

To: Transport Industry Operators

**Uncollected cargoes Seminar
28 November 2012 – Q & A**

The 12th annual SMIC seminar on uncollected cargoes pulled some 300 participants to attend with much curiosity for 3 hours in the YMCA Assembly Hall. The accumulated questionmarks and enigmas about the subject matter lurking in the trade were unleashed among the audiences.

In total 32 questions of similar nature but different circumstances were made from the floor. 25 questions needed to be and have subsequently been answered separately by emails. These Q&As are compiled in this issue of Chans Advice for sharing among its readership.

Q1. How to avoid the risk of paying terminal charges arising from the uncollected cargoes?

A1. The terminal storage charges (resulting from the uncollected cargoes) are the actual losses suffered by the carrier. Provided that the terminal's reasonable storage charges' invoice is produced and that the carrier's payment evidence is submitted, the shipper and consignee under the B/L should have the liability to compensate such actual losses to the carrier, and it is difficult for the shipper and consignee to deny liability.

Q2. Can you tell me whether the terminal storage charges, regarding the uncollected cargoes, is insurable?

A2. If the transport liability insurer covers the forwarder for the extra costs arising from uncollected cargoes, the related terminal storage charges should be insured by the insurance policy.

Q3. How to calculate the premium of the transport liability insurance?

A3. The transport liability insurance premium is usually based on many factors e.g. the annual gross freight receipt, the volume of cargoes shipped in terms of tons or TEU per year, the usual types of cargoes carried, the claim history of 3 to 5 years, the usual trading areas, the percentage of CY/CY shipments and CFS/CFS shipments, the percentage of the business as agent and the business as NVOCC, any own warehouses, any own trucks...

Q4. HK to LA, USA shipment on FOB HK basis. The freight charges should be paid by the consignee. However, when the shipment arrived at LA, it was learnt that the consignee went bankrupt. Which party should pay for the freight charges (from HK to LA) before the uncollected cargoes can be returned to HK? If the shipper is willing to pay the demurrage charges, is the LA consignee's forwarding agent also liable to pay some charges?

A4. The shipper asked the carrier to ship the cargoes to the consignee on the condition that the consignee would pay the freight charges to the carrier upon taking cargo delivery. However, the consignee went bankrupt and failed to take cargo delivery and of course did not pay the freight charges. It was the shipper that asked the carrier to do the freight collect shipment, and therefore the shipper should be responsible for paying the outstanding freight charges. Moreover, the B/L would also have contract terms stipulating clearly that the shipper needs to be responsible for paying the freight charges if the consignee fails to take cargo delivery in the freight collect shipment. Furthermore, the carrier has the right of particular lien i.e. the cargo owner needs to settle all the outstanding charges related to the

cargoes before the carrier will release the cargoes to the cargo owner. Accordingly, the shipper has to pay the outstanding freight charges (from HK to LA) to the carrier before the carrier will consider the new business of return shipment from LA to HK. The forwarding agent of the consignee is not a party to the B/L contract, and also has done nothing wrong in this matter of the consignee's bankruptcy and the uncollected cargoes, the consignee's forwarding agent should have no liability to pay any outstanding charges.

Q5. If the shipper and the consignee both do not take cargo delivery in the end, which party has the right to sell the uncollected cargoes? LA Customs? forwarder? carrier? Are the sale proceeds of the uncollected cargoes to be shared among the three parties?

A5. It is common the uncollected cargoes in the USA will go to the General Order (G.O.) warehouse of the USA government. It is up to the discretion of the G.O. warehouse as to when and how to sell or dispose of the uncollected cargoes. It is very common to see the sale proceeds (if any) in the end will not be sufficient to cover the storage charges of the G.O. warehouse. Hence, there will normally be nothing from the G.O. warehouse to be given to the carrier to cover the outstanding charges.

Q6. The forwarder clearly knew the US\$100/day demurrage charge prior to making the booking of the shipping order, and the forwarder has had a long period of time in doing business with the shipping company. The forwarder had all along paid the demurrage charges of US\$100/day in the past. When the latest uncollected cargo incident happens, can the forwarder still make a valid submission to the court that the forwarder can refuse to pay the demurrage of US\$100/day because such demurrage charge is a penalty clause?

