

To: Transport Industry Operators

Q & A
Cargo misdelivery without B/L
Court of Final Appeal's approach Seminar
3 November 2010

The Court of Final Appeal landmark case on delivery of cargo without bills of lading has set off the alarm bell that bills of lading terms must be reviewed before it is too late.

The Q&A session at the end of the November 2010 seminar was by far the shortest in all past SMIC seminars as there were too many to answer on site, and that the technicality of the seminar material had taken quite a bit of time. The seminar is one among the top 3 SMIC seminars in terms of number of participants, number of questions and degree of interest. The seminar had unleashed the various concerns on the subject among traders, banks, lawyers and the freight industry.

There were 9 questions we dealt with live in the seminar, and 35 in the month after. This vividly showed the degree of concern among transport operators on the grave exposures that come along with delivery of cargo without collection of bills of lading. Participants were all keen to find out how best should they be doing in protecting themselves apart from practicing good operations. These questions and answers are compiled in this issue of the Chans Advice for sharing among readers who care the bills of lading terms.

Q1. If the consignee really loss the OB/L, then what should F/F do in order to protect ourselves? Can we release the shipment base on letter of indemnity of the consignee which states that they lost the OBL and will bear all necessary cost which may arise?

A1. The forwarder should demand the shipper, the consignee each to issue a guarantee letter to the forwarder agreeing and undertaking to fully indemnify the forwarder for all claims, losses, liability, costs and expenses resulting from the forwarder's delivery of the cargoes to the consignee without production of the original B/L. However, it should not be secure enough for the forwarder to only just get the shipper's and the consignee's guarantee letters, since these two parties may disappear or go bankrupt in the future, which means no protection to the forwarder at all if there are any cargo misdelivery claims. Therefore, it is also important that the shipper and consignee should be demanded to arrange for a first class bank (whose financial security is acceptable to the forwarder) to issue another guarantee letter to the forwarder indemnifying the forwarder against all claims, losses, liability, costs and expenses resulting from the forwarder's cargo delivery to the consignee without original B/L.

Q2. Is telex-release (indemnity letter from shipper + bank) good to protect the HB/L issuer - forwarder?

A2. The telex release instruction operates like that: the shipper (i) surrenders the full set of original B/L to the carrier at the loadport, and (ii) instructs the carrier to deliver the cargoes to the consignee without production of the original B/L. Since the carrier has in fact already got back the full set of original B/L from the shipper for cargo delivery, this is not a situation of cargo misdelivery without presentation of original B/L. The carrier will have no cargo misdelivery liability, and hence no need to obtain any indemnity letter from the shipper, consignee or bank.

Q3. Except U.S.A., is there any other countries who have a provision which allows the carriers release cargo to consignee without the presentation of original B/L.

A3. From our experience of actively handling cargo misdelivery claims all over the world for more than 20 years, we only know that the USA would allow the carrier to release cargoes to the named consignee without production of the original straight B/L.

Q4. What's the difference between "Telex Release" and "Express B/L" in law?

A4. The telex release is a standard well established practice in the shipping industry. It operates like that: the shipper (i) surrenders the full set of original B/L to the carrier at the loadport, and (ii) instructs the carrier to deliver the cargoes to the consignee without production of the original B/L. The carrier has no risks in following the shipper's telex release instructions.

Express B/L has no standard practice in the shipping industry. It all depends on the parties' (the shipper, consignee, and carrier) contractual agreement as to what is meant by the Express B/L. It is different case by case, and is always confusing and unclear. For example, sometimes the Express B/L intends to have the cargoes released to the consignee without original B/L, but the Express B/L front page still has the standard wording saying (i) one original duly endorsed B/L needs to be surrendered for cargo delivery, and (ii) one original B/L is accomplished, the other originals of the B/L become void. The Express B/L will easily lead to cargo misdelivery claims. All in all, it is risky and dangerous to use Express B/L. If the intention is really to deliver the cargoes to the consignee without presentation of the original B/L, the well established industry practice of telex release should be used, and it will not have cargo misdelivery without original B/L claims.

Q5. With regards to newspaper reporting for loss of b/l(s), actually the main purpose is to issue a new sets to shipper after a period of 3 days' newspaper reporting but is not for purpose of releasing cargoes without original b/l. Is it the right way for reissuing a new set by this way?

