

Logistics

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LOGISTICS BULLETIN



Welcome to the January edition of our [Logistics Bulletin](#).

In this edition, we examine key developments affecting the logistics industry as we enter 2013. We explore the potentially paperless future, covering the increasing adoption of electronic bills of lading. We then look at a recent English High Court decision where the carrier paid the price for incorrectly issuing clean bills of lading. It is generally accepted that the continued safety and operational dangers posed by inaccurate container weight declarations are putting vessels, other cargo, crew and terminal facilities at risk and we consider the case for regulation.

We also cover insurance and liability clauses in contracts for logistics services, following a recent English High Court decision that a limitation clause was ineffective as the same contract required insurance for a greater sum. The following article examines the protections available for freight forwarders and operators who become aware that cargo contains counterfeit goods. We also set out how freight forwarders can communicate more effectively with HMRC to minimise the risk of penalties or fines being levied.

Should you require any further information or assistance on any of the issues dealt with here, please do not hesitate to contact any of the contributors to this Bulletin or your usual contact at HFW.

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Electronic bills of lading

Until recently, bills of lading represented one of the last bastions of paper-based trading in an increasingly electronic world. That is in part a reflection of the unique legal characteristics of bills of lading, which make them more difficult to dematerialise than, say airline tickets, or money. However, there are good reasons for thinking that these difficulties have now been overcome and that electronic bills of lading may soon become a reality in the liner industry.

The attractions of electronic bills of lading have been clear for a number of decades. We need only consider the most obvious:

1. Eliminating the waste, delay and duplication involved in the use of paper.
2. Reducing the possibilities for fraud - there have been several high profile cases recently involving the simple device of taking delivery of cargo against a forged bill of lading.
3. Reducing the need for delivery of cargo against a letter of indemnity, which prejudices the carrier's P&I cover. The usual reason for this to occur is that the original bill of lading has not arrived at the port of discharge. With electronic bills, this should be avoidable.
4. Electronic documentation offers great possibilities for integration of systems across the whole supply chain from seller to customer.

The benefits are fully realised if not only bills of lading but other documents required for international trade and trade finance, such as packing lists, invoices, certificates of origin etc, can also be captured and presented in electronic form.

English law in fact contains very few impediments to e-commerce in general. A simple contract need not be on paper, or any other medium, and need not be signed, in order to be enforceable. Contracts of carriage - in the nature of charterparties - are agreed daily merely by an exchange of emails, as are many other contracts. What makes bills of lading different?

It is commonplace that a bill of lading has three functions: (1) a receipt for the goods loaded; (2) evidence of the terms of the contract of carriage and (3) a document of title to the goods. The first two functions appear to be easy enough to perform electronically. A receipt can be issued by email; the terms of a contract of carriage can be notified by email.

However, the second function - evidence of the terms of the contract of carriage - is more complex than it first appears. This is because, with a bill of lading - and also a waybill - the expectation of the parties and the aim of the law is that the benefit of the contract of carriage will be transferred to the receiver. In the case of a bill of lading, this is achieved by statutory provision in the Carriage of Goods by Sea Act (COGSA) 1924, under which the benefit of the contract of carriage is transferred to the "holder" of the bill of lading. The general view of commentators is that COGSA 92 is only applicable to paper documents.

Similarly, the "document of title" function gives to the "holder" of the (paper) bill of lading constructive possession of the goods, and right to demand delivery of the goods from the carrier. The common law recognition of bills of lading as documents of title according to the custom of merchants is generally considered to be limited to paper bills of lading.

The solution to these difficulties has been sought in the form of a multilateral contract, in which all potential participants in a particular trade agree in advance for electronic bills of lading (as defined in the contract) to be recognised, and to have certain consequences which mirror exactly the consequences attaching to a similar paper document by the law. The contractual architecture is then coupled with an IT infrastructure within which the feature of unique possession of the electronic bill of lading, and other necessary features, can be modelled.

Following a rule change in 2010, the International Group of P&I Clubs now covers risks arising from the use of electronic trading systems approved by the Group. The International Group grants its approval based on a legal review of the documentation and the operation of the systems concerned. To date, two such systems have been approved by the Group: BOLERO, which uses a messaging platform derived from SWIFT (Society for Worldwide Interbank Financial Telecommunication); and Electronic Shipping Solutions (ESS), which uses an internet-based platform, the ESS-Databridge™. In BOLERO the "bill of lading" exists as a series of SWIFT messages; in the ESS system the bills of lading and other documents



preserve the appearance of paper documents.

