

like the Nota de Carga Revisada is conclusive evidence of the condition of the cargo at the time it is discharged from the ship.

The Nota de Carga Revisada as well as the Acta Conjunta are issued by the carrier or the carrier's agent.

The importance of the Nota de Carga Revisada and/or Acta Conjunta lies in the fact that they are the only documents which state the condition of the cargo at discharge from the ship. From a legal point of view the Nota de Carga Revisada and/or Acta Conjunta are enough proof to determine the existence of damage or shortage, when the condition of the cargo differs from that stated in the bill of lading.

Being a legal obligation in Argentina, the issuance of the Nota de Carga Revisada and/or Acta Conjunta for each ship discharged, it is clear that any cargo claim will be filed based on what the Nota and/or Acta states. Likewise the Nota and/or Acta will be sufficient and

irrefutable evidence of the condition of the cargo at the time of the discharge.

Any cargo claim will be subject to the presentation of a Nota and/or Acta which ascertains the damage or shortage alleged.

From a legal point of view there is no question of the importance of the Nota de Carga Revisada and/or Acta Conjunta. There is also a clear and direct relationship between a cargo claim and the Nota de Carga Revisada and/or Acta Conjunta.

Therefore it is important to stress the need for establishing procedures which ensure that the inspections of cargo at the time of discharge at Argentinean ports are done with all the strictness that the law and the liabilities arising therefrom demand.

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Cargoes of agricultural products

Short loadings at Paranaguá, Brazil

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INTRODUCTION

The port of Paranaguá is the major Brazilian port as far as the export of agricultural commodities in bulk is concerned. Of the 21 silos available in Paranaguá, 16 are privately operated whilst the remaining five, the loading spouts and the wharf are still being operated by the government of the State of Paraná. The weight of cargo loaded is measured by automatic shore scales which are calibrated by the National Institute of Metrology (INMETRO) only once a year. Usually the loading operation is administered by two cargo controlling companies, one appointed by shippers and the other by receivers, who in addition to drawing samples from the cargo being loaded on board also regularly check the shore scales and on completion of loading issue a Certificate of Quality and Weight.

Vessels loading grain at Paranaguá are mostly bulk carriers chartered by the main grain trading houses or operating companies related to them, or chartered vessels by independent operators who offer their services as

carriers (the so-called "parcel service"). The cargoes loaded at Paranaguá are sold and shipped on FOB basis and usually the buyers are the main grain trading houses so that the documents i.e. Mate's Receipts and Bills of Lading name the FOB suppliers as shippers.

Normally the ship agents appointed by charterers also look after owners' interests on routine matters. Sometimes a shipowner appoints another agent to act as a protecting agent but the charterers' agents remain responsible so far as the authorities are concerned. The charterers' agents are also normally responsible for issuing the Bills of Lading and upon the vessel's arrival they are usually supplied by Masters with a Letter of Authorisation to sign Bills of Lading on their behalf, strictly in accordance with the Mate's Receipts.

THE SHORTAGE AND ACTION BY SHIPPERS AGAINST CLAUSED MATE'S RECEIPTS AND BILLS OF LADING

Despite the aforementioned means of weight control, a particular problem with which shipowners are often

confronted is shortage of cargo verified upon completion of loading, which often exceed the mark of one per cent (1 per cent). The best way to protect the vessels' interests in such cases is that Masters insert a remark in the Mate's Receipts and/or Bill of Lading stating the shortage observed. However, although being an elementary right of the Masters, this solution does not always produce the intended results.

It is already standard procedure that when Mate's Receipts and/or Bills of Lading are issued with a remark stating the discrepancy observed between the quantities indicated by the shore scales and by vessel, usually by means of draft surveys, a Writ of Prevention¹ is filed by the shippers at the local Civil Court against the carriers and Master demanding the immediate delivery of clean documents and the result is always a favourable verdict and consequent court order requiring the agents and/or Master to deliver clean documents. At this stage, there is no alternative other than to issue the documents demanded, as disobeying a court order would result in serious consequences. Upon granting a favourable provisory and preliminary verdict, the local judge orders the plaintiffs (shippers) to provide security to remain with the court until the end of the legal proceedings (Writ of Prevention and main lawsuit). The usual security offered by plaintiffs is the quantity of cargo in dispute i.e. the quantity of cargo alleged to have been short loaded.

