Claussing of mate's receipts and bills of lading

Under the Hague Rules and the Hague-Visby Rules the carrier is, after receiving the goods into his custody, on the demand of the shipper, bound to issue a bill of lading showing among other things the apparent order and condition of the goods. However, most if not all bills of lading contain words acknowledging that the goods are received in "apparent good order and condition". When the carrier acknowledges goods are received in apparent good order and condition, the carrier does not guarantee the goods were in a good condition on shipment, only that they appeared so. The apparent good order and condition relates to the carrier's knowledge (including that of the master) on a reasonable inspection of the goods. This statement in the bill of lading is not a matter of contract but of representation of the masters opinion as to the condition of the cargo on loading. It is against this representation that the purchasers of the goods, and banks who advance funds against its security under letters of credit, rely.

Under the Hague-Visby Rules the fact that other evidence is available to show that the apparent order and condition was otherwise than described is irrelevant once the bill of lading is in the hands of a third party acting in good faith, i.e. a buyer of the goods who has obtained the bill of lading from the shipper or a chain of traders. At the place of discharge the bill of lading holder is entitled to receive goods in the order and condition described in the bill of lading. That is; unless the bill of lading is changed to the contrary, the receiver is entitled to receive cargo in apparent good order and condition and the carrier is potentially liable for any discrepancies, whether such have occurred during the voyage or are of pre-shipment origin.

It is furthermore irrelevant for the carrier's liability vis-a-vis the eventual third party holder of the bill of lading if in breach of authority provided by the master - often in compliance with provisions of the governing charterparty -some other party e.g. charterers' local agent, has issued the bill of lading on behalf of the Master other than in conformity with the particulars of a mate's receipt, in which accurate remarks regarding the apparent order and condition of the cargo has been made. While, in such a situation, an appropriately worded authorisation letter in combination with a clauses mate's receipt may prove useful in bringing a claim against the charterers, the carrier's liability vis-a-vis the bill of lading holder is unaffected. Thus, in such circumstances the bill of lading - and only the bill of lading - will be considered when determining the apparent (good) order and condition of the goods at the time of shipment.

It has been pointed out that the description of the cargo by which the carrier is bound is the apparent (good) order and condition. This needs to be distinguished from the cargo's actual order and condition. Equally it does not describe the quality of the goods. As the obligation on the master is to exercise the judgment that can be expected by a reasonably competent and observant Master in order to express an honest and reasonable view, [1] the apparent order and condition so described by the master does not amount to a guarantee as to the cargo's actual order or condition.

The nature of the master's obligation is not that of an expert on the particular type of cargo in question. This can and often does create a dilemma for the master, whether to clause a bill of lading or not - in the twilight zone between what can and cannot be expected of the Master in this respect the importance of having the assistance of an expert surveyor is of particular importance and if in doubt Masters should seek assistance from the Club and / or local Club's correspondents.

The other side of the coin is that should the master fall in his duty by issuing a bill of lading with remarks which are unjustified under the above test, the shipper will be entitled to damages resulting therefrom. However, if a shipper's first remedy in such a situation is to demand another bill of lading without the incorrect remarks. If the master disagrees and refuses to issue a clean bill of lading there is an impasse with potentially expensive repercussions for the party that is wrong. For example, the shippers might arrest the vessel because they allege the owners are illegally refusing to provide a clean bill of lading, and if unable to sail the Charterer will usually put the vessel off-hire or, if the vessel is on voyage charter, laytime or demurrage will often have ceased to run because loading has been completed. If the Master's position is justified that hire should in most circumstances not be interrupted or in a voyage charter the owner would be entitled to damages for detention; the Bouladoura [1989] 1 Lloyd's Rep. 393. This may take months if not years to recover. If the clausuing is wrongful, delay will turn out to be at the Owner's expense. [2]

A further consideration is that if a carrier does not clause a bill of lading when preloading damage is apparent on a reasonable inspection of the goods there is no as of right Club cover for any consequent damage claims at the discharge port. Rule 25 xii (viii) (e) provides:

".....there shall be no recovery .........in respect of the Member's liabilities, costs or expenses arising out of:

(e) The issue of a bill of lading ................known by the Member or the Master of an entered ship to contain an incorrect description of the cargo or it's condition or quantity"

Any remarks should be as accurate as possible. Thus, if the individual items of the cargo can be individually identified the list of remarks should specify the apparent order and condition for each item. If this is not possible then the number of items with certain types of deficiencies should be specified. For the reasons set out above though unless the master is confident as to the accuracy and reasonableness of any clause(s) he intends to insert on the bill of lading, or whether or not to clause at all, he should seek assistance from expert surveyors.

