Bills of Lading 4 - Cargo Shortage Claims

The carrier is under an obligation to deliver the full cargo which was loaded. Invariably cargo shortage claims arise from time to time. How are these claims treated under English law?

"Figures" is a term used throughout this document to describe the "number packages or pieces, or the quantity, or weight", of the goods carried.

What is the evidence against the owners?

When shortage claims arise at the discharge port, whether or not the carrier is liable is a question of evidence.

a) What is the evidential weight of the bill of lading figures towards third party receivers: conclusive evidence or prima facie evidence?

Under the Hague Visby Rules, Article III Rule 4, the figures on the bill of lading will be conclusive evidence between the carrier and the third party. (See also the Hamburg Rules, Article 16(3)(b)).

b) Can the owners protect themselves with disclaimers such as: "weight, measure, quantity, quality, condition, contents and value unknown?"

English law recognises the disclaimer *"weight, measure, quantity, quality, condition, contents and value unknown"*. This is because of the proviso that the carrier does not have to state the quantity and weight if he has reasonable grounds to believe that these are inaccurate and/or has no means of checking whether the facts are correct (Art III Rule 3).

As a result the statement of the bill of lading will mean that the weight, quantity and measure has no evidential value and are not warranties made by the carrier. This means that there is no prima facie or conclusive evidence against the carrier. *New Chinese Antimony v Ocean Steamship [1917] 2 KB 664.*

"weight, measure, quantity, quality, condition, contents and value unknown": Weighing the evidence

Once it is established that the figures are not binding on the carrier, an English court will just weigh evidence from both parties as in a normal dispute. A useful guide to see how an English court would consider a shortage case is illustrated in the MONTANA LLR 402 [1990]. In this case, the judge looked at the evidence as to how accurate the tally would have been: no tally man on every hold, sometimes a tally man had to count slings from two holds, some of the discharge occurred at night time, the stevedores were paid per tonnage discharged and not time, there was an incentive to discharge quickly (making counting unreliable), and the claimants admitted that one extra bag could go in a sling (a one in 16 occasion would account for a shortage of 1108 bags), each bag could have been filled with slightly more than 50 kgs. The judge was also surprised at the accuracy and rounding of the figures on the bill of lading, namely, 550,000 bags. Claimants did not have to prove where the undelivered cargo went but still needed to provide a possible explanation of the rationale for the bill of lading figures.

c) Does the owner's disclaimer have limits?

The carrier cannot rely on the disclaimer when he has reasonable means of checking the weight, measure, quantity, quality and/or condition. For example, "50 coils" can easily be counted and disclaimers as to the quantity will not be enforceable. If the cargo is 550,000 bags of rice (as per "the Montana") then the qualification will operate.

d) Can the disclaimer on the bill of lading be overridden by conclusive evidence clauses in the charterparty?

Some charterparties incorporated into the bill of lading contain "conclusive evidence" clauses such as *"Owners are to be responsible for the number of bags/packages as signed for in the bills of lading. These bills of lading to be conclusive evidence of the quantity of cargo shipped"*. Provided the bill of lading contains the usual "weight, measure… unknown" disclaimer, the courts have found that there is still no warranty by the carrier to the receiver as to the quantity shipped, as the

carrier is not "signing" for any quantity. *(Herroe and Askoe [1986] 2 Lloyd's rep. 281).*

e) Further defences and evidential rules

Article III Rule 6 of the Hague and Hague-Visby Rules (Article 19 Hamburg Rules) state that a notice of loss or damage shall be given to the carrier, within three days, failing which the lack of notice or the removal of the cargo shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading.