The ESS product was first piloted and taken into active use in the tanker sector, where it has been live since January 2010. It is now making progress in the liner business. ESS's platform for the liner industry, CargoDocs™ for Liner, enables the electronic creation and transmission of the full range of trade and trade finance documents as well as bills of lading, waybills and ship's delivery orders. At present, CargoDocs™ for Liner is being piloted, which involves the transmission of electronic bills of lading and other trade documents between shippers, carriers, banks and receivers, in parallel to a paper trade, so that the operation of the product can be tested and observed. The next stage, in which CargoDocs™ for Liner will be used in live trade, is expected to take place in the first half of this year.

(Holman Fenwick Willan has advised ESS on the legal architecture of their products.)

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Getting the bills wrong

The importance of ensuring that the condition of the cargo is accurately recorded in the bills of lading was reaffirmed in the recent case of the "SAGA EXPLORER", which concerned the shipment from Korea to ports in North America of steel pipes, which were found on outturn to be rusted.

A pre-shipment survey report stated that the steel was *'in apparent good order & condition with the following damage/exception'*, then listed 16 pages of qualifying remarks, including that the steel was *'partly rust stained'*. The report recommended that those comments be claused in or appended to the Mates Receipts. However, whilst the Mates Receipts recorded that the condition of the cargo was *'as per survey report'*, the bills included no such remark. The bills, which stated that the pipes were *'shipped in apparent order and condition'*, had been issued against provision of a Letter of Indemnity (LOI) in the carrier's favour.

The receivers claimed the goods were damaged on arrival. The carrier argued that the steel on outturn was as recorded in the bill. The judge acknowledged that precise definition of pre-shipment condition of steel is problematic. However, the judge also noted that it was common ground between the parties that there was no significant deterioration of the cargo during the voyage, and that none of the disport surveyors considered that the damage was *'normal'* or *'to be expected'*. He also pointed out that the carrier would not have needed any LOI if the cargo had truly been in apparent good order and condition.

The judge therefore concluded that the bills ought to have been claused, and that the carrier had not provided an honest and reasonable non-expert view of the cargo as was required, but made a *'deceitful calculation'*, and issued a false and untrue representation on which it intended the receiver to rely. Since the judge also accepted the receivers' evidence that they would have rejected the bills if they had known that they

misrepresented the condition of the cargo, the carrier was liable for the damage to the cargo.

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Putting on weight

Inaccurate container weight declarations continue to create safety and operational issues, putting vessels, other cargo, crew and terminal facilities at risk.

In their December 2011 Financial Review, TT Club, who insure in excess of 80% of all maritime containers, reported having received 357 accident claims resulting from bad container stowage and handling in the last six years, accounting for 35% of total claims.

With vessels growing in size and the current economic climate pushing the industry to be as efficient as possible, the issue of container weighing has become increasingly significant.

The technology for weighing containers exists, and need not create undue cost or impair the efficient running of ports: the US has implemented the mandatory weighing of export containers for years without these issues.

As industry self-help efforts have failed to solve the problem of mis-declaration, interested parties have been pushing for tighter mandatory global regulation.



Moving on

The 17th session of the International Maritime Organisation (the IMO) sub-committee on Dangerous Goods, Solid Cargoes and Containers (the DSC), drew to a close on 21 September 2012. The issue of container safety, including weight checks, featured significantly on the agenda.

Two proposals for the requirement of accurate container weights were presented to the DSC. The first, drawn up by the World Shipping Council (WSC), International Chamber of Shipping (ICS), Baltic and International Maritime Council (BIMCO), International Association of Ports & Harbours, International Transport Workers' Federation and IMO member states, called for all loaded containers to be weighed prior to vessel stowage. The second, proposed by Germany, suggested the option of verification of weight by calculation.

A working group of interested parties was set up by the DSC to propose amendments to the Convention on the Safety of Life at Sea (SOLAS) and provide associated guidance. The group agreed that it is necessary to amend chapter VI, which currently places an obligation on the shipper to provide the ship's master with the gross mass of a container prior to loading, but does not require the given container weight to be verified. Although in theory this places responsibility for accurate declarations with the shipper, enforcement action is not taken against shippers who provide incorrect declarations.

The amendment proposed was to require the verification of container weight as a condition of loading, the modes of verification suggested being:

the shipper's signed declaration of container weight (the current position under SOLAS), weighing of the stuffed container, or weighing the contents of the container and adding the container tare weight.

The obligation for this would be met by the shipper, or, in situations where this would be impractical, the ship's master or port facility would be responsible. In any event, weight verification would be a pre-requisite of loading.

Time lag

Owing to time restraints the working group did not finalise the associated guidance.

