

Liquid Cargo Shortage Claims

Contents

Introduction	1
Practical Guidance.....	2
Insistence on the Shore Figures by Shippers/Charterers .	2
What is an acceptable margin?	2
Within acceptable margin.....	2
If not within acceptable margin	3
Evidence	3
Theory	4
Letters of protest	4
Letters of indemnity	4
"Weight Unknown...." and similar bill of lading clauses	4
Refusal to sign	4
Letters of Credit	5
Hague/Hague-Visby Rules	5
P&I Cover.....	6

Introduction

This briefing provides general thoughts and guidance on dealing with a discrepancy between ship and shore figures at a load port and on the use of letters of protest in these circumstances.

The briefing comprises **Practical Guidance** followed by the underlying **Theory**.

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Liquid Cargo Shortage Claims

Practical Guidance

Insistence on the Shore Figures by Shippers/Charterers

1. The key issue for any master when ship and shore figures do not match when loading liquid cargo, is to decide whether he can issue an honest bill of lading.
2. An honest bill of lading is one that will not deceive the receiver into thinking that he is getting something that the ship, in fact, is not able to deliver.
3. The vital decision for the master to take, therefore, when faced with a discrepancy between ship and shore figures, is to decide whether that discrepancy is within an acceptable margin.
4. If it is within an acceptable margin, then either of the figures could conceivably be correct. It would not, therefore, be dishonest to use the shore figure if compelled to do so.
5. By contrast, to issue a bill of lading with a figure which a master knows to be false, or where the master has no belief in its truth, or where he has simply decided to make no effort at all to check its accuracy, would be to issue a dishonest bill.

What is an acceptable margin?

6. What is an acceptable margin will vary according to the facts and circumstances of each loading. There is no universal margin acceptable for all cases. Some guidance can be obtained from the Club's Loss Prevention Guide on Shipboard Petroleum Surveys which (at page 13) suggests that if on comparison of shore and ship figures there is a discrepancy of more than 0.3%, then this needs to be investigated.
7. It is important to remember that the only relevant criteria are those applicable at the load port. Whilst there will often be a difference between ship figures from load port to discharge port (the Institute of Petroleum, now the Energy Institute, recognising that this may be in the region of 0.2%), and while other cargo will lose volume or weight in the course of a voyage due to evaporation (giving rise to discussions about "customary allowance" or acceptable "in-

transit loss") there is no justification for using these to give guidance on what may be an acceptable margin at the load port.

Within acceptable margin

8. If, on an objective assessment of the figures (helped by the rule-of-thumb at 6) the discrepancy is within an acceptable margin, then the owners/Members' position should be relatively straightforward.
 - a) Firstly, of course, owners should try to get:
 - i) the ship's figures shown on the bill;
 - or
 - ii) both figures shown on the bill.
 - b) If neither is acceptable to the shipper (as is likely to be the case), then there is nothing wrong in the shore figure being shown on the bill of lading; in particular
 - i) The owner will preserve his right to an indemnity from the shipper (or charterer) if the shore figure is inaccurate (see para 17 later) and;
 - ii) The owner will retain P&I cover on the basis that he has not included an "incorrect" description of the cargo. (see paras 17 and 18 later)
 - c) In any event, the owner should also try to include on the bills of lading any or all of the phrases "**weight...(etc) ...unknown**", "**said to be**", "**shippers' figures**" or any of the similar phrases which appear on many standard bills of lading.
 - d) Finally, to be sure of evidencing the care that the Owners have taken to legitimise their decision to issue a bill where there is a known discrepancy, it is useful also to issue a letter recording all of the steps taken by owners, and recording that whilst Owners consider the discrepancy to fall within an acceptable margin, Owners nevertheless rely upon shippers' guarantee and indemnity in respect of the figures they have supplied. (This is in accordance with the Hague Rules – see para 17 later).

Liquid Cargo Shortage Claims

If not within acceptable margin

9. Where the discrepancy does not fall within an acceptable margin then:
 - a) the master should immediately give notice that he is willing to issue a bill of lading showing the ship's figure and that the ship is ready to sail, but if that is not acceptable, then;
 - b) call for a recalculation of the shore figures and a joint re-measurement of the ship's figures. This may lead to a reduction in the discrepancy falling within the acceptable margin, whereupon paragraph 8 above can be followed. If the discrepancy continues to fall outside the acceptable margin, then the master should:
 - c) insist on ship's figures: or if rejected;
 - d) insist that the bill of lading contains both ship and/or shore figures: or if rejected;
 - e) refuse to sign until an acceptable figure has been identified and agreed. (Any such refusal can be justified on the grounds set in the proviso to Article 3 Rule 3 of the Hague Rules – see para 17 later).
 - f) Sail and leave the matter to be debated while the ship makes its way to the discharge ports. On a cautionary note, however, it is important that before the ship sails, every opportunity has been given to shippers, charterers and independent surveyors to check or verify the ship's measurements and to take their own, and that all such steps or offers to assist are recorded in written notices.
 - g) If not allowed to sail, record this in a suitable Letter of Protest.
 - h) Do not sign a bill of lading with a figure which is not true or not credible. If such a bill of lading is signed, a Letter of Protest recording that the figure in the bill of lading is not a true or credible figure will not provide protection.