A5. Issuing a new set of B/L to the shipper without the return of the first set of B/L is just like cargo release without original B/L. To the holder of the first set of original B/L, the cargoes were misdelivered even though against the second set of original B/L. The holder of the first set of original B/L will have a valid legal claim against the carrier for cargo misdelivery without production of the original B/L (the first set), and the carrier will have no valid legal defence. The newspaper advertisement will not be a defence to the carrier. If the newspaper advertisement could be a valid defence, how could the B/L be a document of title to the cargoes? (The holder of the B/L just simply does not know if the B/L was already cancelled yesterday or will be cancelled tomorrow by newspaper advertisement) In short, the carrier cannot issue more than one set of original B/L for one shipment of cargoes. In case the carrier needs to issue a replacement set of original B/L, the first set of original B/L has to be returned to the carrier for cancellation first.

The newspaper advertisement is not the correct way of issuing a new set of original B/L. In case the first set of original B/L cannot be returned to the carrier for cancellation, the carrier should demand the shipper, the consignee each to issue a guarantee letter to the carrier agreeing and undertaking to fully indemnify the carrier for all claims, losses, liability, costs and expenses resulting from the carrier's issuing a replacement set of original B/L to the shipper without the return of the first set of original B/L to the carrier for cancellation. However, it should not be secure enough for the carrier to only just get the shipper's and the consignee's guarantee letters, since these two parties may disappear or go bankrupt in the future, which means no protection to the carrier at all if there are any cargo misdelivery claims. Therefore, it is also important that the shipper and consignee should be demanded to arrange for a first class bank (whose financial security is acceptable to the carrier) to issue another guarantee letter to the carrier indemnifying the carrier against all claims, losses, liability, costs and expenses resulting from the carrier's issuing a replacement set of original B/L to the shipper without the return of the first set of original B/L to the carrier for cancellation.

Q6. You mention below that we need to ask for bank guarantee and understand your concern that no matter shpr or cnee will have chance to go to bankrupt anyway but in practice, it is very difficult for us, freight forwarder to request any bank guarantee for such situation and frankly speaking, we don't see any banker will jump in to issue such bank guarantee to us for protecting us with regards to our issue another duplicate sets.

A6. The carrier did not do anything wrong in the loss of the original B/L as alleged by the shipper, and the carrier does not need to take any risks for the mistake of the shipper. However, the carrier has the freedom to take the cargo misdelivery risks if it wants to, and the carrier can decide to accept only the

guarantee letters issued by the shipper and consignee. Nevertheless, transport liability insurers would not agree to insure carriers for cargo misdelivery claims arising from the situation that the carrier deliberately issues a replacement set of original B/L to shipper without the return of the first set of original B/L for cancellation. The bank of course will not voluntarily issue a guarantee letter to the carrier. The shipper or consignee needs to put up sufficient security to the bank before the bank is willing to issue the guarantee letter to the carrier.

Q7. Besides USA, is Mexico also the country allowing mis-delivery of cargoes without the presentation of b/l under straight b/l situation?

A7. From our experience in handling cargo misdelivery claims in Mexico, there should be no such legal basis in Mexico allowing the carrier to release the cargoes to the named consignee without production of the original straight B/L.

Q8. In Hecny case, speaker mentions that there is no discharge indicated in the HBL thus Hague Visby rule cannot apply. However, if discharge is indicated, whether Hecny can apply "H.V" rule and release from the liability

A8. What I mentioned during the Seminar was: During the Carewins case in the Court of Appeal stage, the Court of Appeal held that the Hague Visby Rules applied (because there was no discharge definition in the B/L, and such made the discharge include delivery), and that the Hague Visby Rules made the B/L exclusion clause null and void, and that the Hague Visby Rules made the forwarders fully liable for cargo misdelivery without any liability limitation. In short, the Hague Visby Rules would not help the carrier exclude liability, but would make the carrier liable for cargo misdelivery without original B/L.

During the Court of Final Appeal stage, the shipper voluntarily did not rely on the Court of Appeal's views on the Hague Visby Rules' point, and the shipper agreed that the cargo delivery was after discharge and hence no application of the Hague Visby Rules, and the shipper agreed to fight with the forwarders only on the point of the B/L exclusion clause. In the end, the Court of Final Appeal ruled that the forwarders lost the case even on their B/L exclusion clause because the clause was found as unclear and ambiguous. That is why it is now very important to have clear and unambiguous B/L terms to deal with liability issues.