Unfortunately, significant differences in opinion between member states were revealed at the DSC meeting, in particular with regard to who would be the bearer (or bearers) of the new obligation.

In addition, technical objections were raised by Panama and Cyprus, who, although not opposed in principle to the requirement of weight checks, were concerned with ensuring that the amendments were not rushed through.

Panama argued that the new regulations and accompanying guidelines should be developed at the same time to enable practical issues to be identified as early as possible.

Alternative IMO representative for Cyprus, Nicolao Charalambous, invited the IMO to look at wider container accident prevention considerations.

Dragging on

As the majority of interested parties

saw the changes proposed as modest, well-researched and ultimately inevitable, there was wide-spread frustration at the delay caused by the objections.

International Transport Workers' Federation (ITF) representatives have strongly criticised Panama and Cyprus, accusing them of putting the interests of their ship registers above safety standards. News that Panama then declined the invitation to participate in the IMO correspondence group set up to work on the proposal and associated guidance, no doubt caused further annoyance.

Despite this, there was a general consensus that a pragmatic approach to container weighing would need to be taken, with considerable support for the German proposal. According to TT Club director Peregrine Storrs-Fox: "The direction seems clear, and the delay will be insubstantial, so we are urging shippers, forwarders, freight consolidators and terminals to start planning for the reality."

Settling up

The correspondence group is due to report to the next session, to be held in September 2013.

Even if new legislation is agreed, it remains to be seen whether the IMO will actually enforce it: after all there is already established, but commonly overlooked, legal regulation requiring cargo weight declarations to be accurate.

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Insurance and liability limitation clauses: a quick reminder of how they work

Many people think that insurance and limitation clauses are one and the same thing, whereas actually they are designed to address two different issues. A liability limitation clause sets out the maximum liability a party will incur in the event of a breach of contract whereas an insurance clause sets out the type and level of insurance cover a party (usually the service provider) is required to take out. Whilst the two clauses address different issues, they are linked and therefore cannot be drafted in isolation from one another. A recent English High Court case has demonstrated the particular importance of considering any amount of insurance cover stated very carefully when drafting limitation of liability clauses.

Insurance clauses

Contracts for logistics services often contain a requirement for the logistics service provider (LSP) to take out certain insurance policies for the duration of the contract term. For instance, there may be a requirement to take out freight liability insurance or goods in transit insurance. Such a clause is not designed to set out the liability of the LSP in the event of the goods getting lost or damaged during the provision of the logistics services. The purpose of the clause is to place an obligation on the LSP to have insurance in place to cover its liability for loss or damage to goods. The actual liability of the LSP should be set out in a separate liability clause.

Liability limitation clauses

The contract for logistics services should include a provision which addresses the liability of the LSP if certain events happen (e.g. in the event of a cargo loss or damage or in the event of delay). The purpose of such a clause is to apportion the risk between the parties. Most industry standard terms and conditions include such a clause. For instance, the Road Haulage Association Limited Conditions of Carriage 2009 includes a limitation clause the effect of which is to limit the liability of the Carrier in the event of physical loss, mis-delivery of or damage to goods to a maximum of £1,300 per tonne. Another example of a limitation clause can be found in clause 26(A) (ii) of the British International Freight Association Standard Trading Conditions (2005A Edition) (BIFA Conditions) which limits the freight forwarder's maximum liability for all other claims (i.e. claims not relating to loss or damage to goods or delay) to a maximum of 75,000 Special Drawing Rights per transaction. A clause which limits the time a party has to make a claim is also a limitation clause, and so is a clause excluding liability for certain types of losses (e.g. loss of profit).

For a party to be able to rely on a limitation clause it must show that (i) the clause was properly incorporated into the contract and (ii) that on a proper interpretation of the clause, the clause covers the event in question. For instance, if the parties intend for a clause to apply in the event of negligence, then the clause needs to include words which sufficiently indicate that the parties intended that liability arising out of negligence should be covered by the

limitation clause. The final hurdle to overcome when seeking to rely on a limitation clause, is to see whether there is any statutory control which renders the clause unenforceable.

Statutory controls on limitation clauses

The Unfair Contract Terms Act 1977 (UCTA) is a complex piece of legislation which regulates limitation clauses, and for the purposes of this article, we will only concentrate on one of the controls exercised by UCTA, namely the requirement of reasonableness. UCTA provides that where a party seeks to rely on a clause that limits or excludes its liability for negligence, it can do so provided the clause is "reasonable" (Section 2(2) of UCTA). The requirement for reasonableness will apply to any clause limiting or excluding liability for breach of contract (and not just one excluding or limiting negligence based liability) when the clause is contained in standard terms (Section 3(2) of UCTA). Schedule 2 to UCTA sets out a number of factors to be considered when assessing whether or not a clause is reasonable (e.g. the strength of the bargaining positions of the parties relative to each other).

