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Carriage of steel cargoes and clean bills of lading

We are frequently asked whether there is a solution for the common problem encountered when loading steel cargoes, which necessitate a steel pre load steel survey under all P&I Club rules.

It is not uncommon that steel cargoes have surface or minor rust, being the inherent nature of steel cargo which however do not affect the cargo's value or usage. However surface rust and moisture, however minor are recorded during the steel pre load survey and carriers are consequently obliged in accordance with Club rules to issue claused mates' receipts and bills of lading which reflect these remarks.

It is invariably the situation that shippers will not accept claused bills of ladings for the reason this document will not be acceptable to banks for letters of credit.

The ICC Uniform Customs and Practice for Documentary Credits ("UCP") provides:

"A Bank will only accept a clean transport document. A clean transport document is one bearing no clause or notation expressly declaring a defective condition of the goods or their packaging.

The word 'clean' need not occur on a transport document, even if a credit has a requirement for that transport document to be 'clean on board'."

Accordingly carriers are required to issue clean bills of lading notwithstanding the remarks in the steel pre load survey report and the mates receipts, in consideration of an LOI from the shippers and or charterers. Carriers are concerned that in this situation where they have no other alternative but to comply with the shipper's request for practical and commercial reasons, their P&I Club cover will be prejudiced.

Is there a solution to the problem that the carriers will in many such situations not be able to obtain the benefit of Club cover? We will in this article endeavor to find a solution.

The word 'condition' appears twice in the Congen bill of lading:

"Shipped at the port of loading in apparent good order and condition on board the vessel..."

"...condition...unknown."

In the (The Skarp) (1935), Langton J opined "...there is no question that there are many classes of goods as to which there may be a distinction when one is speaking of their apparent condition and of their real condition..."

In other words, there are two types of condition of cargo, one is the 'apparent condition', and the second is the 'real condition'. The 'apparent condition' is the only remark which is important for the purposes of the carrier complying with their obligations under the Hague or Visby Rules Art III Rule 3.

What is the definition or purpose of the remark 'apparent condition' in the bill of lading? This refers to the condition or appearance of the goods based on a reasonable examination, in order to give reasonable notice to a third party bill of lading holder there is some defect to the goods. It is a tricky question, as even though surface rust on steel cargoes may be noticeable upon a reasonable examination, such surface or minor rust may not necessarily be tantamount to a defect in the goods?

The words "apparent good order and condition" would apply differently to different types of cargoes. For example, it is not in doubt that visible rust on scrap cargoes would not amount to damage or defect in the goods, and in the same manner, visible rust on steel in appropriate circumstances would not amount to a damage or defect in the goods. For some steel cargoes, the existence of surface rust is normal and expected and does not affect its use or value and in this situation, the steel is in good 'apparent order and condition' despite visible rust.

It will therefore be a question of fact whether such minor or surface or visible rust on steel cargoes would in each case amount to damage or defect in the goods, but this is definitely not always the case.

In this circumstance, it would not be unreasonable or unlawful to incorporate a clause into the bill of lading that a clean bill of lading does not necessarily mean there is no surface rust on the goods.

Such a clause was included in the bill of lading in the case of (*Toyko Marine & Fire v Retla*) (1972), and the United States Court Of Appeal held that such a clause did not represent the goods were loaded free of surface or visible rust even though a clean bill of lading was issued.

It is likely that a similar conclusion would be held by an English Court as it is said in the case of (*Canada & Dominion Sugar v Canadian National SS*)(1947), that "...the bill of lading must be construed as a whole, like any other commercial document."

The reason why such a clause on the back page of the bill of lading is lawful and reasonable, is that it is normal for some steel cargoes that visible rust which does not amount to damage. This is different to the situation where there is clear and certain damage to the goods, but the carrier makes a remark of this damage on the back page of the bill of lading to intentionally avoid alerting the third party bill of lading holder.

Although such a clause may assist the carriers to provide a defence when a cargo claim for damage is made, what about the Club cover? The fundamental reason why Clubs cannot cover the liability arising from the issuance of a clean bill of lading when the cargo was in fact damaged, is firstly because this is not a risk and is an eventuality which is not insurable, and secondly such an action is tantamount to defrauding innocent third party receivers.

Therefore if we can prove to the Club that the clause protects carriers in view it is normal for such cargoes to have visible rust which does not affect its usage, and therefore such visible rust does not amount to damage, then these circumstances warrant the issuance of a clean bill of lading and we may try to satisfy the Club they would not be breaching the two fundamental rules which prevents them from providing cover. However the blind issuance of clean bills of lading based on a full reliance on the clause excepting liability for rust is clearly not sufficient to expect there would be Club cover.

To conclude, in order to obtaining an LOI from the shippers and or the charterers, in order to have an opportunity to show that Club cover should not be prejudiced and the LOI is legally valid and enforceable, it is important the carriers exercise due diligence to investigate the visible rust do not affect the cargo's value and or usage and hence does not amount to damage.

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