

## Claims Guides

# Bills of Lading 3 - Issues with Quantity and Quality of the Cargo at the Loadport

On the demand of the shipper, the carrier has a duty to record the condition and quantity of the cargo upon loading. Problems sometimes arise when the cargo is in a damaged condition or does not tally with the quantity declared by the shipper.

### The condition of the cargo

#### a) Owners' obligations: to record the apparent order and condition of the goods

Article III Rule 3 of the Hague Visby Rules states that the carrier or the master are under an obligation to record the condition of the cargo as received: "After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:... c) the apparent order and condition of the goods...."

As a result the carrier should clause the mate's receipts and bills of ladings (B/Ls) if the cargo is damaged before loading.

The carrier's duty is to record the apparent visible of the cargo "condition" not "its quality". The description must be accurate, proportionate and record the condition of the cargo at the moment of receipt by the carrier.

A question arises as to whether the bill of lading should be claused when the cargo is damaged after receipt by the carrier but before the bill of lading is issued. If the bill of lading is a "shipped on board" bill, then the bill of lading must show the apparent order and

condition at the time of loading. The issue as to when the loading operations are finished is a more difficult matter in particular for bulk cargo. If this situation arises Members should contact the Club Managers for advice.

If the cargo is not in "apparent good order and condition" the bill of lading should be claused. The master is not expected to be an expert: he is only expected to ascertain damages or defects apparent to a reasonable, non-expert person. This duty is reflected within the ambit of the Club's cover in respect of cargo claims and failure to comply with this duty may result and cover restrictions – see Rule 2 Section s16(c) (e).

Reference to a survey report will not constitute adequate clausing (unless it is attached to all bills of lading and the pages are numbered as forming part of the bill of lading together with, ideally, the bill of lading number stamped on the report).

#### b) Can the carrier issue a clean bill of lading against a letter of indemnity (LOI)?

The shippers will generally require a clean bill of lading in order for the bank to make a payment through the documentary credit system. If a cargo is damaged, the shipper/charterers will often put pressure on the carrier

to issue a clean bill of lading. In consideration of doing so the shipper/charterers may propose to issue an LOI (Letter of Indemnity) in favour of the owners/charterers.

Issuing a clean bill of lading when the cargo is damaged, constitutes fraud under English law. An LOI for which the purpose is to defraud a third party is unenforceable under English law. Furthermore, not only will the LOI be unenforceable but the carrier may prejudice his Club cover - see again the exclusions from cover under Rule 2 Section 16(c)(e).

#### c) If the cargo is damaged prior to loading but the charterparty stipulates that "the carrier shall only issue clean bills" or "sign the bill of lading as presented": what should the carrier/owner do?

If the charterparty requires the master to issue clean mate's receipts or bills of lading, the master should reject (if possible) any cargo which description would require the bill of lading to be claused. If only defective cargo is available, then shippers/charterers cannot rely on the charterparty to force the issue of clean bills.

The master is entitled to refuse to sign the bill of lading, even if the charterparty requires the master to sign it "as presented".

## The quantity of cargo loaded on-board

### 1. Carrier's obligation to insert the shipper's figures

Under Article III Rule 3 of the Hague Visby Rules, the carrier or the master are under the obligation to insert the figures in the bill of lading as provided by the shipper: "After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:... b) the number of packages or pieces, or quantity, or weight... as furnished in writing by the shipper ...."

The Hague Rules also provide for a similar provision. What is clear from the Rules is that the figures inserted in the bill of lading are the shipper's figures.

The obligation of the carrier is however not absolute. Article III Rule 3 continues on to state that the master "shall not be bound to state in the bill of lading any marks, numbers, quantity or weight which he has reasonable grounds for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking".

#### As a result the carrier should:

- Only enter the shipper's figures if he reasonably believes that these are accurate
- Mark the bill of lading as "weight, measure, quantity unknown" if he cannot verify the accuracy of the statement.

### 2. Ship/shore differences

The shipper's figures invariably come from shore side measurements, being from shore tanks in the tanker trades and from weighbridges, belt scales or other means for dry bulk cargoes. It is impossible of course for a ship to precisely determine how much cargo has been loaded in the holds or tanks. All that can be done is to make an independent check using the best means available. In the tanker trades that means taking ullages whilst in the dry bulk trades the method is invariably draft surveys.

Such surveys may not be entirely accurate, because, inter alia, they entail trying to accurately read draft marks which may be challenging if any swell is running, the ship may not be on an even keel, she may hog or sag, there might be different water density, there is potential for squat effect, etc. It is a near certainty that the ship's figures obtained from a draft survey will not precisely match the shore figures.

They nevertheless serve a useful purpose in giving some verification of the amount of cargo loaded and thus the likely accuracy or otherwise of the shipper's figures.

If there is a significant difference between the shippers', and the owners', figures or there are no reasonable grounds for checking, then the master is under no obligation to issue the bill of lading demanded by the shipper.

### 3. What constitutes a "significant" difference?

It is worth reiterating that the master need not (and indeed under the Club Rules should not) sign a bill of lading, that he has "reasonable grounds for suspecting" does not accurately reflect the amount of cargo loaded on board. But what constitutes "reasonable grounds", bearing in mind that ship and shore figures are unlikely to match? When does the difference between the two sets of figures become significant?