Q9. Re Forwarder Cargo Receipt or Forwarder Certificate of Receipt issued by FORWARDERS / NVOCCS – Understand that FCR is not an Document of Title, but many client still ask for it which instructed by Consignee (Buyer) or via L/C. Pls clarify if the Forwarder issue the FCR as per client request, do they need to collect the ORGL FCR frm Consignee at dest before release cargo at destination? Do you know what reason why client still ask for this document no matter under Cnee's instruction or via L/C?

A9. It all depends on the contract terms of the particular FCR. Most of the FCRs in the market are not documents of title to the cargoes, and the forwarders can deliver the cargoes to the consignee without presentation of the original FCR. Occasionally, one may find a FCR saying that it is a document of title to the cargoes, and the forwarder will have to require the consignee's production of the original FCR for cargo delivery. The reason as to why the shipper accepts FCR is mainly the result of the negotiation of the sale of goods contract terms with the buyer. If the FCR is not a document of title to the cargoes, that means the buyer is in a stronger position, and the seller has to deliver up the goods to the buyer first with the cargo value payment probably to be made later by the buyer. If the sale of goods contract involves L/C, that would mean the bank would pay the cargo value to the seller upon submission of the original FCR, and hence a good protection to the seller/shipper.

Q10. Re Lost of Mate Receipt or Lost of Original HBL by client – As per yr explanation during the Seminar, if any client lost the ORGL HBL and Forwarders just ask them to lodge the Advertising 3 days in newspaper for the Void / Null, client issue the Letter of Guarantee or Letter Indemnity to the Forwarders, in which Forwarders will re-issue a new set of ORGL HBL to client. Basically it is not work or legal when under an court case?

As you shld well know that this is an general practice in this Forwarders/NVOCCS industry, it is really hard to ask client to submit an Bank Guarantee? Seems it is not workable as client claims all Forwarders / NVOCCS are doing that way? What is yr comment on this? How the Forwarders / NVOCCS can do on this event? In case, if there is no way to refuse, would it be the Forwarders/NVOCCS make their Management own decision on commercial decision to their client which finally also under the FORWARDERS/NVOCCS own risk OR liability?

- A10. For loss of B/L, the forwarder should demand the shipper, the consignee each to issue a guarantee letter to the forwarder agreeing and undertaking to fully indemnify the forwarder for all claims, losses, liability, costs and expenses resulting from the forwarder's issuing a replacement set of original B/L to the shipper without the return of the first set of original B/L to the forwarder for cancellation. However, it should not be secure enough for the forwarder to only just get the shipper's and the consignee's guarantee letters, since these two parties may disappear or go bankrupt in the future, which means no protection to the forwarder at all if there are any cargo misdelivery claims. Therefore, it is also important that the shipper and consignee should be demanded to arrange for a first class bank (whose financial security is acceptable to the forwarder) to issue another guarantee letter to the forwarder indemnifying the forwarder against all claims, losses, liability, costs and expenses resulting from the forwarder's issuing a replacement set of original B/L to the shipper without the return of the first set of original B/L to the forwarder for cancellation.

Issuing a new set of B/L to the shipper without the return of the first set of B/L is just like cargo release without original B/L. To the holder of the first set of original B/L, the cargoes were misdelivered even though against the second set of original B/L. The holder of the first set of original B/L will have a valid legal claim against the forwarder for cargo misdelivery without production of the original B/L (the first set), and the forwarder will have no valid legal defence. Advertising the loss of B/L in newspaper would not help protect the forwarder's position since such could not be a valid defence for the forwarder in court to deal with cargo misdelivery claims. If newspaper advertisement could be a valid legal defence, the B/L's document of title function in the international trade would no longer exist. How can the B/L be a document of title if the B/L holder has to worry about whether the B/L was already cancelled yesterday or will be cancelled tomorrow by newspaper advertisement? From our experience of handling claims of cargo misdelivery without original B/L for more than 20 years, we have never come across even one court case mentioning the newspaper advertisement as defence. Anyway it is up to the forwarder to decide if it insists on having a first class bank's guaranteed letter in addition to the two guarantee letters issued by the shipper and consignee. If no, the forwarder has to run the risk that the shipper and consignee may be financially unable to honour their guarantee letters to indemnify the forwarder when unfortunately a cargo misdelivery claim is later on brought against the forwarder by the holder of the first set of original B/L.

