Insight Article

Early departure procedure and bills of lading

The extremely hazardous practice of issuing signed, but otherwise blank bill of lading forms, was mentioned in Gard News Edition 991, and on that occasion involved the loading of cargo at West African ports. Comment was also made in Gard News Edition 1022, and reference then was made to a procedure, known as "Early Departure Procedure" (EDP), being used at many loading terminals including some in the North Sea. A common feature of EDP is the issuing of bills as mentioned above.

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Investigation surrounding a recent case, involving the loading of crude oil at a terminal in the United Arab Emirates (UAE), revealed that EDP was being used including the practice of the signing of blank bills. It is suspected that this is not confined to the UAE, and given the grave dangers involved for vessel owners who permit, or fail to take the necessary measures to prevent, the said practices, an opportunity arises to serve a reminder.

Whilst EDP is said to be at the option of the visiting ship there is heavy pressure on owners to comply. Terminals are keen to have maximum use of their facilities and minimum delay to waiting vessels, charterers are frequently worried about the effect of delay on future part-loading and discharge schedules, as well as complications with regard to laytime and demurrage. It is known that EDP is a feature of pre-fixture negotiations, and that charterers seek to use their commercial bargaining power with a view to the inclusion of express charterparty provisions stating owners' acceptance of EDP and the deduction from laytime of time resulting from owners' non compliance with it.

In the case concerned, it is understood that blank bills were presented to the master by the pilot/loading master before completion of loading thus leaving the vessel free to leave the loading facility without delay. The terminal concerned in fact asserts that a delay of up to 12 hours will result if EDP is not accepted and blank bills not signed. This delay, which is said to arise because of the time taken to have shore loading figures properly documented and forwarded to the ship, will also cost the owner USD 500, a charge imposed by the terminal for the extra expense involved. This extra expense is probably in respect of the boat fees involved in delivering documents to the ship at anchor (where the ship would proceed immediately after loading if EDP is not accepted or bill of lading amounts are disputed). The possible delay could be further extended should re-calculation or re-dipping of tanks be required and/or if difficulties are encountered with regard to the clausing of the bills. It may come as no surprise that the terminal concerned was understood to be extremely reluctant to permit any alterations to the bill of lading form or any qualification of the details it had inserted thereon3.

It goes without saying that, with a blank but signed bill in their hands, the shippers seek to insert the highest figures. In this case, such figures happened to be shore tank figures and these were duly inserted in the bill, without the application of any relevant Vessel Experience Factor (VEF). The difference between shore and ship figures can of course be large and the figure inserted in one bill in this case was around one per cent greater than the ship's figure (the one per cent difference was confirmed at subsequent independent surveys). An additional concern in this instance was that this bill contained no qualifying words or clausing (even in print) to the effect "weight, quantity etc. unknown".

Upon learning of the shore figures at the time of departure from the loading facility, the vessel issued a protest to the shipper/terminal and charterers outlining the difference between the figures.

THE DANGERS EXPLAINED

The issuing of blank but signed bills of lading is a dangerous practice, particularly if shore figures are inserted without any qualification, e.g. "weight, quantity etc. unknown". The bills in the case concerned were "to order" bills and under the Hague Visby and Hamburg Rules, as well as many national law hybrid versions thereof, bills transferred to third parties acting in good faith can be held as conclusive evidence of the receipt by the Carrier of the weight and quantity stated within the bill. Even when words such as "weight, quantity etc. unknown" or "as per shore/shippers figure" are used, the Carrier may not be fully protected. Whilst under English law such qualifying clauses usually prevail it is possible that entitlement to rely on the same may be removed. This could happen where there is a considerable difference (probably in excess of 0.5 per cent) between the bill of lading and ship's figures; the grounds for this proposition would be that the difference would have been obvious to the master.5Many other jurisdictions may not of course follow the reasoned approach of the English courts and qualifying clauses are often ignored completely. It may be thought that the issuing of a letter of protest, puts the onus on the shipper or charterer to attach it to the bill of lading, and if he does not attach it, he is exposed to possible "bad publicity" or potentially "fraudulent behaviour". Whilst the Association is not convinced that such an onus exists, the legal effect of such a protest is very questionable, particularly against a third party bill of lading holder (even if the protest were to be attached to the bill - which is unlikely). As to the possibility of recourse against the charterers, the decision in the case of the "NOGAR MARIN" is indicative of the general approach of the English courts. The court stated that, if the master fails to correct a bill of lading inaccuracy of which he was reasonably aware, and even where the charterers knew of such inaccuracy, a contractual or implied indemnity to which the owners may otherwise be entitled, could not be upheld against the charterers in respect of the carrier's settlement of a third party claim under the bill of lading. Many other jurisdictions could be expected to follow a similar approach. For owners caught out by these dangerous practices, and faced with a shortage claim by cargo interests, there is also the cold reality that they will probably be standing alone. Rule 34(1)(b)(ix) of the Association's Statutes and Rules excludes cover for liabilities, costs and expenses arising out of the issue of a bill of lading known by the master to contain an incorrect description of the cargo quantity. Cover is also excluded for ante-dated or post-dated bills and this may result where blank but signed bills are issued. For those thinking that a letter of indemnity (LOI) is the answer, it will no doubt be appreciated that when such documents are given or accepted in unlawful circumstances (such as where the master/owners knew that an innocent party would rely on the incorrect statements) this is tantamount to fraud. Such documents would be legally unenforceable and effectively of no value.