There are a number of cases which illustrate how the courts have approached the test of reasonableness, including some relating to the standard terms used in the logistics sector. For instance, the 9 month time bar provision in the BIFA Conditions was upheld in *Granville Oil & Chemical Ltd v Davis Turner & Co Ltd 2003*. In *Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd [2004]*, a clause in the BIFA Conditions limiting the damages



recoverable in respect of loss by theft of mobile telephones (valued at £2m) to approximately £25,000 was upheld as reasonable. Similarly, the court has held that the £100 per tonne limit contained in United Kingdom Warehousing Association - Conditions of Contract was reasonable on the facts as found in the case of *Sonicare International Ltd v East Anglia Freight Terminal Ltd* [1997].

Recent decision on unreasonable limitation clause

In a recent case, *Trustees of Ampleforth Abbey v Turner & Townsend Project Management Ltd* [2012], the court looked at a limitation clause which had the effect of limiting the liability of a service provider to the fees paid to it (which in this case meant a limit of £111,321). Under the contract, the service provider was required to maintain Professional Indemnity cover of up to £10 million. The court decided that the limitation clause was not reasonable because it was inconsistent with the requirement to have insurance in place for up to £10 million. The Judge held that: “[i]n the absence of any explanation as to why in this case [the service provider] should have stipulated insurance cover of £10 million despite a limitation of liability to less than £200,000, I consider it unreasonable that the contract purported to limit liability in that manner”.

This case has shown the importance of awareness that whilst insurance and limitation clauses address different issues, they need to be consistent. Insurance clauses should be drafted so that they impose a requirement on the service provider to take out insurance to cover its liability under the contract. Any

requirement to take insurance which exceeds the maximum liability of the service provider could result in a clause limiting liability to a lesser amount being held unenforceable. If the limitation clause is in fact upheld because the facts are different from the case considered above, this could result in the customer paying for insurance without getting the full benefit of it.

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Counterfeit goods

The shipping of counterfeit goods is an ongoing issue for freight forwarders and NVOCCs (Operators). The sale of such goods in the UK is obviously in breach of intellectual property rights and it is not uncommon for street vendors of these goods to be pursued by the brand owner, but what of the Operators that are unknowingly importing the goods, declared as generic clothing or other goods, into the country? There are two principal concerns for such an Operator – its obligations under the contract of carriage (when a bill of lading is issued, it creates a contractual obligation for the carrier to deliver the goods) and its ability to recover costs incurred in connection with carriage of the goods.

Both of these concerns arise because an Operator is generally the first in the line of fire from the brand owner when the existence of the counterfeit goods are discovered, but how can the Operator avoid his contractual

obligation to deliver the goods, and can it recover any expenses incurred?

Contractual obligation to deliver the goods

An Operator might be able to make use of a “Public Policy” defence to avoid its contractual obligation to deliver the goods - the enforcement of contractual claims can in some circumstances be against public policy. Public policy can result in contracts being unenforceable in totality, or just in respect of certain obligations. That the public policy defence makes only certain obligations unenforceable makes it a useful remedy for the Operator as it would not usually want the entire contract of carriage to be unenforceable as it may want to rely on its rights against the shipper or consignee.

In order to rely on the public policy defence, an Operator would have to show that the importation of the goods into the UK or the distribution therefrom would be illegal. Assuming that the brand owner has an exclusive licence for the importation or distribution of goods in the UK, it is unlikely that this would be a problem and the Operator should be able to defend any claim for non-delivery.

Can the Operator claim its expenses in dealing with the goods?

Most Operators will be contracting for the carriage of goods on either standard bill of lading terms such as the FIATA bill, TT Series 100 bill or on bespoke bill of lading terms. The FIATA and TT bills contain a provision (clause 6.2 and clause 7 respectively) where the Merchant (which includes the shipper and



consignee) guarantees the description of the goods, marks, numbers and quantity and agrees to indemnify the Operator for all loss, damage and expenses arising or resulting from the inaccuracies in, or inadequacies of, such particulars. Bespoke bills of lading normally contain similar clauses.

The Operator should be able to rely on these types of clause to bring a claim against the shipper for its expenses in dealing with the goods. Operators should be aware, however, that some bespoke bills of lading only provide such a remedy against the shipper, which may be of limited use when dealing with a foreign customer with few assets to enforce against.