A6. The legal concept of penalty clause is on the basis that the two parties have already clearly agreed and accepted the penalty clause as the contract term, but that the law still does not allow the penalty clause to be legally valid. Therefore, the penalty clause is legally invalid and unenforceable because it is in terrorem of the offending party, extravagant, unconscionable, deterrent, and not genuine pre-estimate of losses; but not because it has not been agreed by the two parties. Hence, even if the forwarder has already contractually agreed with the shipping company to pay US\$100/day/20' container as container demurrage, such duly agreed contract term will still be legally held invalid and unenforceable if the court regards it as a penalty clause.

Q7. FCL shipment, triangle business ex Yantian to USA. The PRC factory sold the goods to the Hong Kong shipper. Later on, there are commercial disputes between the PRC factory and the Hong Kong shipper. The PRC factory is asking the forwarder to hold the cargoes despite the fact that the HB/L is in the Hong Kong shipper's hands. What can the forwarder do?

A7. It appears both the factory and the shipper are competing for the same cargoes. The forwarder as NVOCC cannot know which party (the factory or the shipper?) is the cargo owner. The forwarder should apply to the court asking the court to decide which party is the cargo owner for the forwarder to follow its instructions on cargo delivery. This legal action is called interpleader action, which is a time consuming exercise. Moreover, not many states have such a kind of legal action. Therefore, the forwarder may have to go for a simpler method of following the shipper's instructions (since it is the shipper that is holding the full set of original HBs/L) after obtaining the transport liability insurer's approval.

Q8. How can the transport liability insurer help the forwarder? Can the forwarder buy insurance cover for uncollected cargoes and demurrage charges?

A8. You should choose a transport liability insurer whose insurance policy terms also cover forwarders for (i) extra costs resulting from uncollected cargoes and (ii) liability for cargo conversion resulting from sale or disposal of uncollected cargoes. When you legally have to pay extra costs resulting from uncollected cargoes or you are legally held liable for the cargo owner's conversion claim after your sale or disposal of the uncollected cargoes, your transport liability insurer should compensate your losses in accordance with the transport liability insurance policy terms.

Q9. For the telex release shipment, can the B/L back page terms give sufficient protection?

A9. The telex release shipment means the shipper has firstly surrendered the full set duly endorsed B/L to the carrier for the cargo delivery purpose and thereafter instructed the carrier to deliver the cargoes to the consignee without production of original B/L. Provided that the carrier has got back the full set of duly endorsed original B/L and received clear written instruction from the shipper to deliver the cargoes to the consignee without production of the original B/L, the protection to the carrier should be sufficient and the carrier should comply with the shipper's telex release instruction.

Q10. For the telex release shipment, how to define the time when the consignee has taken cargo delivery?

A10. For the telex release shipment, when the carrier delivers the cargoes to the consignee without production of the original B/L, it is the time that the consignee has taken cargo delivery.

Q11. Due to the shipping company's / forwarder's mistake or planning the ship's itinerary, the customer refuses to take cargo delivery because the cargo selling period passed. Can this be dealt with as uncollected cargoes?

A11. Even if the shipping company or forwarder has any mistake or negligence leading to the cargoes' missing the selling period, the shipper and consignee still have to fulfill their obligation to mitigate their losses by taking the cargo delivery and then selling / disposing of the cargoes at the best terms obtainable. Moreover, it is the universal customary practice in the shipping industry that the shipping company and the forwarder can only accept liability for physical loss of or physical damage to the cargoes, but not for any consequential losses e.g. loss of market of the cargoes... In case the shipper and consignee insist on not taking cargo delivery, the shipping company or the forwarder can sell or dispose of these uncollected cargoes according to its B/L terms.

Q12. If the uncollected cargo incident happens after the consignee has surrendered the B/L for D/O and settled all the charges, is it true that (i) the shipping company can only claim against the consignee but not the shipper and (ii) the shipping company cannot rely on the B/L terms?