SOME ADVICE

Despite the pressures of terminals and charterers EDP should be resisted. The costs of taking precautionary measures and of possible delays can be far outweighed by the liability exposure. Commercial relationships are of course important but charterers are well aware of the risks they are trying to force owners to take. Charterers would probably not take such similar risks themselves (and do not by issuing a LOI as LOIs are legally unenforceable), and there must be many more important reasons why a charterer uses a particular owner on more than one occasion. Owners willing to take a stance can take heart from the decision of the English Courts in the case of the"BOUKADOURA"10. In that case it was held that even where 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 owners were therefore entitled to recover their loss (mostly the costs of the delayed sailing) from the charterers not only under the particular express indemnity contained in the charterparty but also in damages, arising from the charterers' breach of the implied warranty in presenting an inaccurate bill of lading and subsequent refusal to accept the master's signature if it was qualified with regard to the shore figure. With the above in mind, the following points of advice should be considered: (1) Owners should seek to include an express provision in the charterparty stating that EDP is not accepted. This should be brought to the attention of masters in order that they can resist further pressure from charterers and their representatives. (2) Bills of lading are not to be signed until the accuracy of their contents has been verified and, if necessary, appropriately qualified by the master or the authorised agent of the master. (3) The use of vessel's 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. If agents can be used, bills should only be signed by agents on the master's or owner's behalf when the master or owner has checked that point 2 has been complied with. (4) If an owner is caught out and reasonably suspects that the figure inserted in the bill of lading is greater than the amount of cargo shipped on board, attempts should be made to identify the consignee or notify party on the bill of lading in order to give notice to him of the ship's figure. The ship's interests should then issue protests to everyone they can think of, shippers, charterers, charterers' agents, and if possible, the consignee or notify party. The shippers should also be requested to attach a copy of the protest to the bill and to forward a copy of the protest to the buyers. As outlined above, such measures will probably not avoid liability but may avoid a claim, for what will usually be a paper loss.

Footnotes

1. October 1985, page 7 "Signing bills of lading at West African ports".
2. July 1986, page 18 "Crude oil trading and supply".
3. Here lies another advantage of EDP for charterers/shippers - a clean bill of lading.
4. In the case of the "ATLAS" [1996] 1 Lloyd's Rep. 642 the judge found that the prima facie presumption of the Hague or Hague Visby Rules could not apply where the words "weight unknown" were inserted in the bill. There is no reason to belive that this would not equally apply to bills which would otherwise qualify for conclusive evidentiary effect.
5. Article III, Rule 3 of the Hague and Hague Visby Rules states that no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading, any marks, number, quantity or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received or which he has more reasonable means of checking.
6. Spain is a good example of how other jurisdictions treat qualifying clauses. Under Spanish law, such clauses can only be effective if certain conditions are satisfied, one of which requires the owners to prove that the reason for the inclusion of such clauses must be justified, as their effect is subject to the master's "real and effective impossibility to check the particulars of the cargo". This is obviously a very difficult burden to discharge.
7. [1998] LLRep 412. See also Gard News Edition 111 October 1988, page 5.
8. Exact words not used.
9. Rule 34 (1) (b) (viii).
10. [1989] 1 Lloyd's Rep. 393.