For loss of mate receipt, there should be no need for newspaper advertisement or guarantee letter. The mate receipt is the carrier's confirmation that the shipper's cargoes have been received. The carrier thereafter has to issue its B/L to the shipper. The presentation of the mate receipt by the shipper in exchange for the B/L issued by the carrier is just for the easy administration of B/L issuing. Even if the shipper cannot return the mate receipt, the carrier has to issue its B/L to the shipper after the cargoes were already received by the carrier from the shipper for carriage. The holder of a mate receipt other than the shipper is not entitled to ask for B/L from the carrier.

- Q11. Re ensure to collect ORGL HBL before releasing the cargo to cnee at dest – Accdg to yr information in USA, if there is Straight B/L which means the Direct Consignment or direct consigned to Consignee in B/L, under the USA Law, it is legal to release cargo without collecting the ORGL HBL. If the HBL is registered by our dest ofc or agent in USA, in case cargo really release without collecting the ORGL HBL. Shpr lodge the Court Case in HKG if Consignee do not settle the payment to them? What could the Forwarders/NVOCCS at origin do for this kind of case? Does HKG Court will accept the USA Laws for abv? Or we still face the HKG Court finally decision, since Shipper lodge the Court Case in HKG, it will only apply the HKG Laws ONLY, they will not care abt the USA LAWS?**

- A11. Since this is the USA NVOC's B/L, the shipper should claim against the USA NVOC for the cargo delivery without original straight B/L. We presume the USA NVOC's B/L contains an exclusive USA jurisdiction clause. Accordingly, the Hong Kong court would have no jurisdiction, and the USA court would probably dismiss the shipper's cargo misdelivery claim on the ground that the USA laws would allow the carrier to release the cargoes to the named consignee without presentation of original straight B/L. You as Hong Kong agent for the USA NVOC had done nothing wrong in the cargo delivery without original straight B/L. You also have no contract with the shipper. Accordingly, you should have no liability to the shipper no matter in tort or in contract. The B/L contract of carriage is between the USA NVOC and the shipper. You just have another agency contract with the USA NVOC. The USA NVOC but not you is the carrier under its own B/L.

- Q12. The USA exceptionally allows cargo release without original straight B/L. The NVOCC B/L is registered in the USA, and is issued by the NVOCC's agent in Hong Kong. Is the B/L governed by the Hong Kong law?**

A12. It depends on the jurisdiction clause in the NVOCC's B/L. If it is an exclusive Hong Kong jurisdiction clause, the B/L will be governed by the Hong Kong law. However, if the clause refers to other jurisdictions e.g. the USA, then the B/L should not be governed by the Hong Kong law.

Q13. To do telex release in the PRC, the shipper has to issue telex release guarantee letter to the carrier, but the shipper does not endorse on the B/L. Is that acceptable?

A13. It depends on the telex release arrangement between the shipper and carrier. For example, if it is stated in the telex release guarantee letter that the shipper will not collect the full set of original B/L from the carrier, and that the full set of original B/L is deemed as duly endorsed by the shipper and surrendered to the carrier for the purpose of cargo delivery to the consignee, that should be acceptable.

Q14. If the consignee tells that the original B/L has lost, what should a forwarder do in order to release the cargo but without the risk of misdelivery without original B/L.

A14. The forwarder should demand the shipper, the consignee each to issue a guarantee letter to the forwarder agreeing and undertaking to fully indemnify the forwarder for all claims, losses, liability, costs and expenses resulting from the forwarder's delivery of the cargoes to the consignee without production of the original B/L. However, it should not be secure enough for the forwarder to only just get the shipper's and the consignee's guarantee letters, since these two parties may disappear or go bankrupt in the future, which means no protection to the forwarder at all if there are any cargo misdelivery claims. Therefore, it is also important that the shipper and consignee should be demanded to arrange for a first class bank (whose financial security is acceptable to the forwarder) to issue another guarantee letter to the forwarder indemnifying the forwarder against all claims, losses, liability, costs and expenses resulting from the forwarder's cargo delivery to the consignee without original B/L.