A12. After the consignee has surrendered the B/L to the shipping company for exchanging Delivery Order to take cargo delivery, the consignee and the shipping company become to have the contractual relationship in accordance with the B/L terms. There is usually a definition of Merchant in the B/L terms, which includes the shipper, the consignee, the B/L holder... Accordingly, the shipping can base on the B/L terms to claim against the consignee and/or the shipper for all the costs resulting from the uncollected cargoes.

Q13. If the shipper released the original B/L to the consignee, but the consignee did not take delivery of the cargoes, can shipper resale / dispose of / return the cargo?

A13. After the shipper gets back the full set of original B/L from the consignee and surrenders such to the carrier, the shipper has the right to ask the carrier to sell, dispose of, or return the uncollected cargoes.

Q14. You advised that the shipper has the right to ask the carrier to sell, dispose of, or return the uncollected cargoes after it getting back the full set of original B/L from the consignee and surrenders such to the carrier. However, what should the shipper do if it was unable to reach the consignee for the original B/L?

A14. The B/L is a document of title to the goods. If the shipper cannot surrender the full set of the B/L to the carrier, the carrier cannot follow the shipper's instruction of changing the consignee, sale or disposal of the uncollected cargoes, or return shipment. The shipper may have to apply to the court holding the shipper as the owner of the cargoes and ordering the carrier to deliver up the cargoes to the shipper. Otherwise, the carrier may finally rely on its B/L terms to sell or dispose of the uncollected cargoes by public auction (and the shipper may participate to bid for the cargoes).

Q15. If the cargo is still in transit when the consignee was insolvent. The shipper informed the forwarder to withhold the cargo while the administrator asked the forwarder to release the goods. Should the forwarder release the cargo?

A15. Since there are two parties competing for the same cargoes, the forwarder (presumably as NVOC) has to take the interpleader legal action asking the court to decide which party (the shipper or the consignee?) is the cargo owner for the forwarder to release the cargoes. However, the interpleader legal action is a time consuming exercise and not many states have this action in their legal system, the forwarder may have to choose a simpler way to solve the problem by releasing the cargoes to the party (the shipper or the administrator) holding the full set of original Bs/L after obtaining the transport liability insurer's approval.

Q16. you mentioned to us that if the forwarder without any HB/L contractual right of dispose of uncollected cargoes nor court's order, the forwarder will take a risk - the cargo owner may sue the forwarder. I checked with our HB/L, we do not have this term on it, but it shows on our STC as per Haffa. Kindly let me know if we still take a risk?

A16. Despite that your HB/L does not have a term to allow you to sell or dispose of the uncollected cargoes, your HB/L also refers to your STC as per Haffa. You need to check your STC to see if it contains any term allowing you to sell or dispose of the uncollected cargoes. If yes, you may proceed to sell or dispose of the uncollected cargoes accordingly after obtaining your transport liability insurer's approval.

Q17. Why we need to obtain our transport liability insurer's approval?

A17. Even if you have contract terms that allow you to sell or dispose of the uncollected cargoes, some courts in this world may still hold you liable for cargo conversion and order you to compensate the cargo value to the cargo owner. Your transport liability insurer should cover you for such kind of cargo conversion liability in accordance with the insurance policy terms, and would require you to obtain its approval prior to your sale or disposal of the uncollected cargoes.

Q18. Can we arrange the Uncollected Cargoes returned back to HKG, after, Sale or Disposal for above ...

A18. After your sale or disposal of the uncollected cargoes according to the B/L contractual terms or court order, you can ship the cargoes back to Hong Kong if the new cargo owner agrees with you to do a new business of carriage.

Q19. Can we request the Shipping Liner to Sale or Disposal from them directly ... If they arrange that all demurrage who pay...