In an ideal world knowing the client is preferable but the reality is that this is not always possible. Walk-in business is still an important source of business for most freight forwarders. The danger is that the small profit made on that one-off shipment could rapidly be extinguished when facing claims from a high profile brand owner with deep pockets. Operators should therefore make themselves familiar with their bill of lading terms to ensure that they would be able to avoid liability through the operation of clauses such as those described above.

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The secrets of effective communication with HMRC

Establishing effective lines of communication with HMRC is frequently the best way to resolve any situation and minimise the risk of a penalty being imposed in relation to unpaid duty, VAT, or other charges. But dealing with HMRC does require a different strategy to communicating with a commercial counterparty, as well as a recognition of the particular circumstances which apply to HMRC representatives.

This article seeks to offer some practical guidance for those dealing with HMRC, based on our own recent experience. While you may not be able to escape liability for unpaid duty, VAT, or other charges, there are times when you can minimise your risk of receiving a penalty charge or other fine (which might substantially exceed the amount of unpaid duty) simply by communicating effectively with HMRC.

Understand your position before you talk to HMRC

This involves collecting the documents and getting the facts straight as soon as possible. For example, were you acting as a direct representative or an indirect representative? What was the specific error? Who are the key individuals involved? Is the problem a one-off or is it more systemic? You will need a thorough understanding of the legal position and the technical arguments, so you will want to get expert advice on this complex area as quickly as possible, so that you can present a compelling case.

Maintain a dialogue with your customer

While the terms of your contract may require your customer to indemnify you for any liability to HMRC, that will not be a defence to HMRC's customs demand against you. You therefore need to consider whether to involve the customer in your dialogue with HMRC if you think that this will not prejudice your position with HMRC, and if you think that there is a meaningful prospect of the customer settling the customs liability directly with HMRC.

Establish a working relationship with HMRC

It is worth reminding yourself that the demand letter has been written by a particular individual, who has responsibility for resolving the matter. Generally speaking, the more you can engage with that particular individual, the better.

That may involve picking up the phone (we find that this is invaluable, and that the HMRC representatives usually react positively to being contacted by phone), or even offering to travel to HMRC offices to meet representatives, in unusual cases.

Reply in time

HMRC letters will usually include deadlines for a response. It is important to comply with these deadlines but we often find that, where the legislation permits, HMRC representatives are sensible about agreeing short time extensions, particularly where there are good reasons why more time is required to collect all of the necessary information and present it to HMRC in a coherent fashion.



Make the HMRC representative's life as easy as possible

Ultimately, the HMRC representative has to make a decision about what action to take, and you want them to take whatever is your preferred outcome. This essentially involves persuading them to agree with you, and there are two key things which you can do to maximise the prospect of this.

The first thing to do is to tell them your story. That means presenting the relevant information in a logical, compelling fashion, so that the representative can follow what you are saying. You need to explain what happened, why it happened, and why it will not happen again, in order to minimise the risk of any penalty or other fine being imposed. This is an area where expert input can be invaluable. Our experience is that there is no benefit in trying to bamboozle HMRC with technical data or bury them in information. It is usually far better to engage in an open, constructive dialogue, and put all of your cards on the table.

The second thing to do is to organise the documents, so that when the HMRC representative reads your submission, he has a well-ordered bundle of supporting documents, which he can review in tandem with your submission. If the representative cannot easily navigate through the

documents, he is much less likely to agree with the points you want to make.

Be proactive

This involves contacting HMRC when you see an issue, rather than waiting for them to contact you. It also involves having a payment plan in mind, if you think you are liable to make payments to HMRC, rather than waiting for HMRC to dictate a payment plan which works for them. Demonstrate that you have taken remedial action to prevent a recurrence.

HMRC are interested to ensure that errors and omissions are not repeated. As a result, it is vital that you can show the lessons which you have learned, and the policies and procedures which you have put in place to be sure that there is no recurrence. You should also mention involvement of senior management (if applicable) to show how seriously you treat the issue.

Summary

So what is the secret of effective communication with HMRC? The key is to keep in mind at all times that the HMRC representative's priority is to resolve the matter and that, if you can present the facts and documents in a logical and coherent fashion, which is easy for the representative to

understand and which shows that the problem won't be repeated, you are far more likely to achieve your desired outcome.

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Conferences & Events

Global Liner Shipping Workshop: Collaboration and clever contracting
Grand Connaught Rooms, London
(17 April 2013)
Anthony Woolich and
Catherine Emsellem-Rope

Global Liner Shipping Conference
Grand Connaught Rooms, London
(18-19 April 2013)
Anthony Woolich,
Catherine Emsellem-Rope and
Matthew Gore

We will be hosting Part 1 and Part 2 of our MultiModal Seminars in the coming months - dates to follow.

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