Q15. If we issue our USA principal's B/L and remark clearly "as agent of carrier" on the B/L i.e. we are agent for the USA NVOC and the B/L terms are subject to the USA law, do we need to assume liability?

A15. You should not need to assume liability to the shipper and consignee in contract since you do not have any contract with them. The contract of carriage as evidenced by your principal's B/L is between the shipper, consignee and the USA NVOC. The shipper and consignee should base on the proper B/L contractual channel to make cargo claims against the USA NVOC.

However, if you have actually done something wrong causing the cargo losses or damage, the cargo owner could have valid claims against you in tort. Alternatively, your principal would base on the agency contract with you to claim against you for indemnity after your principal compensates the shipper or consignee for cargo losses or damage according to the B/L terms.

Q16. We are forwarder and only charge small amount of freight, why should we have to be responsible for the full cargo value which is so expensive? The cargo owner needs to buy cargo insurance or to check the financial situation of the consignee before doing business with the consignee. If the buyer is not reliable, the cargo owner can have many ways to protect itself. The cargo owner should not use the B/L as protection, and pass the liability to the forwarder.

A16. The B/L is a contract of carriage between the cargo owner and the carrier, hence the cargo owner's having the contractual rights to claim against the carrier for compensation if the carrier has done something wrong to say damage or lose the cargoes. However, it is the customary practice in the shipping industry that the carrier would only assume liability proportionate to its role of being carrier and charging the freight on the basis of cargo weight, package or size but not on the basis of cargo value. Therefore, it is common in the shipping industry that the carrier would agree to bear liability on the basis such as US\$3 per kg, US\$1,000 per package. It is important for the cargo owner to buy cargo insurance so that the compensation to the cargo owner would be on the basis of 100% or 110% of the cargo value depending on the insured value. When the cargo insurance company later on takes recovery action against the carrier, it should have no problem to accept the universal customary practice in the shipping industry of reasonably limiting the carrier's liability based on cargo weight or package. The carrier should also buy transport liability insurance to protect its position, and transfer the risks to its insurer. This is just an apportionment of risks among the parties.

Q17. The cargoes were shipped from HK. The HK forwarder was the agent of the overseas NVOC to issue the overseas NVOC's B/L to the shipper. The overseas NVOC released the cargoes to the consignee without

original B/L. The shipper claims against the HK forwarder for compensation. Does the shipper have the right to claim against the HK forwarder? Can the HK forwarder rely on liability exemption clauses? Does the HK forwarder have joint and several liability?

A17. The B/L contract was between the overseas NVOG and the shipper. There was no contract between the HK forwarder and the shipper. The forwarder just had the agency contract with its principal i.e. the overseas NVOG. Accordingly, the shipper cannot have any valid claim against the HK forwarder based on contract. The HK forwarder had not done anything wrong in the cargo misdelivery, and hence no liability to the shipper in tort as well. In short, the HK forwarder should have no liability no matter in contract or in tort. The carrier under the B/L should be the overseas NVOG. The shipper should follow the proper contractual channel to claim against the overseas NVOG for the cargo misdelivery based on the B/L terms.

Q18. There are three originals of B/L, which original is for the purpose of cargo delivery? Who is holding each of these three original B/L?

A18. Each of these three originals of B/L can be presented by the consignee to the carrier for cargo delivery. The B/L should have the attestation clause saying that after one original of duly endorsed B/L is presented for cargo delivery, the other two originals of B/L will be void and can no longer be used for cargo delivery. Usually all the three originals of the B/L are held by the shipper, who later on will pass the full set of original B/L to the consignee for taking cargo delivery.

Q19. How to divide the liability assumed by the forwarder and the shipping company in cargo misdelivery without original B/L?

A19. It depends on which B/L is the one related to the cargo misdelivery without original B/L. If it is the forwarder's B/L, the forwarder should be liable. If it is the shipping company's B/L, the shipping company should be liable.

Q20. What are advantages of using specific endorsement?

A20. It is difficult to say the specific endorsement has any advantages or disadvantages. It all depends on the parties' needs, wishes, and their contractual agreement. Once a specific endorsement is made to a particular party, that party has the right to take cargo delivery upon production of the original B/L. If the specific endorsement is made to the order of that particular party, that party has the additional option to further negotiate the B/L by making blank or specific endorsement.

