

## June 2018

# Contracts of carriage and bills of lading

## Clausing bills of lading

### A master's dilemma

A master will often be obliged to issue bills of lading in accordance with charterparty requirements and in line with the Hague/Hague Visby Rules (the Rules). This can become complicated if a master is asked to issue a bill that, in his view, does not accurately reflect the condition or quantity of the cargo loaded.

The club has previously published general guidance on a master's rights and obligations when he finds himself in such a position, in our web alert titled [When is a master entitled to refuse damaged cargo? A reminder](#). The general rule is: provided the master has reasonable grounds to suspect that the description of the quantity, quality or condition of the cargo is inaccurate, he may refuse to sign the bill as presented. However, what is considered reasonable will depend on the specific facts of the case, and a master who unreasonably refuses to issue clean bills could be in breach of the Rules and, consequently, make his owners liable for damages under the charterparty.

### What standard is a master held to?

In *The David Agmashenebeli*<sup>1</sup>, the court considered when a master might be entitled to clause a bill of lading. In this case, the claimant cargo interests argued that under Article 3 Rule (iii) of the Hague Rules, the master was under an absolute obligation to describe the actual apparent condition of the goods. That obligation was contractual in nature, and thus not qualified by notions such as reasonableness or honest belief. The defendant owner argued that as long as the master was acting honestly in signing a bill of lading with a certain description of the cargo, he could not be liable or place the owner in breach if, despite his honest belief in the description, it was nevertheless wrong.

The Judge did not accept either argument and held that Article 3 Rule (iii) of the Rules meant that, upon request of the shipper, a bill of lading should be issued containing a description of the apparent order or condition of the cargo. This would not make the description itself a contractual term, nor would it impose upon the master an absolute obligation to give an accurate description. The standard imposed is that of the reasonable assessment of the master. The law does not cast upon the master the role of an expert surveyor. If the master is in any doubt, he can take independent expert advice, but this is also a matter for his own judgement. The court decided that imposing any higher standard would lead to masters conducting unnecessarily detailed investigations into whether bills should be claused.

### Reliance upon standard protective wording

If a master is not able to make specific remarks on the bills, to what extent can a carrier rely upon standard protective wording such as 'Weight measure, quality, quantity, condition, contents and value unknown' as found in the Congen bill?

If such qualifications are made on the bill then it will probably be sufficient to establish that the bill makes no representations at all about the actual condition or quantity of the cargo loaded.<sup>2</sup> In the hands of the shipper, the bill will not even be prima facie evidence against the carrier of the cargo that was shipped. This would be the case even where Hague/Hague Visby Rules are applicable. Owners can therefore rely on other evidence in their hands to demonstrate the actual condition of the cargo that was loaded.



**Jamie Green**  
Claims Director  
T: +44 20 7680 5611  
E: jamie.l.green@ctplc.com



**Annie Stow**  
Claims Director  
T: +44 20 3320 2308  
M: +44 7769 913 655  
E: annie.stow@ctplc.com



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### The position under Hague/Hague Visby when the bill is transferred to a third party

When the bill is transferred to a third party and the Hague Rules are applicable, the position remains the same and the bill will not hold any evidentiary value. This point was discussed in detail in *The Mata K*,<sup>3</sup> where it was held that a bill of lading providing 'weight unknown' meant the bill was not even conclusive evidence against the carrier of the goods as required by section 4 of COGSA 1992. However, the position would be different if the bill is subject to the Hague Visby Rules and did in fact make a representation about the cargo, because Article III Rule 4 provides that:

*'Proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.'*

It is therefore always important to assess which rules are applicable to the contract of carriage as this will determine whether the bill of lading will be conclusive evidence of the cargo shipped.

### Disputes over ship and shore figures

It will often be the case that the shore figures at the load port will exceed the ship's own figures with regards to how much cargo was loaded on board. The shipper/charterer will likely insist that its figures are used as it will be under an obligation to load a certain amount of cargo as per the underlying sales contract. As discussed above and in [When is a master entitled to refuse damaged cargo: A reminder](#), the master may refuse to sign a bill which he suspects contains inaccurate information. If he accepts the shore figures in return for a Letter of Indemnity (LOI), which may not even be enforceable, there may also be issues for club cover in the event that a claim is brought at the discharge port. The club will consider the following factors when making a decision on whether to cover a claim on a case-by-case basis:

- Did the master issue a Letter of Protest?
- Is the shortage within the customary allowance?
- What was the jurisdiction of the load port?
- Was an LOI obtained from the charterer/shipper?
- What are the charterparty terms?

### Practical guidance

If a master finds himself in a situation where he wishes to clause the bills or mate's receipts but is facing resistance from the shipper, the member should contact the club for guidance. Depending on the facts, it may be appropriate to appoint a surveyor to assist the master.

Importantly, if the shipper's figures exceed the ship's figures by more than the customary allowance, the master should insist that the ship's figures are inserted on the bill or the bill is claused to say what the ship's figures are as determined by any draft/ullage survey conducted. If the master fails to do so, club cover may be discretionary.

On the other hand, if the discrepancy between the shipper's figures and the ship's figures is within the customary difference, it may be appropriate to clause the bills with 'number, quantity and weight unknown' and to accept an LOI countersigned by an internationally recognised bank. However, the enforceability of the LOI will depend on the facts of the case and cover may again be discretionary for any eventual claim arising out of the short loading.

If members are ever in doubt as to whether bills should be claused, the club is always on hand to give advice.

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**Charles Taylor & Co. Limited**  
The Minster Building, 21 Mincing Lane,  
London EC3R 7AG  
Registered in England No. 02561548

Telephone: +44 20 3320 8888  
Emergency mobile: +44 7932 113573  
Email: [pandi.london@ctplc.com](mailto:pandi.london@ctplc.com)  
Website: [www.standard-club.com](http://www.standard-club.com)

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1 *The David Agmashenebeli* [2003] 1 LLR 92  
2 *The Atlas* [1996] 1 Lloyd's Rep 642.  
3 *The Mata K* [1998] 2 Lloyd's Rep 614.

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