Evidence

10. Throughout the process at 8 or 9 above, it is essential that a clear record is maintained in documentary form (and with the assistance of P&I correspondents and surveyors) of all steps taken by the ship, measurements and calculations, and any other factors relevant to any potential disputes between Owners, Charterers, Shippers and Receivers. In particular, in the event of disputed quantities at load port an independent surveyor should be appointed to verify all measurements and calculations at an early stage.

Liquid Cargo Shortage Claims

Theory

Letters of protest

11. There is a widespread practice of using Letters of Protest to record discrepancies between ship and shore figures, suspected presence of water content etc. Indeed, the use of Letters of Protest is referred to a number of times in the Club's Loss Prevention Guide on Shipboard Petroleum Surveys. This is a useful way of recording the difference between ship and shore figures *when they are within the acceptable margin* and reinforces the process recommended at paragraph 8 above.
12. However, the use of Letters of Protest can be counterproductive for owners in circumstances where *the discrepancy falls outside the acceptable margin*. Typically, in such a situation, the master issues the bill of lading with the shore figure, and then subsequently issues a Letter of Protest stating what he believes to be the correct (ship's) figure. The difficulty with this is twofold:
 - a) It clearly evidences a belief on the part of the master that the bill of lading figure is wrong. It therefore immediately suggests that it is a bill of lading that he should not have signed.
 - b) It also does little to assist the shipowners' defence against the receivers. The receiver has not seen the Letter of Protest, he has only seen the bill of lading. The bill of lading states that a higher figure was shipped. The shipowner is not in a position to deny that figure (see the conclusive evidence rule at Article 3 Rule 4 of Hague-Visby Rules – paragraph 17 see below).

Letters of indemnity

13. Similarly, Letters of Indemnity are fraught with difficulty. If the bill of lading contains a figure which the master does not believe to be true, then that bill of lading will deceive the receiver. A letter of indemnity promising to indemnify the Owners for issuing such a bill, would usually be unenforceable. (The Hamburg Rules opens the door slightly ajar for such a letter at Article 17.3 but remains highly problematic). See our Loss Prevention Guide on Letters of Indemnity.

"Weight Unknown...." and similar bill of lading clauses

14. English law does allow a denial by the master that he is confirming any of the figures stated in the bill of lading. The use of the expression such as "*weight, quantity unknown...*" which appears in many printed forms of bills of lading is very helpful to an owner wherever any claim is brought under English law. For that reason, those words, should therefore always be included in your standard bill of lading. Other words such as "*shippers figures*" or "*said to be*" are probably of less effect, but they certainly do no harm. They will not, however, help where the figure inserted in a bill of lading is obviously wrong.

Refusal to sign

15. Refusal to sign a bill of lading is clearly a drastic step. The following points should be noted:-
 - a) Refusal to sign does not mean that the vessel should not sail as soon as possible after completion of loading and completion of all measurements, (and re-measurements where called for).
 - b) Refusal to sign is permitted under the Hague, Hague-Visby and Hamburg Rules.
 - c) Refusal to sign may bring considerable pressure to bear on the shipper. The shipper will usually have a letter of credit expiry date to meet. There is thus some pressure on the shipper to get a bill and an owner holding his ground can sometimes drive the shipper to accept one of the options at 9 (b), (c), (d) above. Furthermore, courts and arbitrators have always been quick to support Owners who take a stand to insert an accurate figure in the face of a shipper who is demanding a questionable figure.
 - d) Whilst a refusal to sign a bill of lading is, of course, a serious step and is the last thing that an owner will wish to do in terms of charterers/shippers/customer relations, the attempt to avoid the problem at the load port by issuing a bill with too high a figure will, of course, come back to bite the owner at the discharge port. It is in a shipper's interest to obtain a bill with a high shore figure and it is

Liquid Cargo Shortage Claims

also in a dishonest shipper's interest to exaggerate that figure so that he makes a "turn" on the cargo on each occasion. As soon as the shipper has procured such a bill of lading, the question of delivery of the quantity recorded becomes the shipowner's problem, often without the support of its P&I Club.