Q21. If the endorsement was not made by authorised signature of the original holder of B/L, will the forwarder/carrier liable for any mis-representation or mis-transfer?

A21. Unless the sample of the authorised signature is provided to the forwarder/carrier beforehand, the forwarder/carrier should not be liable for the unauthorised signature of the endorsement. If the shipper and consignee do not provide the forwarder/carrier with the sample of their authorised signatures, they should not be able to ask the forwarder/carrier to assume liability for unauthorised signature.

Q22. If the B/L endorsement turns out to be fraudulent, and someone, being the holder and endorsee of the endorsed B/L (who is NOT the actual owner of the goods) has claimed delivery of the goods, who would suffer the loss - original owner of the goods?

A22. It depends on the facts, circumstances of the particular case. Generally speaking, the holder / endorsee has not obtained a good title to the goods because of the fraudulent B/L endorsement, the real owner of the goods could have the right to claim back the goods from the holder / endorsee.

Q23. What are the risk to goods owner if B/L is lost? How can they minimize this risk or lost?

A23. If it is a "To Order" B/L with blank endorsement, an unlawful holder can take cargo delivery from the carrier. It is important the cargo owner should immediately notify the B/L loss to the carrier, and ask the carrier to stop any cargo delivery. If it is a straight B/L, an lawful holder being not the named consignee should not be able to take cargo delivery from the carrier. Nevertheless, it is still also important for the cargo owner to inform the carrier about the B/L loss.

Q24. After reported loss by the cargo owner, if the goods were released by the carrier by mistake to someone holding the "lost" original B/L (blank endorsed), would the Carrier be held liable for the compensation to

the cargo owner? After reported loss, how could the cargo owner apply for re-issuance of the original B/L? I understand that the carrier would not be willing to do so unless corporate or bank guarantee is provided for indemnity. If so, it seems that even after the reported loss procedure having been properly done to carrier, the cargo owner still has to bear the risk of wrongful release of the goods, right?

A24. After the cargo owner reports to the carrier about the loss of the full set of original B/L, and the carrier still releases the cargoes wrongly to someone holding the "lost" original B/L, the carrier should have the liability to compensate the losses to the cargo owner.

After the reported loss of the B/L, the carrier would normally require the shipper and consignee each to issue a guarantee letter to the carrier agreeing and undertaking to fully indemnify the carrier for all claims, losses, liability, costs and expenses resulting from the carrier's issuing a replacement set of original B/L to the shipper without the return of the first set of original B/L to the carrier for cancellation. However, it should not be secure enough for the carrier to only just get the shipper's and the consignee's guarantee letters, since these two parties may disappear or go bankrupt in the future, which means no protection to the carrier at all if there are any cargo misdelivery claims. Therefore, it is also normal that the shipper and consignee would be demanded to arrange for a first class bank (whose financial security is acceptable to the carrier) to issue another guarantee letter to the carrier indemnifying the carrier against all claims, losses, liability, costs and expenses resulting from the carrier's issuing a replacement set of original B/L to the shipper without the return of the first set of original B/L to the carrier for cancellation. Issuing a new set of B/L to the shipper without the return of the first set of B/L is just like cargo release without original B/L. To the holder of the first set of original B/L, the cargoes were misdelivered even though against the second set of original B/L. The holder of the first set of original B/L will have a valid legal claim against the carrier for cargo misdelivery without production of the original B/L (the first set), and the carrier will have no valid legal defence.

Q25. Can shipper authorize carrier to release goods to consignee/buyer without production of original B/L?

A25. Yes, the shipper can do that by telex release instruction i.e. the shipper surrenders the full set of original B/L to the carrier at the load port, and instructs the carrier to deliver the cargoes to the consignee.

Q26. Can the telex released be done against production of 1/3 B/L instead of full set by the shipper?

A26. Since the telex release is not the normal situation that the consignee presents one original duly endorsed B/L at the discharge port for cargo delivery, the carrier would require the shipper to surrender the full set duly endorsed original B/L at the load port for telex release. This is to avoid a situation that some other parties at the discharge port hold the other original B/L and ask for cargo delivery after the carrier delivers the cargoes to the consignee in accordance with the shipper's telex release (based on surrender of only one original B/L). There is a possible argument that the surrender of only one original of the B/L at the load port would not make the other two originals of the B/L null and void because this is not the normal circumstance that the consignee presents one original of the B/L at the discharge port, which will make the other two originals of the B/L null and void.

