

Bills of lading: The Early Departure Procedure and other words of caution



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One of the functions of a bill of lading is to act as a receipt for the cargo shipped. The bill must therefore contain an accurate record of the quantity of cargo carried. This is often more complicated than it may at first appear and this article looks at two of the key issues that can arise.

Introduction

Bills of lading are the cornerstone of nearly all contracts of carriage by sea. Once issued, a bill of lading: (1) acts as a receipt for the cargo shipped; (2) represents the contract of carriage between the receiver and carrier; and (3) is a document of title for the goods in question and, in turn, a negotiable instrument. By virtue of (3), property in the goods being transported on board a ship can be passed from one buyer to another while the sea carriage is still in progress, through what is known as an endorsement on the bill.

The legal issues surrounding bills of lading are vast, as are the international conventions that have been created by the shipping community. These international conventions include the Hague¹ and Hague-Visby² Rules and the Hamburg Rules³.

Ship versus shore figures

All three above-mentioned conventions require that bills contain accurate and true information as to the quantity and condition of the cargo loaded. For example, under Article III Rule 3 of the Hague/Hague-Visby Rules, after receiving the cargo, and on the demand of the shipper, the master is obliged to issue a bill of lading evincing, amongst other things, the quantity of cargo to be carried. A recurring problem many carriers face, especially when loading liquid cargoes, is when the ship and shore

figures show different quantities of cargo. Ships rely on their individual tank gauges, often as well as a draft survey, while shore-side terminals and facilities use a variety of different methods to calculate the quantity of cargo provided to a ship. While no method is beyond repute, more often than not, a shore-side terminal/facility will claim it has provided more cargo to a ship than the amount the ship claims to have received.

Refusal to sign

In these circumstances, provided the master has reasonable grounds for suspecting the quantity (or for that matter condition) of the cargo loaded on board the ship is inaccurate, he may refuse to sign the bill of lading 'as presented'. However, if the master unreasonably refuses to sign or authorise the issue of a bill of lading with the use of shore figures, he runs the risk of being in breach of Article III of the Rules and possibly also liable to his charterer (under the subject charter) for any delay and consequent costs/losses down the chain.

Case study

What constitutes a reasonable refusal will, as with all things, turn on the particular facts of the case. However, the English courts handed down some useful guidance in *The Boukadoura*⁴. In this case, there was a difference between the shore and ship figures of about 1%. The master

1 Dated 25 August 1924.
2 Dated 23 February 1968.
3 The full title of the convention is the United Nations Convention on the Carriage of Goods by Sea 1978.
4 [1989] 1 Lloyd's Re 393.

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was prepared to put both the ship and the shore figures on the bill of lading, but the shippers refused and insisted on the shore figures being used. In an attempt to resolve the dispute, a second draft survey was carried out by an independent surveyor. This confirmed the ship's figures, but the shippers nonetheless still refused to accept a bill of lading showing the ship's figures. Ultimately, and after considerable delay, a bill of lading based on the ship's figures was issued and the cargo was carried to its destination and discharged, without any shortage claim. The charterer subsequently claimed for the time lost due to the delay at the load port. Although the charterparty provided for bills of lading to be issued by the master 'as presented', the court agreed that the master was only obliged to issue a bill of lading for the quantity of cargo he *reasonably* believed to have been loaded.

Reasonable refusal

There are no clear-cut guidelines to determine when, or if, a master can reasonably refuse to issue a bill of lading if he considers the quantity of cargo shown on the bill to be inaccurate. Each case will turn on its individual facts and also largely depend on expert evidence (including additional draft surveys). Further, and somewhat irrespective of the law of the subject charterparty, the location and law of the loading port will play an important role in any 'budding' dispute. Therefore, as soon as a master is aware of a problem in this respect, it is vital that he contacts the club or club's local correspondent for advice and guidance (ideally with personal attendance on board) before any dispute escalates.

Other options

Other options available to a master (rather than insisting upon a corrected bill of lading) include: demanding a letter of indemnity (LOI) from the shipper and/or charterer, issuing a letter of protest (LOP) or obtaining guidance from the local court as

to the correct quantity of cargo loaded. All of these options have their own shortcomings and, it should be mentioned, club cover implications where a master or member issues a bill of lading with knowledge that it contains an incorrect statement as to the quantity of cargo loaded on board the ship⁵.

Early Departure Procedure Why is it used?

In many terminals, considerable pressure is placed on the ship to leave the loading berth quickly. In such cases, tank gauging and corresponding generation of documentation can often be performed in a hurried fashion and the onus is always on the ship's officers to ensure errors are not made. By definition, an Early Departure Procedure (EDP) normally requires that the ship departs prior to the bill of lading having been issued, and sometimes even before the quantity of cargo on board has been officially determined. EDPs are especially prevalent in the North Sea and the Middle East, and the practice raises a number of factual uncertainties and possible legal liabilities for the shipowner. We deal with these below.