GROUND OF WRIT OF PREVENTION

The grounds of Writ of Prevention alleging that the correct quantity of cargo was loaded on board are usually as follows:

- (a) The weight of the cargo loaded on board was determined by automatic shore scales, which, during the shipment, were checked by two cargo controlling companies, one appointed by shippers and the other by receivers and in addition, the afore-mentioned shore scales are regularly gauged by the National Institute of Metrology (INMETRO), a department of the Ministry of Industry and Commerce;
- (b) The sale of the cargo is regulated by the National Association of Exporters of Cereals (ANEC) Contract Clause 8 which states: *"weight: final on the occasion and place of shipment by means of certificate issued by usual*

controlling entity, cost of which is for seller's account. The buyer has the option to, at his own expense and for his own guidance, request the joint control of the weight ... For all effects and purposes the result of the controlling entity appointed by seller will be final".

- (c) The predominant understanding of Brazilian Courts is that: *"the final weight to prevail is the shore weight ascertained in the place of shipment by usual controlling entity"*;
- (d) The draft survey is inaccurate.

The above grounds can be contested but as previously mentioned, the court order must be immediately obeyed and by the time the defence is presented, the documents have been delivered clean and most likely have already been negotiated, so that it will be very difficult to procure their return.

ACTIONS TO PROTECT THE VESSEL'S INTERESTS

From the above it can be concluded in the first instance that in cases involving short-loaded cargoes, owners are placed in a position where it is very difficult to take effective steps to protect their interests.

In a past case involving a short-loaded quantity of cargo, prior to any action by shippers, there was an attempt to reverse the situation by means of tendering to court the claused bills of lading together with a petition explaining the reason for the remark and demonstrating by means of an official draft survey report issued by local Customs that the shortage in question had indeed occurred. However, the attempt failed because despite the fact that the claused bills of lading had been deposited in court, shippers still filed a Writ of Prevention, to which a favourable verdict was granted, so that a new set of clean bills of lading had to be produced and released.

The recommendations in case shortages are verified upon completion of loading are as follows:

- (a) Master to clause the Mate's Receipts and Bills of Lading no matter whether a further action (Writ of Prevention) will be taken by shippers. In case of a possible future claim, it can be argued that the documents were properly claused but had to be further re-issued and released clean *under duress*;
- (b) Following local standard procedure, upon a vessel's arrival, Masters to supply agents with a Letter of

Authorisation enabling them to sign the Bills of Lading on his (Master's) behalf. Such Letter of Authorisation could possibly be supplied on completion of loading containing a specific demand for the inclusion of a described clause. In such way, although shippers could still obtain clean bills of lading by means of a court action, they could still face difficulties as one of the required documents, to be enclosed with the Bills of Lading to be presented to the banks, is the Master's Letter of Authorisation to sign Bills of Lading.

(c) It is usual procedure that during the course of the loading operation and prior to completion of same, the agents or stevedores periodically present to the Master the Mate's Receipts covering the parcels of cargo already loaded on board to be signed. Masters should only sign all Mate's Receipts on completion of loading in such a way that a remark covering the percentage of the short loaded quantity ascertained can be inserted in all Mate's Receipts and not only in the last ones presented on completion of loading which do not represent the total manifested quantity.

(d) Although meaning additional costs, request to Customs for a draft survey or alternatively a displacement survey on completion of loading when the Master concludes that there is indeed a shortage. The surveys by Customs are important because they are considered official and are used as evidence in Court.

(e) The vessel's hatchcovers and entrances to the holds to be sealed prior to departure and shippers, stevedores, agents and charterers to be formally invited to accompany the sealing.

(f) If on completion of loading the Mate's Receipts covering the majority of the cargo loaded are already signed and the Master's Letter of Authorisation for agents to sign the bills of lading on his behalf is already in possession of agents, Master to tender a Letter of Amendment to the Letter of Authorisation for the agents to sign the Bills of Lading, requesting that his remark is inserted in the bills of lading to be issued on his behalf.

(g) To contest the Writ of Prevention and the Main Lawsuit to be filed by shippers and in that respect the following precautions should be adopted at the discharge port:

– To arrange for a draft survey, to be as official as possible;²

– To arrange for the unsealing of the hatches and entrances, to be as official as possible³ and to invite receivers to accompany it;

– To obtain the official shore records covering the discharged quantity.