Q27. For shipping guarantee issued by banks, if no original B/L is produced for redemption, how many years of liability will the bank need to bear under HK Law?

A27. The suit time limit against the carrier based on the B/L terms is usually one year according to the customary practice in the shipping industry. Therefore, if the carrier does not receive a Writ served within two years from the cargo delivery, it should be quite safe that there should be no cargo misdelivery claim against the carrier, which in turn would have no indemnity claim against the bank under the guarantee letter issued. The carrier normally would agree to return the bank guarantee to the bank for cancellation after three or four years from the cargo delivery if the carrier has not received any cargo misdelivery claim.

Q28. As a forwarder, which measures to be taken in such cases where shpr/consignee advises that the original B/L both straight B/L or Order B/L was lost?

A28. For the safety sake, there should be no difference to the measures that the forwarder should take no matter it is a straight or "To Order" B/L. Although some countries e.g. England, Singapore, Australia regard the straight B/L as non-negotiable, there are more than 190 countries in the world and it would not be possible to guarantee that all the courts in the world would regard the straight B/L as non-negotiable. In other words, it should not be possible to rule out the possibility that a straight B/L is held legally negotiable and

there is a potential B/L holder to claim against the carrier for cargo misdelivery even if the shipper and consignee both issued guarantee letters to the carrier for cargo delivery to the consignee without original B/L.

The suggested procedures would be as follows: The forwarder should demand the shipper, the consignee each to issue a guarantee letter to the forwarder agreeing and undertaking to fully indemnify the forwarder for all claims, losses, liability, costs and expenses resulting from the forwarder's delivery of the cargoes to the consignee without production of the original B/L. However, it should not be secure enough for the forwarder to only just get the shipper's and the consignee's guarantee letters, since these two parties may disappear or go bankrupt in the future, which means no protection to the forwarder at all if there are any cargo misdelivery claims. Therefore, it is also important that the shipper and consignee should be demanded to arrange for a first class bank (whose financial security is acceptable to the forwarder) to issue another guarantee letter to the forwarder indemnifying the forwarder against all claims, losses, liability, costs and expenses resulting from the forwarder's cargo delivery to the consignee without original B/L.

Q29. Not negotiable ≠ not transferable?

A29. "Negotiable" is the same as "transferable" in terms of B/L. It means to transfer the To Order B/L from the shipper to the consignee through delivery of the B/L and endorsement on the B/L. For example, A sells the goods to B, and B further sells the goods to C; A can endorse and deliver the To Order B/L to B, and B can endorse and deliver the To Order B/L to C. The carrier will deliver the goods to C upon production of the duly endorsed original B/L even though C's name may not be entered into the Consignee box on the B/L front page.

"Not negotiable" is the same as "Not transferable". This refers to the straight B/L, which has a named consignee and does not contain any words "To Order". The named consignee cannot further endorse on the straight B/L and deliver it to another party. This means the B/L is not negotiable or transferable. The carrier will only deliver the goods to the named consignee but no other party upon production of the original straight B/L.

Q30. If the forwarder issued B/L at HKG as carrier, but the HQ of this forwarder is at U.S.A., can they appeal to court at U.S.?

A30. It depends on the jurisdiction clause of the B/L. If it contains an exclusive USA jurisdiction clause, the shipper and consignee should sue the forwarder in the USA courts.

Q31. If the Law wants to protect shpr's interest of getting cargo payment, why not shpr require an Order B/L instead?

A31. It is clear that the shipper gets the protection under a To Order B/L. However, it is now also clear the shipper gets the same protection under a straight B/L because the Hong Kong courts regard the straight B/L also as a document of title to the goods.

Q32. At least the cargoes were delivered to named cnee on HBL, not to wrong address or wrong company. Why not the shpr sue the buyer based on the sales contract between them? Forwarder can submit Proof of Delivery.