A19. After you contractually or legally obtain the right of selling or disposing of the uncollected cargoes, you can in turn ask the shipping company to sell or dispose of the uncollected cargoes. In case the shipping company insists on continuously storing the uncollected cargoes despite your instruction, the shipping company shall bear all the extra costs continuously incurred for the uncollected cargoes. After the shipping company's sale or disposal of the uncollected cargoes, the shipping company can submit to you all the supporting documentary evidence (to prove its actual losses resulting from the uncollected cargoes) for your consideration in case the shipping company still wants to claim for the container demurrage. In case the shipper can duly prove its actual losses, you as the shipper / consignee under the MB/L should have liability to compensate the shipping company, and the actual shipper and consignee under your HB/L should in turn have liability to indemnify you for your losses.

Q20. (1) Due to business integration and acquisition, my customer agent (freight forwarder) holding a lot of uncollected cargoes in their own warehouse and some of the old (uncollected) cargoes are even switching to outside warehouse to store because the rental of their existing warehouse is very expensive in comparison to the outside ones – both concerning space utilization and costs.

(2) There are almost 100 cbm of old cargoes with multi-shipments including air and sea cargoes idling in these warehouses but all of them are untraceable – because there is NO H/BL; HAWB or any document in relation to those cargoes in the warehouse.

(3) Years passed but the cargoes are still lying in the warehouses...

(4) I would like to know that under the above situation – because we have no referral / reference to neither contact could the shipper / consignee nor to have any document for sending Reminder

Notes for notifying the related parties for sale or disposal of these cargoes – even their existing H B/L or HAWB did have the uncollected cargo terms and conditions.

(5) Moreover, most of the uncollected / old cargoes were found no shipmark / information for referring to – just loose cartons, barrels or skids. Could we publish an legal advertisement in the Authorized Newspaper by stating that we will abandon a number of uncollected / old cargo by issuing photos attached to confirm there is no more ownership, then we organize an auction / tendering to sell all those to the interested buyer – we will then to record down the collected amounts from selling those uncollected / old cargoes to prepare for the cargo conversion risk.

A20. Since you are not the owner of the uncollected cargoes, you legally have no right to sell or dispose of the uncollected cargoes unless you have contract terms with your customers that allow you to sell or dispose of the uncollected cargoes. We suggest you check your contract terms with your customers again. In case you have the contract terms allowing you to sell or dispose of the uncollected cargoes, you may accordingly wish to follow the contract terms to sell or dispose of the uncollected cargoes. If you really do not have such contract terms, the only legal way to sell or dispose of the uncollected cargoes is to obtain the Court Order for you to do so. Publishing advertisements on newspapers will not give you the right legally to sell or dispose of the uncollected cargoes if you do not have such a right contractually or you have not got the consent of your customers or the cargo owners to sell or dispose of the uncollected cargoes. We suggest you report the case to your transport liability insurer so that it can instruct its shipping lawyer to give you the legal advice as to how to deal with this uncollected cargo problem without the risk of cargo conversion liability.

Q21. My company have a one lot LCL cargo from HKG to Karachi. But vessel ETA KAR over 1 year, UNTIL NOW, cnee did not pick up cargo and settle dest. local charges. As per shipper info, they had already send the original HBL to CNEE side, so the original HBL in CNEE hand. Now, I want to know that :-

- If shipper issue abandon letter to us for arrange abandon, is it ok ?
- If we will debit shipper for all dest. local charges, is it legal ?
- Or we need to arrange anything or you have any suggestion to us ?
- Plse kindly adv.

A21. The B/L is a document of title to the goods. If the shipper wants to abandon the cargoes, the shipper has to firstly surrender the full set of the B/L to you to prove its cargo ownership prior to its giving you the cargo abandonment instruction.

The shipper is the party asking you to ship the cargoes from Hong Kong to Karachi. Accordingly, the shipper should have the contractual liability under the B/L to compensate you for all your losses (including the destination local charges) resulting from the uncollected cargoes. However, the shipper may argue that it should not be liable to you for all those losses caused by your own failure to fulfill your obligation to mitigate your losses since you have unreasonably kept the uncollected cargoes for more than one year. We suggest you look at your B/L contract terms to see if there is any clause allowing you to sell or dispose of the uncollected cargoes. If yes, you should follow the B/L terms to sell or dispose of the uncollected cargoes after obtaining your transport liability insurer's approval.

