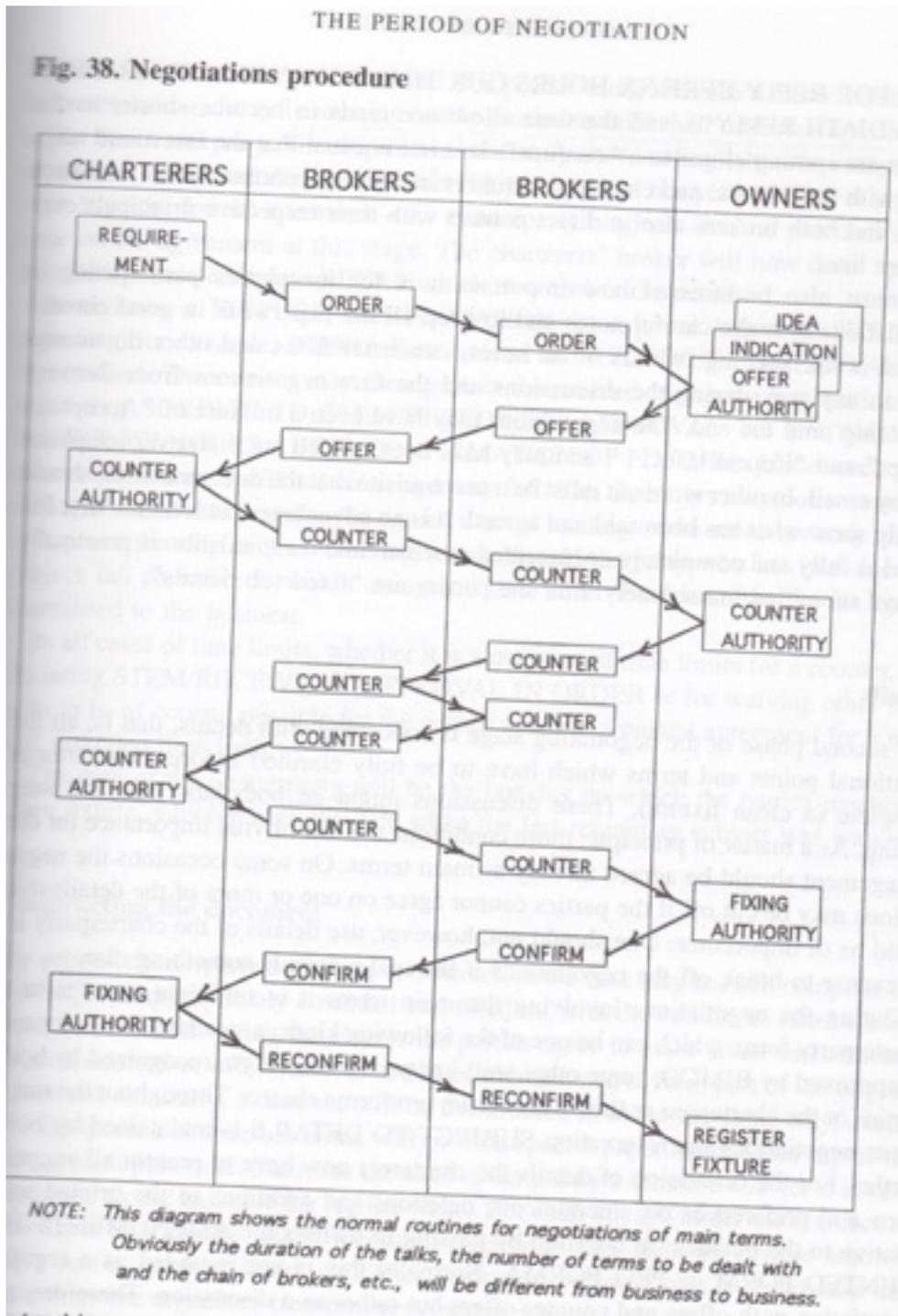
Fig. 10. The shipping information network



NOTE: The systems are always open and accessible for any interested party, but shippers and charterers must check that the market is properly and fully covered for their requirements.

¹⁰⁹ Lars. Gorton, Patrick. Hillenius, Rolf. Ihre and Arne Sandevärn, <Shipbroking and Chartering Practice>, p 38

PICTURE 3¹¹⁰



¹¹⁰ Lars. Gorton, Patrick. Hillenius, Rolf. Ihre and Arne Sandevärn, <Shipbroking and Chartering Practice>, p 38

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