In case the shortage is confirmed, the evidence is to be made available locally in order to be presented to the local Court in the legal proceedings commenced by shippers in Paranaguá.

COMMENTS

Problems involving shortages of agricultural products verified on completion of loading of vessels at the port of Paranaguá existed in the past, are at present being verified and the tendency is that in the future such problems will probably continue to occur. This is especially likely considering the fact that the demand projection indicates that the quantities of agricultural products to be shipped through the port of Paranaguá will increase in the next few years when it is estimated that a quantity of 10.3 million metric tonnes will be shipped in the year 2000 and 12.7 million metric tonnes in the year 2005.

Investigations to determine the cause and the origin of the shortages were already carried out in the past and they all failed to come to a plausible conclusion. Obviously the problem in question could be minimised if the local Civil Court were to refrain from issuing favourable verdicts on the Writs of Prevention filed by shippers demanding the release of clean documents apparently without considering the vessel's position. However, at present there is at least one positive point, which is the security demanded by Court which is expected to guarantee an eventual favourable verdict to the vessel. So far no final verdict on this kind of matter has been issued by the local Civil Court. There is, however, a court case pending where a shortage was observed on completion of loading of a vessel. The vessel loaded in August 1995 and the said shortage was confirmed at destination and the relevant evidence was submitted in the legal proceedings. The verdict is eagerly awaited.

The shortage problem also drew the attention of local Customs so that draft surveys on vessels scheduled to load bulk cargoes at Paranaguá have been randomly

carried out at Customs' request during the last four years. Shortages up to one per cent verified upon completion of loading are accepted by Customs and in cases involving shortages beyond the mentioned allowance, shippers are compelled to correct the export documents according to the total shortage

figure ascertained by the draft survey. However, Customs' initiative is not producing the intended effects as shippers are succeeding in obtaining the release of the export documents according to the weight ascertained by shore scales by means of Court Injunctions filed against Customs.

¹ The Writ of Prevention is a provisory legal action intended to ensure the future force of a main lawsuit to which it is related, and which results in a provisory and preliminary verdict and a consequent court order to be immediately accomplished by defendants prior to lodging any defence. The party, (defendant), against whom the Writ of Prevention is filed has five days to present a defence, otherwise he will be considered in default. According to the Brazilian Civil Procedural Code, the Writ of Prevention must be followed by a main lawsuit to be filed by plaintiffs within 30 days of defendants being summoned in the Writ of Prevention. Usually these main lawsuits are for Indemnity or Collection for damages or losses and they can be contested within 15 days. The provisory and preliminary verdict issued in the Writ of Prevention may eventually be modified during the course of the proceedings or in the main lawsuit.

² The expression "as official as possible" means by any governmental entity or party officially recognised or certified by a governmental entity. This is required because a significant bureaucracy surrounds the Brazilian system and therefore, official documents are more easily recognisable and acceptable by local authorities, including the local Courts.

³ See footnote 2.

Carriage of fishmeal

On 26th March 1997 the IMO published its DSC Circular No. 6, containing Amendment 29 to the International Maritime Dangerous Goods (IMDG) Code. One of the provisions in the Amendment excludes the application of the IMDG Code and Bulk Carrier (BC) Code to certain types of fishmeal.¹

Although both destabilised and anti-oxidant treated fishmeal are still included in the IMDG Code as dangerous cargoes, if anti-oxidant treated fishmeal (normally IMO Class 9) is certified by the competent authority of the country of shipment as having no self-heating properties when carried in packaged form, then the provisions of the IMDG and BC Codes will not apply. Accordingly, as indicated in Observation (c) of the Annex to the IMO DSC Circular No. 6, fishmeal in packaged form which is accompanied by a certificate issued by a recognised authority of the country of shipment or other recognised authority stating that the

product has no self-heating properties when carried in packaged form does not have to be carried in accordance with the provisions of the IMDG Code applicable to anti-oxidant treated fishmeal which is not so certified (IMDG Class 9 cargo). Therefore fishmeal cargoes may be divided into the following categories:

Destabilised fishmeal: IMO Class 4.2. cargo. Carriage must be in accordance with the provisions of IMDG and BC Codes.

Stabilised anti-oxidant treated fishmeal: IMO Class 9 cargo. Carriage must be in accordance with the provisions of IMDG and BC Codes.

Stabilised anti-oxidant treated fishmeal which is properly certified as having no self-heating properties when carried in packaged form: not considered a dangerous