The role to be played by pre-load surveys

The purpose of the pre-load survey is to ascertain the condition of the cargo to be loaded at the time of shipment in order for the carrier to be able to accurately describe the same on Bill(s) of Lading to be issued.

As seen above the importance of accurately describing the apparent order and condition of the cargo is paramount. Certain types of cargo are particularly sensitive, valuable, or otherwise susceptible to attracting claims and with some of these cargoes identifying the signs of defects can be
Reliance on Letters of Indemnity - a perilous route at the best of time

The actual extent to which Letters of Indemnity are used is difficult to tell with any accuracy. What is quite clear, however, is that a letter of indemnity obtained in exchange for issuing a bill of lading which - knowingly to the person issuing it (or where the master averts his gaze from the facts i.e. blind eye knowledge) - contain an inaccurate description as to the apparent order and condition of the goods, will most likely be unenforceable in the English Courts [3]. Therefore, possibility of recovering from the issuer of the Letter of Indemnity for any liability incurred to a bona fide third party holder of the bill of lading will thus depend on the goodwill of the provider of the indemnity. And even if a letter of indemnity is enforceable its value will - in the absence of it being backed by a third party - depend entirely on financial strength of the issuer.

In addition, as discussed above, there is no as of right Club cover if a bill of lading is issued that is known to describe incorrectly the cargo's apparent condition.

The reason why the English courts - and Club rules - take such a rigid view of the practice of accepting Letters of Indemnity procured in such circumstances is that the issuer of the Bill of Lading is, by knowingly misdescribing the goods, committing a tort of deceit. Where clean bills of lading are issued when they should not the allegation is that the carrier under the bill of lading has misrepresented the apparent condition of the cargo on loading. If made out any such liability has nothing to do with the carriage of the cargo, but is a breach of contract, but in liability in deceit. The consequence is that a claimant (whether a negotiating bank or non-shipping lawful holder of the bill of lading) has been denied the opportunity to reject the bill of lading and refuse to pay for the goods by the carriers misrepresentation when issuing the bill of lading of the apparent order and condition of the goods. The significance is that the carrier is liable not simply for any loss or damage to the goods in the normal way, but for the full value of the goods and because the liability is in deceit potentially for unforeseen losses as well [4].

Conclusion

For the reasons discussed above the importance of a proper description of the cargo's apparent order and condition cannot be stated too strongly. While commercial pressure and letters of indemnity may sometimes lure shippers into agreeing to issue clean bills of lading when a reasonable master would otherwise normally clause the risks involved in doing so are significant.

[3] Brown Jenkinson v. Percy Daiton [1957] 2 Lloyd’s Rep 1 – Shippers issued a clean bill of lading despite knowing that the cargo was not in apparent good order and condition. Shipowners thereby made a representation of fact which was known to be false, with intent that it should be acted upon – payment would be made on the basis of the bill of lading being clean. By doing so owners were guilty of tort of deceit. Thus the letter of indemnity was unenforceable.

[4] Smith New Court v. Smitgeur Vickers [1997] AC 284 per Lord Browne-Wilkinson at para 25 “a. The defendant is bound to make reparation for all the damage directly flowing from the transaction, b. Although such damage need not have been foreseeable, it must have been directly caused by the transaction [...] I. In addition, the plaintiff is entitled to recover consequential losses caused by the transaction" and per Lord Steyn at para 80 "the plaintiff is entitled to recover as damages a sum representing the financial loss flowing directly from his alteration of position under the inducement of the fraudulent representation"