Unfortunately there are no hard and fast rules. Each case depends on the circumstances of that particular shipment and the master's intuitive feel for whether the differences are minor and within usual measurement tolerances, or whether there is cause for greater concern that the ship's figures are significantly at odds with those provided by the shore. For example, a shortage of a few tonnes might be of concern for small parcel but obviously becomes progressively less so as the parcel size increases.

One parameter that is often quoted is a measurement tolerance for bulk cargoes of  $\pm 0.5\%$ . Although not framed in any law this is a broad international standard and we think provides a good general guide as to when a ship/shore difference is becoming significant such that further steps may be required before bills of lading are signed.

#### 4. If it is apparent that the figures are incorrect, what should the carriers/ owners do?

##### Option 1: Refuse to sign the bill of lading?

Under Article III Rule 3 of the Hague Visby Rules: “...no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, numbers, quantity or weight which he has reasonable grounds for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking”.

The problem: this will cause delay as the owners may have to go to the local court for adjudication and/or support of their position. An added difficulty with going to court is the legal uncertainty with regards to the local court’s outcomes. Usually this just buys the master time to verify the shipper’s figures. Furthermore, the receiver may bring a claim for delayed arrival of the cargo. It’s a difficult balance for owners and the commercial pressures will be burdensome. Members are advised to discuss options with the Club Managers, which will also have the benefit of clarifying issues or questions of Club coverage.

##### Option 2: Can the master/owner insert the ship’s figures and shipper’s figures into the bills of lading?

This may amount to clausuring the bill of lading and may be rejected by the shippers as the bill may be rejected by the bank under the letter of credit, or the buyer under the sales contract.

##### Option 3: The master marks the bill of lading as “weight, measure, quantity, quality, condition, contents and value unknown”.

The carrier is entitled to put such remark on the bill of lading if he has no reasonable means of checking the relevant condition or cargo quantity (Article III Rule 3 of the Hague Visby Rules). This disclaimer is recognised under English law (however not in many foreign jurisdictions) and means that the bill of lading has no evidential value and no warranty is made by the carrier.

##### Option 4: Can the master/owner obtain an indemnity from shippers?

Owners could ask for a LOI from shippers/charterers, in addition there is already an indemnity in the Hague/Visby Rules, because the owners’ obligation to insert the shipper’s figures under Art III Rule 3, Article III Rule 5 of the Hague Visby Rules (Article 17 Hamburg rules) states:

“The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of the shipment of the marks, number, quantity and weight, as furnished by him and the shipper shall indemnify the carrier against all loss, damages and expenses arising, or resulting from, inaccuracies in such particulars”.

HOWEVER: the indemnity is unenforceable if the purpose is to commit fraud. If the master/owner knowingly inserts manifestly wrong figures, he commits a fraud and any LOI is unenforceable.

Once again Members are advised of the cover exclusions in Rule 2 Section 16(c)(e) as mentioned above, and are encouraged to discuss potential options and the repercussions of adopting them with the Club Managers should such difficulties arise.



## 5. Checklist

In light of the above we recommend the following:

- A. Check – usually via draft survey – the amount of cargo said to have been loaded on board.
  - B. Make a comparison between ship/shore figures to see whether:
    - i. The ship's figures are approaching or exceed  $\pm 0.5\%$  of the shore figure, or
    - ii. The difference is otherwise significant in the context of the shipment, or
    - iii. There is any other concern about cargo figures being presented.
  - C. If none of the circumstances set out in B are encountered then the Bill of Lading may be signed as presented (though with the usual "Weight, quality, quantity, etc., unknown" clausings present where possible as an additional safeguard). Club cover will respond to any shortage claim that might nevertheless arise.
  - D. If any of the circumstances set out in B are encountered and/or you are being subjected to commercial pressure to sign the bills of lading as presented regardless of the ship's figures then the master should:
    - i. Refuse to sign the mate's receipts and/or bills of lading as presented.
    - ii. Issue a note of protest.
  - iii. Enter into a dialogue with the shippers/charterers with a view to persuading them to accept the ship's figures, so far as is possible and practicable. This may involve inviting the shipper to appoint a surveyor to attend a further ship draft survey or even appoint an independent surveyor to assess the loaded quantity.
  - iv. Notify the Club, for assistance with (iii) above and general advice on how to best protect your position.
  - v. If shippers/charterers continue to refuse to recognise the ship's figures and demand signing of the Bills of Lading as presented, consider obtaining a LOI (but see Part 4, option 4 above).
  - vi. Ensure, if possible, that when eventually signed the bills of lading contain the "Weight, quality, quantity, etc., unknown" clausings.
- E. Remember that if in situation (D) you are obliged to bow to commercial pressures and sign the bills of lading as presented, then Club cover for any ensuing cargo shortage claim will fall away because you will have issued a bill of lading "signed for a greater quantity of cargo than is known by the Member, or Master or Chief Officer of the insured vessel to have been shipped". If the ship is arrested the Club is unlikely to be in a position to provide bail or at least to do so only having received valuable counter-security first.

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