Q22. What is the different between MB/L & HBL? What are the effects of MB/L & HBL to whom? Who sign the MB/L and HBL? Agent parties-concerned or Master? Does it mean HBL with uncollected cargo wording but MB/L is not included?

A22. The HB/L is usually issued by the forwarder (as NVOC) to the actual shipper and consignee whereas the MB/L is usually issued by the shipping company to the NVOC (Non Vessel Owning Carrier) and the NVOC's agent. The HB/L is often more related to the sale of goods contract between the seller and buyer. The MB/L is often more related to the contract of carriage as subcontracted to the shipping company by the NVOC. Both the HB/L and the MB/L should have the uncollected cargo contract terms so that the NVOC and the shipping company each may have the contract right of selling or disposing of the uncollected cargoes.

Q23. LCL shipment import to HKG. Consignee in HKG do not come to collect the goods. Any action we can take

- HBL -> Telex released

- Shipment terms exwork
- Shipper overseas not care

-> consignee do not settle our charges, unable to contact.

A23. We presume you act as the Hong Kong delivery agent for an overseas NVOCC whose HB/L has been issued to the shipper and consignee. You should report the uncollected cargo situation to your principal i.e. the overseas NVOCC for its reporting the claim case to its transport liability insurer. The overseas NVOCC should base on its HB/L terms to sell or dispose of the uncollected cargoes. You as agent of the overseas NVOCC have no right nor authority to sell or dispose of the uncollected cargoes unless you have received the instruction from your principal. The contract of carriage is the overseas NVOCC's HB/L with the shipper and consignee. Only the overseas NVOCC has the contractual right to take action against the shipper and consignee. In case your principal insists on not giving you any uncollected cargo sale or disposal instruction, you should check your agency contract with the overseas NVOCC to see if there are any terms allowing you to sell or dispose of the uncollected cargoes. If yes, you should proceed to sell or dispose of the uncollected cargoes by public auction after obtaining your transport liability insurer's approval.

Q24. Shipments from HKG to Vietnam, cargo remaining uncollected at pod, accumulating demurrage. Can carrier sue shipper (a forwarder) at Hong Kong court?

A24. It all depends on the B/L's jurisdiction clause. If it states Hong Kong laws and courts, then the carrier can sue the shipper (the forwarder) in the Hong Kong courts. However, if it states other laws and courts e.g. English, then the carrier should follow the B/L contract terms to sue the forwarder in the English courts.

Q25. If issue direct MBL, forwarder just act as booking agent, shipper on MBL is actual shipper; CNEE on MBL is actual consignee, in case uncollected cargo happened, both shipper / consignee disappeared, will carrier charge forwarder?

A25. The shipping company usually will try to claim against the forwarder for the extra costs resulting from the uncollected cargoes. However, the forwarder (presumably as the agent of the actual shipper) has no liability to the shipping company since the forwarder is not a party under the shipping company's MB/L and the forwarder has not done anything wrong to cause the situation of uncollected cargoes. The shipping company should base on its MB/L's contractual terms to sell or dispose of the uncollected cargoes, and thereafter close the file since the actual shipper and actual consignee under the MB/L have both disappeared.

In many questions above, disposals of uncollected cargoes are not easy and often very complicated involving huge amount of time and legal costs. Forwarders are caught in between and do not know the right direction to properly deal with the headache issues. More often than not, these cases become lingering hot potato.

If you need SMIC assistance in any or all of the above uncollected cargoes issues, please feel free to call Carrie Chung at 2299 5539 or George Cheung at 2299 5533.

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Discerning forwarders could quickly spot any profitable business opportunity as well as cost cutting instrument. Not all insurances are the same but some do greatly assist forwarder in solving the headacheing uncollected cargoes problem, better still with our involvement, for SMIC's ability in helping forwarders making better use of their insurance is proven – SMIC forwarders are fortified by in depth transport legal knowledge truly essential for successful loss prevention. Such ability is not convincing without the test of time. Drop us a line for a try.