A32. It is true that the shipper has a valid claim against the buyer based on the sale of goods contract. However, from our experience of actively handling cargo misdelivery claim cases for more than 20 years, it is common the buyer will disappear or go bankrupt after taking delivery of the goods without original B/L.

Q33. If the shipper really lost the original HB/L, what are the correct things to do?

A33. It is difficult to tell if a shipper really lost the original B/L. The forwarder should still demand the shipper, the consignee each to issue a guarantee letter to the forwarder agreeing and undertaking to fully indemnify the forwarder for all claims, losses, liability, costs and expenses resulting from the forwarder's delivery of the cargoes to the consignee without production of the original B/L. Moreover, the shipper and consignee should be demanded to arrange for a first class bank (whose financial security is acceptable to the forwarder) to issue another guarantee letter to the forwarder indemnifying the forwarder against all claims, losses, liability, costs and expenses resulting from the forwarder's cargo delivery to the consignee without original B/L.

Q34. It was FOB cargoes. The load port NVOC issued its HB/L to the shipper, and the load port NVOC also instructed its destination agent to release cargoes against original HB/L, but the destination agent finally still released the cargoes to the consignee without original HB/L. Do the load port NVOC have liability? Can the load port NVOC pass the problem to the destination agent?

A34. The load port NVOC should be the carrier under its own HB/L, and should have liability to compensate the shipper for the losses resulting from the cargo misdelivery caused by the NVOC's agent. The general position is that a carrier has to be liable to the shipper and consignee for the negligence, mistake or wilful default of the carrier's agents or subcontractors. Since the shipper is still holding the full set of original HB/L, the fact that it was FOB cargoes would not provide the NVOC with any valid legal defence. The load port NVOC should pass the indemnity claim to its destination agent demanding the agent's immediate settlement proposal for the shipper's consideration. However, it is not uncommon to see a situation that the destination agent uses a lot of "excuses" to refuse paying the indemnity claim, or the destination agent disappears or becomes bankrupt. All in all, it is usually not easy to have any compensation from the liable destination agent.

Q35. How about bulk cargo please? It is quite common the shipper or the charterer of the vessel to ask the shipowner release the shipment to the consignee without production of the original bill of lading. You know it only takes several days from the loading port to the discharge port for intercoastal trade in Asia and there is no enough time to get original bs/l to take delivery. What is your advice please?

A35. Bulk cargoes are no different from breakbulk or containerised cargoes in terms of the requirement of cargo delivery only upon production of the original B/L. If the shipowner delivers the bulk cargoes to the consignee without presentation of original B/L, the shipowner should be liable to compensate the B/L holder for the losses according to the B/L terms. Therefore the shipowner should demand the charterer, the shipper, and the consignee each to issue a guarantee letter to the shipowner agreeing and undertaking to fully indemnify the shipowner for all claims, losses, liability, costs and expenses resulting from the shipowner's delivery of the cargoes to the consignee without production of the original B/L. However, it should not be secure enough for the shipowner to only just get the charterer's, the shipper's and the consignee's guarantee letters, since these three parties may disappear or go bankrupt in the future, which means no protection to the shipowner at all if there are any cargo misdelivery claims. Therefore, it is also important that the charterer, the shipper and consignee should be demanded to arrange for a first class bank (whose financial security is acceptable to the shipowner) to issue another guarantee letter to the shipowner indemnifying the shipowner against all claims, losses, liability, costs and expenses resulting from the shipowner's cargo delivery to the consignee without original B/L.

The clock is ticking until the next delivery of cargo without bills of lading case appears before the court. This time, bills of lading with obsoleted terms and conditions will bring the forwarder/carrier it represents a financial disaster. Properly updated bills of lading, on the other hand, will have much higher chance to stand firm in the court. **We sincerely urge our forwarder readers to review their bills of lading NOW.**

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The robust freight industry in 2009 did not sustain well to the last quarter of 2010 as worldwide governments were not in unison in their fiscal policies. The worldwide government interference in 2011, such as the U.S. QEII, is likely to impact the worldwide movement of freight even more.

As uncertain as it was the economy in 2010, we believe the number of E&O, uncollected cargo and completion of carriage claims will continue the major concerns for transport operators in 2011. If you need a cost effective professional solution to defend claims against you, our claim team of five are ready to assist. Feel free to call Carrie Chung / George Cheung at 2299 5539 / 2299 5533.