BILLS OF LADING

Original bill of lading travelling with the ship

Executive summary

- The risk of misdelivery is increased if delivery takes place against an original bill of lading carried in the ship's mail.
- Bills of lading should be claused with a warning that one original is in the ship's mail.
- A Letter of Indemnity (LOI) or contractual agreement for transportation only can be sought, but will not provide complete protection against misdelivery claims.
- P&I cover can be prejudiced if delivery is given against an original bill of lading carried in the ship's mail.

A. Who is this article intended for?

This article is written with the member, in-house claims teams or legal counsel in mind, and anyone else involved in carrying an original bill of lading on board.

For the more practical aspects, we refer to the Club's publication *'Practical Guide: Original bill of lading travelling with the ship'* and recommend that the two articles be read and considered together.

B. What is meant by the expression 'original bill in the ship's mail'?

Bills of lading are usually produced in sets of three identical originals. Usually all three original bills of lading will, once issued, be passed to the shipper by the carrier. Carrying the original bill of lading in the 'ship's mail' or in the 'ship's bag' means that one of the set of three original bills of lading will be carried by the ship whilst it sails from the load port to the discharge port. Thus, the ship will be carrying both the cargo and a document of title (an original bill of lading) to that cargo.

To carry an original bill of lading in the ship's mail is therefore a departure from standard practice, since the shipper usually controls transmission of the original bills of lading to the next party in the chain, and the full set of original bills of lading are sent by post or courier from the load port to the discharge port, whether to the receiver directly or via a chain of intermediary buyers or banks.

The main reason for carrying an original bill of lading in the ship's mail, is to ensure that a bill of lading is available when the cargo arrives at the discharge port. This may be perceived to be a logistical convenience, as there is no need to wait for an original bill of lading to arrive from elsewhere. However, this scenario often gives rises to difficulties.

C. Why carrying an original bill of lading on board might be a problem

The original bill of lading is a document of title. That is to say, the person holding the original bill of lading has the right to demand delivery of the cargo. Where the bill of lading is also a negotiable bill of lading (i.e. the receiver is not named and the bill of lading is instead 'to order'), the cargo may be traded whilst in transit and the original bills of lading endorsed and transferred from party to party. The carrier is not privy to these transactions and will not know, therefore, which party is entitled to receive the cargo when it arrives at the discharge port.

(i) Normal circumstances

Under normal circumstances, the Master would not be concerned to check either that the party presenting an original bill of lading at the port of discharge was lawfully entitled to hold the bill of lading, or to confirm the identity of the person claiming to represent that party. The mere fact that a party has possession of an original bill of lading, submits it to the Master and demands delivery of the cargo, is sufficient for the Master to deliver the cargo to them.

(ii) Document of title

However, where a bill of lading has been carried in the ship's mail, the Master is in possession of the document of title when the cargo arrives at the discharge port. Before the cargo can be delivered, the Master must first pass the original bill of lading to the party claiming to be entitled to it, and then receive it back. All the while, two other original bills of lading will be in circulation and may have been acquired by other parties, or be in the hands of a bank arranging a Letter of Credit. As the carrier has not been privy to transactions relating to the cargo, and does not know if it has been sold in transit or if credit has been extended against it, the Master is not well-placed to judge whether the party at the discharge port claiming to be the party entitled to the original bill of lading, is so entitled.

(iii) Additional risk

If the bill of lading is made out on a 'to order' basis, the Master will need to assure himself that the party which states it is entitled to the bill of lading is indeed so entitled. Otherwise he risks delivering the cargo to the wrong party. Additionally, whether the bill of lading is 'to order', or is made out to a named receiver, the Master will need to correctly identify the person claiming to represent the rightful receiver. These are not responsibilities that usually fall upon the Master or carrier when the original bills of lading have been transferred to the shipper, and by the shipper onward to receivers. Taking on these responsibilities exposes the carrier to additional risk.

For instance, where a Letter of Credit is involved, the bank would usually control the situation and secure its lending by having all original bills of lading in its possession. However, if the cargo has been released against an original bill of lading carried on the ship, the bank's credit will be unsecured. If a Letter of Credit is not honoured by the receiver, because of insolvency or commercial disputes among the parties, the bank may not be compensated for the purchase price advanced to the shipper. The bank will, no doubt, seek compensation from the carrier by questioning the legality of the procedure under which delivery was effected.

In view of the risks of carrying original bills of lading in the ship's mail, the International Group Clubs have all, since July 1990, warned against the practice of carrying an original bill of lading on board in the ship's mail.

Example – carrying bill in the ship's mail

The MV TSC is loading a cargo of coal in Australia. Negotiable bills of lading are issued and the shipper insists that the ship takes one original bill of lading with it on board. The shipper also requests that the Master present the bill of lading to the ship's agent at the discharge port of Calcutta.

Upon arrival at Calcutta, the Master presents the original bill of lading carried in the ship's bag to the ship's agent. The ship's agent presents the bill of lading to Coalfaced Ltd, who is allegedly the entitled receiver. Coalfaced Ltd signs the original bill of lading. The ship's agent then shows the original bill of lading to the Master, thereby supposedly 'evidencing' that Coalfaced Ltd is the lawful holder of the bill of lading and entitled to receive the cargo. The cargo of coal is discharged and delivered to Coalfaced Ltd.

Two days after discharge, Hirst Bank, which says it holds endorsed original bills of lading in its possession, demands delivery of the coal. The owner of MV TSC now faces a problem, since the coal has already been delivered to Coalfaced Ltd.

Upon further investigation, it is clear that Hirst Bank do, indeed, hold original bills of lading that have been duly endorsed to them. Hirst Bank therefore have a legitimate claim against the owner of MV TSC for failure to deliver the cargo to the correct party (i.e. Hirst Bank). This is a so-called 'misdelivery claim'.

In the end, MV TSC has to settle the claim against Hirst Bank for the full value of the cargo.

D. Clausing the original bills of lading
Despite the risks outlined above, requests for bills of lading to be carried in the ship's mail continue to arise.

If members wish, despite the risks, to comply with a request to carry an original bill of lading in the ship's mail, each original bill of lading in the set issued should be clearly claused as follows:

'One original Bill of Lading retained on board against which Bill delivery of cargo may properly be made on instructions received from shipper/Charterers'.

This will act as a warning to anybody considering acquiring the remaining original bills of lading, or providing credit against them, and may thus minimise the likelihood of a complicated situation arising upon delivery, with multiple parties demanding delivery. However, it will not offer the carrier any protection against claims for misdelivery if the cargo is in fact misdelivered.

E. Letter of Indemnity & Agreement for transportation only
If an original bill of lading is to be carried in the ship's mail, it is recommended additionally that:

a. Members request an LOI from the shipper, Charterer and/or receiver (preferably from all parties); and

b. Members try to reach an agreement that the carrier's role is limited to transportation of the bill of lading only.

Further details in relation to these recommendations are set out in the sister publication to this guide *'Practical Guide: Original bill of lading travelling with the ship*'.

F. P&I cover
As mentioned above, the International Group of P&I Clubs does not endorse the practice of carrying one original bill in the ship's mail because of the risks inherent.

For any liabilities arising from misdelivery against an original bill of lading travelling with the ship, the Club will consider whether, in the circumstances of the case, cover may be provided under Rule 4 Cargo Liabilities.

If cover is not provided pursuant to Rule 4, it remains only for the member to apply for compensation under the Omnibus Rule, Rule 19, which gives the Club absolute discretion to compensate a member for claims not otherwise covered by the P&I Rules.