When dealing with a shortage claim the carrier should also consider defences under Article IV Rule 2 of the Hague Visby rules and whether any trade allowance is recognised.

f) Incorporation of a charterparty in the bill of lading (stevedore damage/theft)

Usually part of the shortage claim will be due to improper handling/theft of the cargo by stevedores. If a charterparty clause states that all the risks, liabilities associated with the loading, stowage and discharging of the cargo are borne by the charterers (such as Gencon 1994 Clause 5), then provided such charterparty is incorporated into the bill of lading, the responsibility for stevedore damage or theft during discharge or loading should transfer to the shipper or receivers. In other words, the word "charterers" should be validly substituted by the words "shipper" and/or "receiver". (The Eems Solar) [2013] 2 Lloyds Rep 487 (QB)

Indemnities

a) Against the shipper

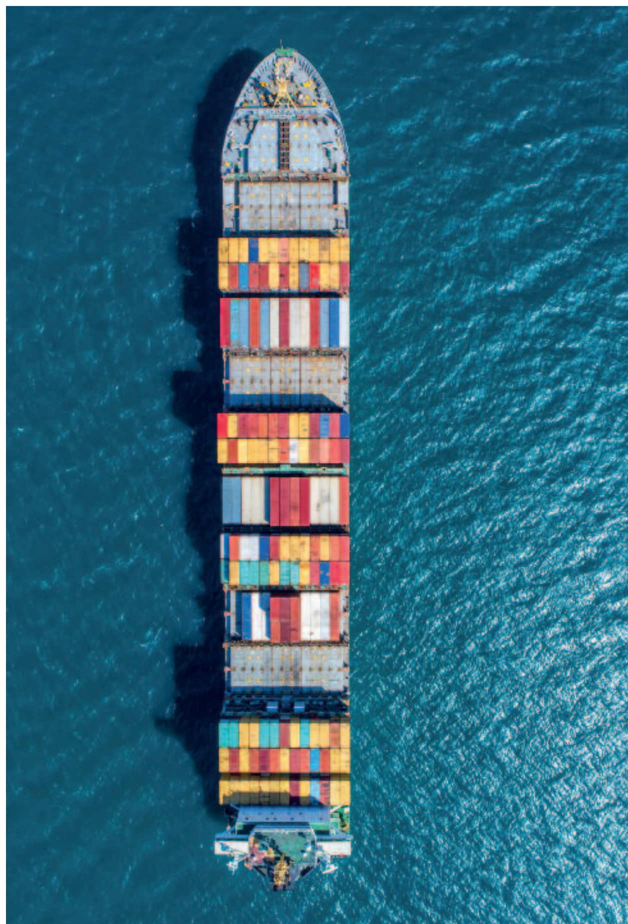
The carrier may have an indemnity against the shipper, if the carrier has no defence and is liable because the shortage arises out of the bill of lading being conclusive evidence i.e. a paper shortage (Article III Rule 5 Hague Visby Rules, Article 17 Hamburg Rules). This indemnity is the reverse side of the coin of Article III Rule 3 where the carrier is under the obligation, upon demand of the shipper to insert the figures in the bill of lading as provided in writing by the shipper (see our guide, "Issues with quality and quantity of the cargo at loadport").

b) Against the charterers

Provided the Hague or Hague Visby Rules are incorporated in the charter (in the absence of the ICA), owners/disponent owners can most likely claim an indemnity against charterers if the loss arises due to an overstatement of the quantity in the bill of lading. This is because the charterers are also most likely treated to have guaranteed the figures. This right can be lost by negligence or deliberately issuing an inaccurate bill (and see below in relation to Club cover).

The owners may have an indemnity against the charterers under the ICA provided an adequate clause is incorporated in the charter. (section 8 a) to d) of the ICA).

Owners are generally also allowed an implied indemnity for complying with charterers' orders under a time charter where



spurious cargo claims lead to vessel detention and financial loss if these are not known at the time of signing the charterparty (The "Island Archon" [1994] 2 Lloyd's Rep 227).

Club cover

Cover for cargo shortage claims is provided by Rule 2 Section 16 (A) of the Club's 2016 Rules. Bills of lading must incorporate the Hague or Hague Visby Rules and claims liabilities arising under the Hamburg Rules will only be covered if the Hamburg Rules are compulsorily applicable to the contract of carriage by operation of law (Rule 2 Section 16 (C) (a)).

Members are advised to take note of the certain exclusions from cover as set out in Rule 2 Section 16 (C) (e) and Members are reminded to submit their bills of lading if they are their own standard form bills of lading for approval by the Managers in the normal way.

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