Letters of Credit

16. A shipper will often argue that the ship's insistence on inserting the ship's figure; or of inserting both ship and shore figures in the bill of lading, is going to be fatal to the letter of credit transaction. As to this:-

- a) Ship and shore figures. It is possibly correct that there may be a problem here for the letter of credit transaction. If two figures are inserted in the bill of lading, but the commercial invoice and other documents show only one figure (as is likely), then there will be a discrepancy between the documents and this might lead to a rejection;
- b) However, the shippers' argument that insisting on a lower ship's figure is likely to take the quantity outside that contemplated by the letter of credit is weak, and even if it does, the parties to the sale contract and their bankers have ways of easily and quickly resolving these problems.
- c) In particular, UCP 600 (the standard practice for documentary credit transactions) expressly states that (absent more stringent express provisions) a tolerance of 5% either side of the letter of credit figure will be acceptable. So if the sale contract and supporting letter of credit anticipate the shipment of 100,000 mt, a bill of lading ranging between 95,000 and 105,000 will usually be an acceptable document to enable the credit transaction to proceed. Indeed, frequently the contract and the supporting letter of credit allow a 10% margin either side on bulk cargoes.
- d) Even where the UCP (5%) or other (e.g. 10%) L/C margin is exceeded, it is still very easy for the sellers and the buyers and their banks to agree to an ad-hoc arrangement accepting documents even though they fall outside the anticipated quantity, and authorising payment of

an amended amount in order for the credit transaction to proceed. These ad-hoc arrangements take hours, or at worst days, and it would be extremely unusual for a shipowner to jeopardise an entire sale and credit transaction simply by insisting on his own figure.

- e) This is useful background information because it does bolster an owner's option of standing firm, should the need arise, where figures are seriously discrepant.

Hague/Hague-Visby Rules

17. The Hague and Hague-Visby Rules will apply to most shipments, will often feature in charterparties and, of course, their principles form one of the foundations of P&I cover.

- a) The Hague and Hague-Visby Rules recognise that there is such a thing as an acceptable margin; or to put it another way, an acceptable level of inaccuracy.
- b) Hague-Visby Rules Article 3 Rule 3 requires a shipowner on demand to issue a bill of lading which contains both the description of the apparent good order and condition of the cargo, and a description as to quantities.
- c) Unlike the obligation placed on the master with regard to good order and condition (where it is he who must determine its apparent condition) it is the shipper who must furnish the figure that is inserted in the bill. Furthermore, he guarantees the accuracy of that figure. (Article 3 Rule 5)
- d) Thus, the Hague-Visby Rules contemplate the shipper supplying the figures; and where the cargo is a liquid cargo, commonsense would suggest that the only figure he can supply is the shore figure.
- e) Hague-Visby Rules goes on at Article 3 Rule 5 to say that the shipper will indemnify the carrier against any loss arising or resulting from "inaccuracies" in the figures supplied. Thus the Hague-Visby Rules contemplate that the shore figures might be inaccurate but that they may still be inserted in the bill of lading.
- f) The question then is what degree of inaccuracy is contemplated as being acceptable. The

Liquid Cargo Shortage Claims

answer lies in the proviso to Article 3 Rule 3 of the Hague-Visby Rules which provides that the master is not bound to put a figure in the bill of lading *“which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has no reasonable means of checking”*.

- g) What the Hague-Visby Rules contemplates is that the master will carry out a check. If he cannot check the figure (which seems unlikely) he should follow the procedure at paragraph 9. If he can check, he is to use that as a benchmark for assessing the reasonable accuracy (or truthfulness) of the shippers' figures.
- h) Clearly, the master has no reasonable means of checking with any precise accuracy the shore figure, nor the shore mechanisms for measurement. What he does have is his own tools onboard the ship, draft survey, ullaging, etc which enable him to form a rough view of the figure that has come onboard. He is then to compare that rough view with a figure proffered by the shipper, and see what is the difference. If that difference is within normal measurement error, then he can follow paragraph 8. If it does not, he should follow the procedure at paragraph 9.
- i) Finally, it should be noted that whatever figure is inserted in the bill of lading will be treated as conclusive evidence of what was loaded; so far as any receiver of the cargo is concerned. The receiver has bought the bill of lading in reliance upon the figures stated in it, and the shipowner cannot later try to argue or produce evidence (e.g. a Letter of Protest) that the figure was incorrect. (Art. 3 Rule 4).

P&I Cover

- 18. For reasons of mutuality, P&I cover assumes that all members will carry on the terms of the Hague or Hague-Visby Rules and will follow proper practice in their handling of bills of lading. Proviso D to the cargo claim rule 19(17) provides that no claim on the Club shall be allowed for liabilities arising out of a bill of lading issued with the knowledge of the member or master with an incorrect description of the cargo or its quantity or condition. In this context, the following summary may be useful:
 - a) issuing a bill where there is a discrepancy between ship and shore figures with an acceptable margin will not prejudice cover. It is not a knowingly incorrect description.
 - b) an acceptable margin will vary from case to case. The 0.3% margin typically attributable to VEF is not necessarily a safe figure, but it is a good starting point.
 - c) issuing a bill of lading with a figure which is not true or which is not credible may prejudice cover for claims arising out of the use of such a figure. This issue of a letter of protest in such circumstances is likely to be counterproductive.
 - d) the legitimate option of refusing to sign a bill is likely to attract support and approval from Club, courts and arbitrator.