While an EDP is said to be at the option of the visiting ship, in reality there is often heavy pressure on an owner to comply. Terminals are keen to have maximum use of their facilities and minimum delay to waiting ships. Charterers are frequently worried about the effect of delay on discharging schedules, as well as complications with regard to laytime and demurrage. It is known that an EDP is commonly a feature of pre-fixture negotiations and that charterers often seek to use their commercial clout with a view to the inclusion of express provisions stating an owner's acceptance of an EDP and corresponding deductions from laytime for any 'lost' time resulting from an owner's non-compliance with it.

⁵ See *Rule 3.13(8)*

Who signs the bill?

Following an EDP, the bill of lading is usually signed by the locally appointed agent, on behalf of the master, at some later stage after the ship has sailed the port. The master will usually authorise the agent, in writing, that he may sign the bill of lading on his behalf under certain strict conditions. In this respect, we strongly recommend that an EDP should not be followed unless the master has permission from his commercial operator or the charterer.

Points to note

The master's authorisation to the agent should also be limited to the signing and releasing of the bills of lading only, and be valid only when all details, including quantity/quality of cargo, have first been approved by the master. If possible, the local agents should be required to fax a copy of the (draft) bills to the ship for the master's approval prior to utilising his authorisation to sign and release the bills of lading. Upon receipt, the master would be well advised to check through the drafts very carefully, prior to confirming his approval of the agent's signing them. In particular, when confronted with a draft bill of lading, the master should examine the following aspects (on the face of the bill) and ensure they accurately reflect his own records and information:

- i) the quantity of cargo said to have been loaded;
- ii) the description and condition of cargo;
- iii) the date;
- iv) the description of the voyage, including load and discharge port(s).

If the bill is incorrect

If a master or ship's crew subsequently discover that a bill has been issued incorrectly (and hopefully against their strict instructions/written letter of authority), then they must notify their management office immediately. This should also be notified to the member's usual club claims handler as soon as possible, who will then be able to advise the member how best

to proceed so as to minimise problems and possible liabilities at the discharge port(s). Such steps may include:

- i) giving the consignee, or notify party, on the face of the bill, written notice of the ship's own figures;
- ii) issuing LOPs to all interests, including shippers, the charterer(s), charterer's(s') agents, and, if possible, the consignee or notify party;
- iii) a request for the shippers to attach a copy of the LOP to the bill and to forward a copy of the protest to the buyers.

Such measures will probably not avoid liability, but may avoid a claim for what will usually be a paper loss.

Cargo shortage

As indicated above, a port/terminal's EDP can sometimes 'push' a ship to anchorage even before the quantity of cargo on board has been properly determined by the ship's crew, by way of tank gauges and draft surveys. If this occurs, then there is no 'benchmark' against which the ship can check the loaded quantity against shore-side figures, and thus there may be no immediate notification to the master of any discrepancy.

It is vital that the implementation of an EDP does not expose a ship to any unwarranted liability caused by, say, an unexpected passage cargo 'loss', in turn attributed to unreliable gauging at the load port shore-side terminal. Whenever a ship and its crew come under commercial pressure to vacate a loading terminal before they have had the proper opportunity to verify the ship's own figures, this must be resisted so far as possible. The use of the vessel's own agents is perhaps one way of avoiding the EDP problem and the pressures involved, although it is appreciated that, with isolated terminals, this will probably be difficult and costly. This must however be compared to the risk exposure of issuing bills with incorrect cargo figures.

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Conclusion

- Owners should seek to include an express provision in the subject charter stating that an EDP is not accepted, wherever this is commercially possible.
- This charterparty provision should be brought to the attention of the master in order that he can resist commercial pressure from the charterer and its representatives on site.
- Bills of lading are not to be signed until the accuracy of their contents have first been verified and, if necessary, appropriately qualified by the master or the authorised agent of the master.
- Owners willing to take a stance can take heart from the decision of the English courts in the case of *The Boukadoura*. In that case, it was held that, although the charterparty provided that bills of lading were to be signed 'as presented', there was an implied requirement that the bills 'as presented' actually related to the cargo and did not contain a misdescription which was known to be incorrect.
- The use of the vessel's own agents (where commercially and financially viable) is perhaps one practical way of avoiding the EDP problem or the pressures involved in inserting shore-side figures into a bill of lading.
- The member should contact the club as soon as a discrepancy or dispute arises as to ship versus shore-side figures at a load port. The club's local correspondents may be able to send someone to attend on board to assist the master and crew.

